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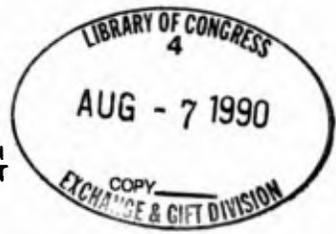




United States

FALSE CLAIMS ACT IMPLEMENTATION

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HEARING
BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIRST CONGRESS

SECOND SESSION

APRIL 4, 1990

Serial No. 74



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

31-410

WASHINGTON : 1990

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KF27
J832
1990

CONTENTS

HEARING DATE

April 4, 1990.....	Page 1
--------------------	-----------

WITNESSES

Budetti, Peter, M.D., J.D., Hirsh professor of health care law, George Washington University, and member, board of directors, Taxpayers Against Fraud, accompanied by Mary Louise Cohen, Esq., Los Angeles, CA	96
Carton, James, Moorpark, CA	87
Gerson, Stuart M., Assistant Attorney General, Civil Division, Department of Justice	9
Grassley, Hon. Charles E., a Senator in Congress from the State of Iowa	1
Kusserow, Richard P., Inspector General, Department of Health and Human Services	30
Michelson, Paul Elliott, M.D., F.A.S.C., La Jolla, CA	84
Phillips, John R., Esq., Hall & Phillips, Los Angeles, CA	68

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Budetti, Peter, M.D., J.D., Hirsh professor of health care law, George Washington University and member, board of directors, Taxpayers Against Fraud: Prepared statement	97
Carton, James, Moorpark, CA: Prepared statement	90
Gerson, Stuart M., Assistant Attorney General, Civil Division, Department of Justice: Prepared statement	16
Grassley, Hon. Charles E., a Senator in Congress from the State of Iowa: Prepared statement	4
Kusserow, Richard P., Inspector General, Department of Health and Human Services: Prepared statement	33
Michelson, Paul Elliott, M.D., F.A.S.C., La Jolla, CA: Prepared statement	85
Phillips, John R., Esq., Hall & Phillips, Los Angeles, CA: Prepared statement..	72

APPENDIX

Letter to Hon. Barney Frank, dated June 11, 1990, from Mark H. Gitenstein, Esq., Stephen M. Shapiro, Esq., Andrew L. Frey, Esq., all three associated with Mayer, Brown & Platt, Washington, DC, and Robert D. Wallick, Esq., associated with Steptoe & Johnson, Washington DC	103
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FALSE CLAIMS ACT IMPLEMENTATION

WEDNESDAY, APRIL 4, 1990

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2226, Rayburn House Office Building, Hon. Barney Frank (chairman of the subcommittee) presiding.

Present: Representatives Barney Frank, Craig T. James, Lamar S. Smith, Chuck Douglas, and Tom Campbell.

Also present: Representative Howard L. Berman.

Staff present: Janet S. Potts, chief counsel; Belle Cummins, assistant counsel; Cynthia Blackston, chief clerk; and Roger T. Fleming, minority counsel.

Mr. FRANK. The hearing of the Subcommittee on Administrative Law and Governmental Relations will come to order.

We are pleased to have with us today—and I will do this before opening statements—Senator Charles Grassley, who has been a diligent fighter in the effort to combat Government waste. We are delighted to have Senator Grassley before us today, and we would ask Senator Grassley to come forward and make a statement.

STATEMENT OF HON. CHARLES E. GRASSLEY, A SENATOR IN CONGRESS FROM THE STATE OF IOWA

Mr. GRASSLEY. Well, Mr. Chairman, thank you very much for making room on your schedule for me to testify this morning, and before I testify I first want to commend you and the subcommittee for conducting this oversight hearing on the False Claims Act of 1986.

The False Claims Act is under attack from the defense industry, from career lawyers in the bowels of the Justice Department, and if we aren't careful and diligent, we are going to either lose this legislation or this legislation is going to be weakened. I call upon you, Mr. Chairman, and other people in this Congress who have been so diligent on this legislation, like Dan Glickman and Howard Berman and, of course, others, who were critical to helping us enact the 1986 amendments. I tell you that each of you are critical in keeping this legislation to continue to do the good work that it has done, not only producing revenue for the Treasury, but cutting down on fraudulent use of taxpayers' money.

Those 1986 amendments are changing the landscape of fraud litigation in America. Well over 200 cases have been filed under the

act. Millions of dollars have been recovered to the Treasury in settled cases.

It has been said in another context that war is too important to leave to generals. So too with antifraud efforts. They are too important to leave just to the Justice Department. We need an active and energized citizenry to help.

The 1986 amendments, passed by Congress, signed by President Reagan, enhanced, encouraged and expanded citizen involvement in fighting fraud against the taxpayers in consultation with the Justice Department. And, as we deputize more "private attorneys general" in the war on fraud, there is good reason to expect even greater recoveries for the taxpayers.

Six times the constitutionality of this act, particularly *qui tam* provisions, has been raised in the courts, and each and every time that challenge has been rejected.

Of course, it is wise to keep an eye on the application of any new remedy like this. We all appreciate that, notwithstanding our best efforts in this institution at careful drafting and political compromise, some problem areas can crop up. So, in the short time I have this morning I want to focus on a couple points that I hope that you will consider. One has to do with people's attitude toward the law. The other relates to the actual language of this law.

On the first point the support of the Justice Department is essential. The Department needs to carefully coordinate its Civil and Criminal Divisions, so that the Department speaks with one voice on this law. The Attorney General, I happen to know, is committed to the effective operation of the law, including the *qui tam* provisions. So too is Mr. Gerson, the head of the Civil Division. I have no doubt that they will speak with one voice.

But, frankly, as I talk with individuals and lawyers involved with some of these cases, I wonder if this view is universally shared. There is some evidence, for example, that some others within the Department may actually be hostile to the purposes of the law. In some cases, they may even be guilty of taking the *qui tam* plaintiffs' information for purposes of bringing their own cases on grounds other than false claims. I am aware of one particular case where this is alleged: A \$200 million Medicare fraud case from Florida, where the Department of Justice got all the information they needed from the *qui tam* plaintiff but then filed its own case against the same defendant, alleging the same facts but under a different theory.

The concern here is not simply that the *qui tam* plaintiff is shortchanged. Rather the Government's action abandons any hope of winning treble damages or any of the other beefed up remedies under the False Claims Act. It also leads to an indefinite stay of the *qui tam* plaintiff's suit and makes discovery virtually impossible, while the Government's alternative case then takes top priority.

Of course, there can be an honest disagreement among lawyers about which theory will be best supported by the facts. Honest disagreements are what law is all about. But if this became a pattern, Mr. Chairman, I think that we would have reason to wonder whether the Justice Department really shares our enthusiasm for that law. The legislative history of the 1986 amendments seems to

suggest that in cases where government fails to intervene it cannot pursue an alternative remedy.

However, there is no explicit prohibition of this practice. Frankly, I am not sure that we should flatly bar the Government from bringing a case under a different theory where they, in fact, honestly believe that the facts won't support a false claims lawsuit. But it is equally clear that the Government's discretion to fail to intervene in the *qui tam* case, and the subsequent filing of their own case, should not be unfettered.

Second, I think there is some genuine confusion over the jurisdictional provisions in the 1986 amendments. As you know, we sought to resolve the tension between, on the one hand, encouraging people to come forward with information and, on the other hand, preventing parasitic lawsuits. The resolution of this question rests on how the law's original source doctrine will be interpreted. We are starting to see some reported opinions on this issue. Now may be a good time for us to study these carefully to see what we can do to maintain a sense of equilibrium. The original source exception was intended to ensure that *qui tam* actions based solely on public disclosure could not be brought by individuals who had no direct or independent knowledge of the information or those who were not an original source to the entity that disclosed the fraud allegations.

Well, I still believe that this is a sound principle. I think we need to be careful that the *qui tam* jurisdictional provisions are not emasculated. A party with knowledge of fraud against the Government ought to be able to maintain a *qui tam* action as long as he had some of the information in advance of the public disclosure. Moreover, the publication of general, nonspecific information does not necessarily lead to the discovery of specific individual fraud, which is the target of *qui tam* action.

So, Mr. Chairman, I again commend you and the subcommittee for your leadership in this matter. I look forward to reviewing the record and working with you on any statutory revisions to this important antifraud law.

Thank you.

Mr. FRANK. Thank you, Senator.

[The prepared statement of Mr. Grassley follows:]

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United States Senate

COMMITTEE ON THE JUDICIARY
 WASHINGTON, DC 20510-8276

STATEMENT OF SENATOR CHARLES E. GRASSLEY
 REGARDING OVERSIGHT OF THE FALSE CLAIMS ACT AMENDMENTS
 HOUSE COMMITTEE ON THE JUDICIARY
 SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
 APRIL 4, 1990

MR. CHAIRMAN, THANK YOU FOR THAT KIND INTRODUCTION, AND FOR MAKING ROOM FOR ME THIS MORNING ON SHORT NOTICE. I FIRST WANT TO COMMEND YOU AND THE SUBCOMMITTEE FOR CONDUCTING THIS OVERSIGHT HEARING ON THE FALSE CLAIMS ACT AMENDMENTS OF 1986.

YOU, MR. CHAIRMAN, ALONG WITH YOUR COLLEAGUES DAN GLICKMAN AND HOWARD BERMAN, AND OTHERS, WERE CRITICAL TO HELPING US ENACT THE 1986 AMENDMENTS.

THOSE AMENDMENTS ARE CHANGING THE LANDSCAPE OF FRAUD LITIGATION IN AMERICA. WELL OVER 200 CASES HAVE BEEN FILED UNDER THE ACT; MILLIONS OF DOLLARS HAVE BEEN RECOVERED TO THE TREASURY IN SETTLED CASES.

IT'S BEEN SAID IN ANOTHER CONTEXT THAT "WAR IS TOO IMPORTANT TO LEAVE TO THE GENERALS". SO TOO, WITH ANTI-FRAUD EFFORTS: THEY ARE TOO IMPORTANT TO LEAVE JUST TO THE JUSTICE DEPARTMENT. WE NEED AN ACTIVE AND ENERGIZED CITIZENRY TO HELP.

THE 1986 AMENDMENTS, PASSED BY THE CONGRESS AND SIGNED BY PRESIDENT REAGAN, ENHANCED, ENCOURAGED, AND EXPANDED CITIZEN INVOLVEMENT IN FIGHTING FRAUD AGAINST THE TAXPAYERS, IN CONCERT AND CONSULTATION WITH THE JUSTICE DEPARTMENT. AND AS WE DEPUTIZE MORE "PRIVATE ATTORNEYS GENERAL" IN THE WAR ON FRAUD, THERE'S NO REASON NOT TO EXPECT EVEN GREATER RECOVERIES FOR THE TAXPAYERS.

OF COURSE, IT'S WISE TO KEEP AN EYE ON THE APPLICATION OF ANY NEW REMEDY LIKE THIS. WE ALL APPRECIATE THAT -- NOTWITHSTANDING OUR BEST EFFORTS AT CAREFUL DRAFTING AND POLITICAL COMPROMISE -- SOME PROBLEM AREAS CAN CROP UP. SO IN THE SHORT TIME I HAVE THIS MORNING, I'D LIKE TO FOCUS ON A COUPLE OF POINTS THAT I HOPE YOU'LL CONSIDER. ONE HAS TO DO WITH PEOPLE'S ATTITUDES TOWARD THE LAW. THE OTHER RELATES TO THE ACTUAL LANGUAGE OF THE LAW.

ON THE FIRST POINT, THE SUPPORT OF THE DEPARTMENT OF JUSTICE IS ESSENTIAL. THE DEPARTMENT NEEDS TO CAREFULLY COORDINATE BETWEEN ITS CIVIL AND CRIMINAL DIVISIONS, SO THAT THE DEPARTMENT SPEAKS WITH ONE VOICE ON THE LAW. THE ATTORNEY GENERAL, I KNOW, IS COMMITTED TO THE EFFECTIVE OPERATION OF THE LAW, INCLUDING THE QUI TAM PROVISIONS. SO TOO, IS MR. GERSON, THE HEAD OF THE CIVIL DIVISION. I HAVE NO DOUBT THAT THEY WILL SPEAK WITH ONE VOICE.

BUT FRANKLY, AS I TALK WITH INDIVIDUALS AND LAWYERS INVOLVED WITH SOME OF THESE CASES, I WONDER IF THIS VIEW IS UNIVERSALLY SHARED. THERE'S SOME EVIDENCE, FOR EXAMPLE, THAT SOME OTHERS WITHIN THE DEPARTMENT MAY ACTUALLY BE HOSTILE TO THE PURPOSES OF THE LAW. IN SOME CASES, THEY MAY EVEN BE GUILTY OF TAKING THE QUI TAM PLAINTIFF'S INFORMATION FOR PURPOSES OF BRINGING THEIR OWN CASES, ON GROUNDS OTHER THAN FALSE CLAIMS.

I'M AWARE ONE PARTICULAR CASE WHERE THIS IS ALLEGED: A \$200 MILLION MEDICARE FRAUD CASE FROM FLORIDA, WHERE DOJ GOT ALL THE INFORMATION IT NEEDED FROM THE QUI TAM PLAINTIFF, BUT THEN FILED ITS OWN CASE AGAINST THE SAME DEFENDANT, ALLEGING THE SAME FACTS, BUT UNDER A DIFFERENT THEORY.

THE CONCERN HERE IS NOT SIMPLY THAT THE QUI TAM PLAINTIFF IS SHORTCHANGED. RATHER, THE GOVERNMENT'S ACTION ABANDONS ANY HOPE OF WINNING TREBLE DAMAGES OR ANY OF THE OTHER BEEFED-UP REMEDIES UNDER THE FALSE CLAIMS ACT. IT ALSO LEADS TO AN INDEFINITE STAY OF THE QUI TAM PLAINTIFF'S SUIT, AND MAKES DISCOVERY VIRTUALLY IMPOSSIBLE, WHILE THE GOVERNMENT'S ALTERNATIVE CASE TAKES PRIORITY.

OF COURSE, THERE CAN BE AN HONEST DISAGREEMENT AMONG LAWYERS ABOUT WHICH THEORY WILL BE BEST SUPPORTED BY THE FACTS. HONEST DISAGREEMENTS ARE WHAT THE LAW IS ALL ABOUT. BUT IF THIS BECAME A PATTERN, I THINK WE'D HAVE REASON TO WONDER WHETHER THE JUSTICE DEPARTMENT REALLY SHARES OUR ENTHUSIASM FOR THE LAW.

THE LEGISLATIVE HISTORY OF THE 1986 AMENDMENTS SEEMS TO SUGGEST THAT IN CASES WHERE THE GOVERNMENT FAILS TO INTERVENE, IT CANNOT PURSUE AN ALTERNATIVE REMEDY. HOWEVER, THERE IS NO EXPLICIT PROHIBITION ON THIS PRACTICE. FRANKLY, I'M NOT SURE WE SHOULD FLATLY BAR THE GOVERNMENT FROM BRINGING A CASE UNDER A DIFFERENT THEORY, WHERE THEY IN FACT HONESTLY BELIEVE THAT THE FACTS WON'T SUPPORT A FALSE CLAIMS ACT LAWSUIT. BUT IT'S EQUALLY CLEAR THAT THE GOVERNMENT'S DISCRETION TO FAIL TO INTERVENE IN THE QUI TAM CASE, AND THE SUBSEQUENT FILING OF THEIR OWN CASE, SHOULD NOT BE UNFETTERED.

SECOND, I THINK THERE'S SOME GENUINE CONFUSION OVER THE JURISDICTIONAL PROVISIONS IN THE 1986 AMENDMENTS. AS YOU KNOW, WE SOUGHT TO RESOLVE A TENSION BETWEEN, ON THE ONE HAND, ENCOURAGING PEOPLE TO COME FORWARD WITH INFORMATION AND, ON THE OTHER HAND, PREVENTING "PARASITIC" LAWSUITS.

THE RESOLUTION OF THIS QUESTION RESTS ON HOW THE LAW'S "ORIGINAL SOURCE" DOCTRINE WILL BE INTERPRETED. WE ARE STARTING TO SEE SOME REPORTED OPINIONS ON THIS ISSUE. NOW MAY

BE A GOOD TIME FOR US TO STUDY THESE CAREFULLY TO SEE THAT WE MAINTAIN A SENSE OF EQUILIBRIUM.

THE "ORIGINAL SOURCE" EXCEPTION WAS INTENDED TO ENSURE THAT QUI TAM ACTIONS BASED SOLELY ON PUBLIC DISCLOSURES COULD NOT BE BROUGHT BY INDIVIDUALS WHO HAD NO DIRECT OR INDEPENDENT KNOWLEDGE OF THE INFORMATION, OR THOSE WHO WERE NOT AN ORIGINAL SOURCE TO THE ENTITY THAT DISCLOSED THE FRAUD ALLEGATIONS.

WHILE I STILL BELIEVE THIS IS A SOUND PRINCIPLE, I THINK WE NEED TO BE CAREFUL THAT THE QUI TAM JURISDICTIONAL PROVISIONS ARE NOT EMASCULATED. A PARTY WITH KNOWLEDGE OF A FRAUD AGAINST THE GOVERNMENT OUGHT TO BE ABLE TO MAINTAIN A QUI TAM ACTION AS LONG AS HE HAD SOME OF THE INFORMATION IN ADVANCE OF THE PUBLIC DISCLOSURE. MOREOVER, THE PUBLICATION OF GENERAL, NON-SPECIFIC INFORMATION DOES NOT NECESSARILY LEAD TO THE DISCOVERY OF SPECIFIC, INDIVIDUAL FRAUD WHICH IS THE TARGET OF THE QUI TAM ACTION.

MR. CHAIRMAN, I AGAIN COMMEND YOU AND THE SUBCOMMITTEE FOR YOUR LEADERSHIP ON THIS MATTER. I LOOK FORWARD TO REVIEWING THE RECORD, AND TO WORKING WITH YOU ON ANY STATUTORY REVISIONS TO THIS IMPORTANT ANTI-FRAUD LAW.

Mr. FRANK. We appreciate your efforts. And I share your view that we seem to be getting out of the Civil Division the kind of enthusiastic support that the law deserves.

I am not going to go into my questions now. I do want to note that we are joined by an alumnus of this committee who was one of the major authors of the amendments of 1986 and has been one of those looking at it most closely, Mr. Berman of California. But I am going to start the questioning with Mr. Campbell and then go to Mr. Berman.

And I just want to say I appreciate the fact that we have been able to work together, and I think that the fact that there are on a bipartisan and bicameral basis people watching closely about this should help to make sure that it is enforced well. And I agree with you we may by next year be looking at some decisional results which might suggest to us some technical changes one way or the other.

Mr. Campbell.

Mr. CAMPBELL. I thank the chairman, and I thank Senator Grassley. It is a pleasure to see you again, and it is always to be on a panel with you or to have you testify. Just one question.

It would be my interest in knowing your view of whether we should regularize standing for a Government employee to bring a *qui tam* action?

Mr. GRASSLEY. I think we have to have some clarification in that area. I don't think it is right to presume that justice is going to be done and fraud is going to be prosecuted unless there is some encouragement for the Government employee to do that. And I don't think you should assume that just because the Government employee is paid to do that, that it is necessarily going to be done. He should be involved in the process as long as he can show that he first made a good faith effort within the proper channels, in any way lawyers need to write that because I am not a lawyer. But good faith efforts to first work through the system to expose fraud should be the guide.

And, if that doesn't work, we should not cut him out of using *qui tam*. Because if we do then we are losing one of the basic resources to fight fraud in this country.

Mr. CAMPBELL. Well, I thank the Senator, and just one followup question. There seems to me, at least theoretically, the potential for a mixed motive where a Federal employee might wish to hold back information—

Mr. GRASSLEY. That is true.

Mr. CAMPBELL [continuing]. In order to have a private gain. Anticipating that, perhaps you would have a suggestion.

Mr. GRASSLEY. Not specific language, although I would be willing to work with you and give you some language in that direction. I think that your fear is well-founded and should be taken into consideration. I don't discount that whatsoever, and that is not right. I mean, an employee doing that. That would not be correct activity for that employee. But I hope that we can write language that will allow us to see that every effort is made, every good faith effort, you know, maximum effort, however you want to put, ought to be put forth because that is part of that person doing their job.

But you know how bureaucracy is in government—bureaucracy even in corporations, because a lot of these cases, obviously, come out of corporations where people have made an effort to bring them to the attention of the people and not gotten the attention they should have. We need this as a shotgun-behind-the-door to see not only that fraud is exposed, but to see that people higher up in the bureaucracy or in the corporate structure or even in the Justice Department are doing their job.

Mr. CAMPBELL. Thank you, Senator. I would be pleased to yield to my colleague from California, if you have a time constraint or something and you would like to go ahead.

Mr. BERMAN. Well, thank you very much. I appreciate it. I am being called down to the Energy and Water Subcommittee, where we are all testifying on our projects. It is my turn and so I have got to run down there.

Mr. CAMPBELL. Mention Santa Clara County, won't you?

Mr. BERMAN. Well, I was down there and Norm Mineta and Don Edwards were already doing that.

[Laughter.]

Mr. BERMAN. But I just wanted to welcome Senator Grassley. I thank the chairman for allowing me to sit in. These days this subcommittee is harder to get onto than it used to be. Used to be able to get this on the third round of bidding and I couldn't any more, so I am not on it this term of Congress.

I really appreciate your testimony, Senator, and agree with a number of points you made. There is one other issue I just wanted to raised generally—and I will come back after I have testified to listen to the rest of the hearing—and that is on the question of resources in the Justice Department in the U.S. attorney's office. I testified before Neal Smith's subcommittee on the Justice Department, urging that they provide for about 15 additional U.S. attorney slots, directed toward reviewing and participating in *qui tam* actions. Everybody who wants to spend some Government money always believes that it will in the end save money, and, of course, my argument was much the same, although here is a case where I think it can be demonstrably proven that that savings will come very quickly after the expenditure of the funds. The inability of the U.S. attorney's offices in heavily impacted areas, Los Angeles being one with all those defense contractors, has meant a very large backlog developing in these cases being filed and with the Justice Department unable to review them the way they should.

And, so I don't know if you have felt the same way, or if, Mr. Chairman, you felt sympathetic to that, but I think an effort to try to get the appropriations process this year to earmark some slots for the U.S. attorneys for this specific purpose could be very helpful I think in achieving the kinds of things we tried to do with the original bill.

Mr. GRASSLEY. I had a line of questioning that I was going to pursue with the Attorney General yesterday when he appeared on authorization before our Judiciary Committee but time did not allow me to do that. But I will be pursuing that in other ways.

Mr. BERMAN. Great.

Mr. FRANK. And, as the gentleman knows, given the rather peculiar jurisdictional split in this committee, it is the Courts Subcom-

mittee that has U.S. attorneys. The Civil Division is here and the U.S. attorneys are there. So we haven't as a subcommittee dealt with it. I think it is a reasonable idea but we have no particular license as a subcommittee there. That is the Courts Subcommittee's jurisdiction.

Mr. BERMAN. That is true. I just think as the subcommittee that authorized the bill, if you are willing to, a communication to appropriations would be helpful. And I will ask the Courts Subcommittee as well.

Mr. FRANK. We will work with you. I thank you.

Senator, thank you. We will let you get back across the street.

Mr. GRASSLEY. Thank you very much.

Mr. FRANK. We will now call—and, if you gentlemen don't object, it would seem to me sensible for you to testify side by side and we do the questioning together. I think that would probably be the best way to develop this.

We are pleased to have Assistant Attorney General Stuart Gerson and the Inspector General of the Department of Health and Human Services, Mr. Kusserow.

Let me say, while for Mr. Kusserow this is an interjurisdictional appearance before this committee, Mr. Gerson has in his relatively short tenure been extremely cooperative with this subcommittee and I want to say that we appreciate that. He has been available and responsive, and I appreciate the pains he takes to make sure that we can do our mutual business together.

Mr. Gerson, we will begin with you.

STATEMENT OF STUART M. GERSON, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. GERSON. Thank you. Mr. Chairman, inasmuch as we share a strong commitment to fighting fraud against the people of the United States, we are pleased to discuss the developments in the law following the most recent amendments to the False Claims Act, particularly the *qui tam* provisions. I am particularly happy to sit next to Mr. Kusserow, with whom I have some disagreements in other matters, but it is clear that, with our respective roles, as I have reviewed his testimony, that our views here today are quite similar and our experiences parallel each other. So I think it is a good idea that we are sitting together.

I would respectfully ask that my full written testimony be made a part of the record.

Mr. FRANK. If there is no objection, it will be.

Mr. GERSON. So I will move on to summarize the key points of it.

In sum, while there are several actual and potential problem areas with the application of the law, the regime that has been created balancing public and private resources appears to work reasonably well. After providing some quantitative information about the operation of the law, I will suggest several potential modifications which might be able to improve it. But I don't want those suggestions overrated, in the same sense that sometimes I have come here and have heard elsewhere that there is a lack of commitment to the program, that we are seeking its immediate decla-

ration of unconstitutionality, or that there need for massive changes.

My guess is that we can probably continue to exist the way we are and do reasonably well getting judicial interpretations as we need them. Nevertheless, particularly using the resources of the U.S. attorney's offices I have some suggestions that I think are worthy of at least consideration as this story continues to unfold.

Clearly, the new provisions have been a useful stimulus for citizens to come forward with allegations of fraud against the Government. Concomitantly, we believe—and I am glad Senator Grassley supports this—that the Justice Department and the various agencies who are our clients have been forthright in working with the various relators and their counsel, consistent with our available resources and the substance of the given allegations in any particular case.

It is not an unfair question to continue to ask whether the most efficient way to encourage citizens to join in fighting against fraud is the bringing of full-scale lawsuits when there are potential alternative stimuli. But, as I say, that is a question that we should continue to ask ourselves at the same time that the system can operate quite well.

Similarly, just as we need to assure the maintenance of executive branch prerogatives concerning the nature and extent of investigations and whether to proceed, dismiss or settle, those may temper our views about *qui tam* lawsuits, but again you can't lose sight that we begin and end with support for the general regime.

As an aside, we note that as significant as the enhancement of the *qui tam* provisions might be, we find that it least as useful to work with the amendments strengthening of the non *qui tam* provisions of the False Claims Act; in particular, by increasing the level of damages, clarifying the standard of knowledge and burden of proof the Government must meet, and strengthening the Government's investigative tools by providing for the first time civil investigative demands in this context. We have done a lot toward strengthening the Government's hands irrespective of *qui tam* cases, remembering also that our interests are broader than just the *qui tam* cases. We have a pretty broad perspective on fighting fraud. I know that the Inspector General shares that. We are involved in all kinds of cases that are not *qui tam* cases, and these extra provisions have helped us.

In summary, settlements and judgments obtained by the Civil Division in conjunction with the U.S. attorneys offices have steadily increased. I do note they were steadily increasing before the amendments. For example, in fiscal 1985, the recoveries were around \$27 million. In 1986, that jumped to \$54 million. The escalation has continued. For fiscal 1989, our estimate is in the neighborhood of \$225 million in recoveries in these kinds of cases.

The numbers of cases, similarly have increased. In fiscal 1987, there were 33 cases filed.

Mr. FRANK. Are those judgments or dollars collected, the numbers you gave us?

Mr. GERSON. Those are settlements and judgments.

Mr. FRANK. So they are not necessarily dollars.

Mr. GERSON. No. Probably the dollars would be a little less, as you know from other testimony.

Mr. FRANK. Right. But not radically less?

Mr. GERSON. Yes. Not a great deal.

The case filings ran from 33 in fiscal 1987. Fiscal 1989 saw 93 cases. Fiscal 1990 to date is running ahead of that pace. I think there are about 45 as I speak to you now. The total is 231.

To date, the Department has entered 29 cases and declined to assume responsibility for 121. The remainder are either waiting our determination or are otherwise settled or dismissed. Prior to our intervention decision, our records show about 30 *qui tam* cases having been dismissed, although we would not necessarily be aware of the disposition of all of the cases where we have declined to intervene.

Similarly, our declination of intervention is not the seal of approval of the conduct. It may be no more than an indication that we find the standards for a fraud case have not been met, even though there may be some other form of activity that can be otherwise pursued. Sometimes that indeed leads us to pursue cases on other theories, contract basis, for example. While there is some dispute, for example, the one Senator Grassley might have been describing, I think even that situation is working out very well.

With reference to Mr. Berman—I am sorry he isn't here right now, but I will note that by far the district with the most *qui tam* cases is, indeed, the Central District of California, which has had 40 such cases in that district. The Government has entered 7 of those cases and declined 20. I am informed that at the beginning of 1987 the Central District of California had no attorney specifically responsible for affirmative cases. Now it has four dedicated entirely to that role.

As you know from other testimony that I have given here, I am strongly committed to affirmative cases, which I think are cost effective, and I stress that point in my dealings with the U.S. attorneys and their advisory committee to the Attorney General, and especially in the big districts I believe that that philosophy is being shared and acted upon.

Some other districts that have substantial numbers of *qui tam* cases include the Eastern District of California which has 30 cases, all but 3 of which are related cases. The District of Columbia has 10. The Southern District of California, the San Diego area, has nine. And the Northern District of California has seven. All of that, obviously, reflects defense involvement, but to some degree the numbers also reflect health and insurance related cases. Mr. Kusserow has substantial knowledge of those. We are pursuing those quite vigorously.

Since the 1986 amendments settlements have been achieved in 21 *qui tam* cases with a total recovery of about \$40 million, of which almost \$4 million was paid to the individuals who brought the actions. Included in that number is a \$3.4 million default judgment that has proven to be uncollectable. Settlements of \$14.9 million, \$5 million, and \$2.7 million in cases either brought under the old act or where there was substantial doubt as to the relator's authority to bring the case in the first place, and a \$1.9 million settle-

ment on a contract cause of action in a case that originally had been filed as a *qui tam* case.

While the *qui tam* total of recoveries up to now represents only a fraction of civil fraud recoveries since October 1986, *qui tam* cases increasingly demand more and more of our attorney resources. Since the amendments our Civil Fraud Section, that is, the one that reports to me, has grown from 29 to 42 lawyers; the numbers of hours that Civil Division lawyers have spent on *qui tam* cases has grown in that period from about 1,100 hours in the 6 months preceding passage of the amendments to almost 11,000 hours in the most recent 6 months period, exclusive of the substantial amount of time spent by the U.S. attorneys offices on these kinds of cases. This represents a growth from less than 5 percent of the time our civil fraud attorneys spent on *qui tam* cases before the amendments to almost 40 percent of their time in the most recent 6-month period that we have sampled. In 1989 alone, eight attorney workyears were spent on *qui tam* cases.

So I think there is really no better evidence of what my Division's commitment is to it. I think we have reached a kind of a stasis where we have probably come close to having the effective number of lawyers on it. The work is, indeed, expanding but we are growing more efficient, and remembering also that *qui tam* was designed to balance private against public resources and some of the work ought to be done privately. That is the philosophy of the law.

Within this expansive range of cases, naturally we have had every kind of experience you can imagine. There have been *qui tam* cases clearly filed that have alleged cognizable fraud that we otherwise would not have known about, and likely never would have learned about absent the filing of *qui tam* cases or some other kind of stimulus, be it a bounty or something else. I admit that from the very beginning. So we are getting useful information.

Some cases which have had plausible claims on their face have not worked out that way upon investigation. Some have been frivolous. You will notice in the written testimony that both Mr. Kuserow and I make reference to an expansion of the time in which both the Department of Justice and the Inspectors General might investigate these cases. That might produce a salutary effect on our ability intelligently to intervene or not and to work out some of these problems where there is a failure of theory. Where the fraud theory doesn't work out because you can't show a contemporaneous intention to misrepresent but yet there is a subsequent breach of a contract. We are going to pursue those cases quite vigorously. The fact that they are not trebled means something, but it certainly doesn't excuse the conduct and it doesn't mean that we don't advance those cases, using our same lawyers but on different theories. Clearly we do.

Similarly, we see all kinds of lawyers and relators. Some are extremely cooperative, some clearly are along for the ride, just hoping to pick up their check at the end, and some absolutely believe that they can do the job much better than I and my people can. But all of that is to be expected. There will always be some disputes in any system as to who did what first or who could do it better. But, as I say, the numbers seem to suggest that the system is working out reasonably well.

I am often asked, as I have been indeed asked before this committee, where we stand on the constitutionality of the *qui tam* provisions. As Senator Grassley alluded to, at least four districts have sustained the constitutionality of these provisions. The Department has not to date taken a position on the constitutionality of a relator's right to proceed with a case declined by the Government. There hasn't been a need for us to address that. If there is, we will.

We have resisted attempts to dismiss on constitutional grounds cases originally filed as *qui tam* complaints where the Government has intervened and is pursuing the case. That, to me, is the correct way to deal with their question. I have suggested to Mr. Frank, who has asked me about it, and to others that I can conceive of situations that are of a problematic nature, where we seek to settle or dismiss a case as one prime example, and that is resisted. That is an executive branch prerogative that would raise a constitutional question. It would not involve the categorical declaration of unconstitutionality of the law, even if we were correct about that.

Those are exceptions and they really have not come up in any material way. So, as I say, even there the system seems to work reasonably well. Where we have required judicial interpretations, we seem to be able to get them. I will come to some, as I mentioned earlier, potential amendments. But, by and large, that is what constitutes our position.

We have always assumed, for example, that the Government's right to investigate after a *qui tam* complaint was filed was for the Government's benefit, to assist our client and the people to aid in its decision as to whether to proceed with the case or let the relator proceed and help determine how extensive a case or investigation to conduct. Hence, we believe that we had all that discretion.

One relator recently asked a district judge to compel a more thorough Government investigation, essentially for the relator's benefit. This, if ordered, would constitute another form of impermissible intrusion. But that didn't happen.

The *qui tam* provisions have caused some difficulty on our criminal prosecutions side. When a *qui tam* case is filed in a matter that is already under criminal investigation or contains allegations that a prosecutor wishes to pursue, that criminal investigation must co-exist with the civil case, contrary to our usual procedure to defer the civil action until the criminal action is completed. The statutory period provided for our investigation is, in our view, and I see that in his context the Inspector General of HHS agrees, is inadequate to conduct the kind of investigation that we think is appropriate.

We have had success in seeking and gaining extensions when we have needed time to decide whether to intervene, sometimes with the relator's consent and sometimes over their objection. Nonetheless, there are some examples of *qui tam* cases being required to move forward, sometimes at the behest of a defendant and sometimes at the behest of a relator, while a criminal investigation is pending, with the threat that the broader rules of civil discovery will be used by a defendant to circumvent the more narrow discovery available in criminal cases. In cases that are moving ahead despite a pending criminal proceeding, it is possible that judges will

not be sensitive to the need to stay particular discovery upon a concrete showing of harm to the criminal case.

Another aspect of the timing problems posed by *qui tam* provisions are leading us to consider, as I have suggested here before, that the Department's civil lawyers need direct access to grand jury materials and to evaluate the potential civil ramifications of fraud investigations. That is the problem that we have in that regard. It is not a problem that has been created by the Congress since it is a problem that has been created by a judicial decision called *United States v. Sells Engineering*, which has interpreted Federal Rules of Criminal Procedure 6(e) in an unduly restrictive way. It is the Department's position that that ought to be modified legislatively to allow us to better utilize our civil and criminal lawyers without erecting unnecessary so-called Chinese Walls. We can be helped, and, indeed, the interest that the sponsors and most ardent proponents of *qui tam* have would be helped by a change in that regard.

Another issue that has arisen, that has been mentioned already, is what happens when the Government chooses to pursue only certain of the allegations in a *qui tam* complaint. We have argued that a relator should be allowed to proceed with those unadopted counts that are sufficiently distinct from the ones taken over by the Government, so long as the litigation of those unadopted counts does not interfere with the case the Government has chosen to pursue.

This position is consistent with our concern about the legal ramifications of a *qui tam* cases litigated by a relator that precedes the Government's own criminal or civil case. A case litigated on behalf of the United States by a relator's counsel where large civil penalties are imposed might foreclose a later criminal action for the same conduct under the Supreme Court's ruling in a past term in *United States v. Halper*. This again highlights the need for close coordination between our Criminal and Civil Divisions, though I think we are doing that reasonably well. And, while *Halper* was a *qui tam* case, or at least a false claims case, I think that we have, by and large, circumvented the difficulty, the constitutional difficulty that was thrown up by the double jeopardy decision in that case.

We have had some concern that the Government might be collaterally estopped on some factual issues on *qui tam* counts it chooses to pursue, or potentially even in criminal matters, if the relator has previously lost on the same factual issue. We don't know the answer to that. We are not sure how the trial of a *qui tam* cases will work if the Government and relator's counsel have different, especially inconsistent, theories and legal strategies.

We believe that the statute should be interpreted in a manner consistent with the Department's primary responsibility for prosecuting these cases, and are hopeful that the courts will adopt this view.

As I mentioned, we are apprehensive about how various judges will treat Government requests to dismiss or settle——

Mr. FRANK. Mr. Gerson.

Mr. GERSON. Yes, sir.

Mr. FRANK. We don't have the time. You have mentioned that, as you said. If we can move on quickly, that would be helpful.

Mr. GERSON. I will move on.

Let me talk just a little bit, so I don't repeat myself or cover anything that is in the written testimony. I share the Inspector General's view that the Government questions how much information a relator adds to the process when he files a *qui tam* suit in a matter that has already been disclosed to the Government through a program that provides for civil claims to be resolved by the Government anyway, through voluntary disclosure programs. I share the concern that was implied by Mr. Campbell's question on the Government employee. Senator Grassley did raise the only, to me, cognizable instance in which you even might want to consider that, which is where the employee tries to work through channels to report or investigate the alleged fraud but is thwarted by official inaction or misconduct. Even there I have a great deal of problem with it, because you run into the issue of compartmentalization of information and pursuing two interests at the same time.

I come down in saying that, just as it is your job and my job to pursue these things, it is the job of the Federal employee to do it as well. And, that we need a standard rule to eliminate it, the official bounty hunter, I don't think it is a good way for the Government to do its business. The Congress didn't think it was either. As you will remember, the old regime had U.S. attorneys working for a stake in the proceeds. I don't think that is the way to go. I think the current system works better, and it is our belief as we have litigated the cases that while you might be able to point to an individual case of abuse that the Federal employee ought not be a permissible *qui tam* relator where the information that he has come by is a product of his official duties.

I mentioned some possible amendments. One is the enactment of the change to Criminal Rule 6(e) to repeal the holding of the *Sells* case. Another is to extend the automatic stay provision of the *qui tam* suit. And we have not suggested a specific time reference. I have gone up to the 6-month level. The Inspector General of HHS has suggested 120 days, as I have looked at his testimony yesterday. We think that some extension would be useful in that regard. There are some other clarifications that I have mentioned.

Mr. FRANK. If you have already mentioned them, please don't mention them again.

Mr. GERSON. A different one would be to amend section 3733(a)(1) to state that the Assistant Attorney General for the Civil Division, himself, may authorize the CID—that would parallel the civil investigative demand provision in the Antitrust Civil Process Act, which is 15 U.S.C.—

Mr. FRANK. Mr. Gerson, please don't give us citations in oral testimony. They are in the written record. We do have a time problem. We don't need citations to the Code in your oral testimony. They are in the written record. Please.

Mr. GERSON. These are not, but I will move on.

Mr. FRANK. Then give them otherwise. I just want to stress to you time. You lose members, who have a lot of things. You just got to compress this a little more.

Mr. GERSON. I am about to finish.

To date, we have sought judicial constructions in the *qui tam* provisions that reflect the underlying principles contained in the statute as a way of managing potential areas of difficulty. As it becomes necessary, we want to return here and elsewhere to seek remedial legislation in those areas.

Thank you, Mr. Chairman.

Mr. FRANK. Thank you.

[The prepared statement of Mr. Gerson follows:]

PREPARED STATEMENT OF STUART M. GERSON, ASSISTANT ATTORNEY GENERAL, CIVIL
DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman, we begin on the common ground of our strong mutual commitment to fighting fraud against the people of the United States. This is an area of patent significance to this body, as it is an area of the highest priority for the Department of Justice and for the Civil Division in particular. Thus we hope that our participation in these oversight hearings on the *qui tam* provisions of the False Claims Act will contribute to a balanced understanding of the attributes of this legislative regime, and of some of its burdens as well. This discussion also might lead the way to actions which could improve and enhance the effectiveness of the law.

Qui tam provisions have been part of the False Claims Act since its original enactment in 1863, although they were substantially reinvigorated by the False Claims Amendments Act of 1986. The increased litigation that has resulted from the new *qui tam* procedures has had both positive and negative aspects.

On the whole, the new provisions have given an effective impetus for citizens to come forward with allegations of fraud against the government warranting further investigation. In this regard, we believe that the Department and the various agencies have been forthright in working with relators and their counsel and, consistent with the available resources and the substance of any given allegations, been diligent in the investigation and prosecution of these cases.

It is a matter of fair inquiry, however, as to whether the commencement of a full-scale lawsuit is the most efficient way to accomplish the desirable result of encouraging citizens to join

the fight against fraud upon their government. As I shall discuss further, there are difficulties in harmonizing the government's criminal investigation and prosecutive responsibilities with a civil lawsuit that is already pending where some actions by the relators unduly might limit the government's rights in criminal, civil or administrative proceedings the government wishes to pursue.

We also need to assure the maintenance of Executive Branch prerogatives concerning the nature and extent of investigations and whether to proceed, dismiss or settle (and if so for how much), with a contractual partner. These concerns temper somewhat our support for qui tam lawsuits, but one must not lose sight of the fact that we begin and end with such support.

We also note that the same amendments that added the qui tam revisions also strengthened the non-qui tam provisions of the False Claims Act -- in particular, by increasing the level of damages, clarifying the standard of knowledge and burden of proof the government must meet, and strengthening the government's investigative tools by providing for the first time Civil Investigative Demands in False Claims Act cases.

These modifications have been extremely helpful in the government's civil fraud effort. Indeed, settlements and judgments obtained by the Civil Division, in conjunction with United States Attorneys offices, have steadily increased, even previous to the 1986 Amendments.

Fiscal Year 1985 - \$ 27 million
Fiscal Year 1986 - \$ 54 million
Fiscal Year 1987 - \$ 83 million
Fiscal Year 1988 - \$176 million
Fiscal Year 1989 - \$225 million

The 1986 Amendments to the qui tam provisions have engendered substantial interest. As these provisions have become increasingly well-known, more and more cases have been filed:

Fiscal Year 1987 - 33
Fiscal Year 1988 - 60
Fiscal Year 1989 - 93
Fiscal Year 1990 (to date) - 45

For a total of 231.

To date, the Department has entered 29 cases and declined to assume responsibility for 121. The remainder are either awaiting a determination by the Department or were otherwise settled or dismissed prior to an intervention decision by the United States. Additionally, our records show about 30 qui tam cases having been dismissed, although we would not necessarily be aware of the disposition of all cases where the government declined to intervene.

By far, the district with the most qui tam cases is the Central District of California, which has had 40 cases. In that district the government has entered 7 cases and declined 20 cases. We are informed that at the beginning of 1987, the Central District of California had no attorneys specifically responsible for affirmative cases; now it has 4 attorneys dedicated to that role. Other districts with substantial numbers of qui tam cases include the Eastern District of California with 30 cases (all but 3 of which are related cases); the District of Columbia with 10 cases; the Southern District of California with 9 cases, and the Northern District of California with 7 cases.

Since the 1986 Amendments, settlements have been achieved in 21 qui tam cases with a total recovery of \$40 million, of which almost \$4 million was paid to the individuals bringing the actions. Included in that \$40 million figure, however, is a \$3.4 million default judgment that has proven to be uncollectible, settlements of \$14.9 million, \$5 million, and \$2.7 million in cases either brought under the old Act or where there was substantial doubt as to the relator's authority to bring the case in the first place, and a \$1.9 million settlement on a contract cause of action in a case originally filed as a qui tam fraud case.

While the total qui tam recoveries to date represent only a fraction of civil fraud recoveries since October 1986, qui tam cases are increasingly demanding more and more of our attorney resources. Since the Amendments, our civil fraud section has

grown from 29 attorneys to 42 attorneys. The number of hours Civil Division attorneys have been required to spend on qui tam cases has grown from approximately 1,100 hours in the six months preceding passage of the Amendments to almost 11,000 hours in the most recent six-month period, exclusive of the substantial amount of time spent by attorneys in U.S. Attorney offices on qui tam cases. This represents a growth from less than 5% of the time of our civil fraud attorneys being spent on qui tam cases before the enactment of the Amendments to almost 40% of their time in the most recent six-month period of time. In 1989 alone, eight attorney work years were spent on qui tam cases.

The expansion of qui tam cases has been a mixed blessing. Certainly, we do not doubt the benefits to federal law enforcement officials from the increased participation by citizens in the fight against fraud. The dedicated attorneys in the Department on both the civil and criminal side are delighted to get information from whatever the source where there is cause to think there is fraud against the government.

Unquestionably, there have been qui tam cases filed with respect to fraudulent activities that the government previously did not know about, and likely would never have learned about, absent the filing of the qui tam case or otherwise having the information brought to the government's attention by a citizen. At the same time, there have been some cases that are clearly frivolous or inherently insufficient as a matter of law. Finally, many qui tam complaints have been plausible on their

face, and have required extensive investigation, only to result in the government ultimately declining to enter because it could not within the 60-day period or any extension approved by the court establish sufficient facts to substantiate an allegation of fraud.

Likewise, our experience in working with different relators and their counsel has varied. A number of relators' counsel have been extremely helpful and cooperative. They have done a thorough job in putting the case together and assembling evidence. They fully cooperate with the government's investigation and while offering and providing their assistance, are respectful of our principal role in fraud against the government investigations and the need at times for investigations to be extended.

On the other hand, there are some relators and their counsel who do nothing more than file their case and who plan to sit back and pick up their check at the end. They plan on offering no further assistance beyond the bare statutory minimum of filing their claim, and often that is done in a haphazard manner to ensure that their claim is filed first.

Finally, there are some relators' counsel who are convinced they can litigate the case better than Department attorneys and who resist the government's efforts in the hope of encouraging the government to decline and being allowed to litigate the case on behalf of the United States by themselves.

It has been just over three years since the qui tam provisions have been amended. Litigation under those amendments is well under way, although we are unaware of any case that has yet gone to trial. As with any new statute, a host of legal questions needs to be resolved. Our experience litigating these cases in the last few years has allowed us to identify real and potential problems with the operation of the statute. In particular, the Financial Litigation Subcommittee of U.S. Attorneys has formulated recommendations for consideration by the Department. Ultimately, some of the problems we have identified might be corrected by appropriate judicial decisions, while others may need to be addressed by corrective legislation. These issues are under review.

A principal legal issue that has been raised by a number of defendants is the constitutionality of the qui tam provisions. At least four district courts have sustained the constitutionality of the provisions. The Department has not, to date, taken a position on the constitutionality of a relator's right to proceed with a case declined by the Department.

We have resisted attempts to dismiss on constitutional grounds cases originally filed as qui tam complaints where the government has intervened and is pursuing the case. We shall, of necessity, take a position on a constitutional question when and if a case arises in which prerogatives of the Executive Branch need to be defended.

One problematic aspect of qui tam litigation is that the Executive Branch no longer is exclusively able to set the priorities for its investigations. Upon receiving a qui tam complaint we ask for a recommendation from the affected agency and this will usually require an investigation. Because of the statutory deadlines on the government's decisions, managers of agency investigative resources have lost flexibility in deciding which investigations should be conducted and in what order.

Likewise, we had always thought that the government's right to investigate after a qui tam complaint was filed was for the government's benefit, to aid in its decision on whether to proceed with the case or let the relator proceed, and to help determine how extensive an investigation to conduct. Accordingly, we believed the scope and nature of such investigation was within the discretion of the Department. Now, however, at least one relator has asked a district judge to compel a more-thorough government investigation for the relator's benefit.

Such a posture, if adopted by the courts, would be inconsistent with the principle that while the relator may proceed with any case or investigation not pursued by the government, the relator's rights do not extend so far as to compel a particular level of investigation or a particular decision on whether the government should proceed with the case. Both of these decisions are within the sound discretion of the Attorney General.

The qui tam provisions have caused some difficulty on the Department's criminal prosecution side. When a qui tam case is filed in a matter that is already under criminal investigation or contains allegations that a prosecutor wishes to pursue, that criminal investigation must co-exist with the civil case, contrary to the usual procedure followed by the government of deferring civil action until the criminal case is completed.

The statutory period provided for the government's investigation is often woefully short, given the fact that criminal investigations in complex cases can take years to complete. To be sure, we have had substantial success in seeking extensions of the time when we must decide whether to intervene in qui tam cases or seeking stays of civil cases pending completion of criminal investigations -- sometimes with the relators' consent and sometimes over their objection.

Nonetheless, there are examples of qui tam cases being required to move forward -- sometimes at the behest of a defendant and sometimes at the behest of a relator -- while a criminal investigation is pending, with the threat that the broader rules of civil discovery will be used by a defendant to circumvent the more narrow discovery available in criminal cases. In cases that are moving forward despite a pending criminal proceeding, it is possible that judges will not be sensitive to the need to stay particular discovery upon a concrete showing of harm to the criminal case.

The timing problems posed by the qui tam provisions are leading us to consider that the Department's civil attorneys need direct access to grand jury materials to evaluate the potential civil ramifications of fraud investigations. The artificial barrier between the Department's criminal and civil sides erected by the Supreme Court's 1983 decision in United States v. Sells Engineering, Inc. impose unnecessary restrictions, the effect of which is heightened by the qui tam provisions.

Because the threat of a qui tam suit is always present and because of its potential effect on criminal investigations and prosecutions, close coordination between the Department's Criminal and Civil prosecutors is required. Ensuring the Department's Civil attorneys access to the underlying factual information in fraud-against-the-government cases is the single-most important thing that can be done to improve the required coordination.

Another issue that has arisen is what happens when the government chooses to pursue only certain of the allegations in a qui tam complaint? We have argued that a relator should be allowed to proceed with those unadopted counts that are sufficiently distinct from the ones taken over by the government so long as the litigation of those unadopted counts does not interfere with the case the government has chosen to pursue.

This position is consistent with our concern about the legal ramifications of a qui tam case litigated by a relator that precedes the government's own criminal or civil case. A case

litigated on behalf of the United States by a relator's counsel where large civil penalties are imposed might foreclose a later criminal action for the same conduct under the Supreme Court's ruling last term in United States v. Halper. This again highlights the need for close coordination between the Department's Criminal and Civil sides.

Similarly, we have some concern that the government might be collaterally estopped on some factual issue on qui tam counts it chooses to pursue, or potentially, even in criminal matters, if a qui tam relator has previously lost on that same factual issue. Also, we are not sure how the trial of a qui tam case will work if the government and relator's counsel have different -- perhaps inconsistent -- theories and legal strategies.

We believe that the statute should be interpreted in a manner consistent with the Department's primary responsibility for prosecuting these cases, and are hopeful that the courts will adopt this view.

We are most apprehensive about how various judges will treat government requests to dismiss or settle qui tam cases. For the most part, when the government has determined to decline to enter a qui tam suit it has done so because it was not prepared to allege fraud. That is a far cry from being prepared to certify that the defendant acted properly, and we have been quite willing to allow the relator to go forward and attempt to make his case.

There are, however, times when for legal, policy or judgment reasons, the government may wish to have a qui tam case

dismissed. The statute gives the relator the right to object to those actions and leaves the final decision to the court. Again, we shall have to see how deferential courts are to the Executive Branch's prerogatives not to have a case pursued in the name of the United States, or the Executive Branch's decision to settle with one of its contracting partners.

Continuation of a case by a relator is not without costs to the government. Undoubtedly, government resources will be utilized in responding to discovery requests from both the relator and the defendant and if the defendant ultimately prevails, it may well be able to charge its defense of the action to overhead accounts that are reimbursed by the government.

Another potential area of difficulty lies with distinguishing between fraud claims and simple breach of contract claims. Often qui tam relators who see questionable activity by their employer are tempted to file a qui tam suit alleging fraud to protect their claim to an award should the fraud allegations pan out. When the government utilizes its many resources to investigate the situation from a broader perspective than the relator's, it may turn out that there was nothing wrong at all or, at most, there is a non-fraud claim for single damages.

If the government seeks to recoup its single damages on a non-fraud theory, the relator is not entitled to a percentage of the recovery. Whether a settlement represents a compromised multiple damage fraud recovery or a single damage recovery may become a point of contention between relators and the government.

Another pending issue is the right of government or ex-government employees to utilize information they learned as part of their official duties as the basis of a qui tam suit. This issue raises both government personnel management and conflict of interest issues. We think it important that government program personnel, investigators or attorneys report information they learn about wrongdoing promptly through official channels and not be tempted to hold back information because of the prospect of subsequent private financial gain. To date, the courts have split on this issue.

Finally, we note a concern that has been raised by a number of defense contractors. The Department of Defense has established and encouraged the use of its Voluntary Disclosure Program to report instances of fraud. Contractors are concerned that while undertaking to self-investigate allegations of fraud and preparing a voluntary disclosure report, or even after a voluntary disclosure has been made, they are vulnerable to having an employee utilize information gathered during that process to file a qui tam suit.

Under one view, allowing qui tam suits in that situation is counterproductive and to the detriment of the government. Such contractors have already made the decision to disclose but must, given the potential threat of a qui tam suit, be somewhat circumspect in gathering the facts. This is clearly not in the interest of the government. The government also questions how much information a relator adds to the process when he files a

qui tam suit in a matter that has already been disclosed to the government through a program that provides for civil claims to be resolved by the government anyway. Yet, if there has been no public disclosure of the allegations of fraud, a relator could claim an entitlement to a portion of the recovery.

Mr. Chairman, we appreciate the Committee's interest in the qui tam provisions of the 1986 Amendments. We believe we have done a good job in implementing those provisions, and for the most part qui tam cases are proceeding in an orderly manner. Not all of the problems and issues I have discussed were anticipated at the time the Amendments were enacted. It is thus useful to inform you of them and to anticipate some of their solutions. To date, we have sought judicial constructions of the qui tam provisions that reflect the underlying principles contained in the statute, as a way of managing the potential areas of difficulty. As it becomes necessary, we shall return to the Congress to seek remedial legislation.

Thank you for the opportunity to appear and discuss this significant issue.

Mr. FRANK. Mr. Kusserow.

STATEMENT OF RICHARD P. KUSSEROW, INSPECTOR GENERAL,
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. KUSSEROW. With your permission, Mr. Chairman, perhaps I can submit my full testimony for the record and just highlight it.

Mr. FRANK. Without objection.

Mr. KUSSEROW. First, I want to thank you for the opportunity to sit on the same side of the table with Mr. Gerson. It is the first time I have ever had the opportunity to be on the same side of the table. Usually, we are arguing on the opposite sides of the table, so this is a first for us.

The gist of my testimony is that our experience thus far with *qui tam* indicates that it is a successful program and that it is working in large measure because we have gotten affirmative leadership and guidance from the Department of Justice Civil Division in how we go about doing our investigations and bringing them to successful conclusion.

As Mr. Gerson indicated, there are things that we feel that might improve the process based upon our experience, and I would like to give you a little bit of insight as to the experience that we have had to date.

The first thing I would note is, as with Mr. Gerson, is the fact that we seem to be in almost a geometric progression in the number of cases that are coming through the system. We are finding that initially we had very, very few cases, but we see that more and more cases are coming down the system. In 1987, we only had 2 cases referred to us for investigation. In 1988, we went up to 8 cases and in 1989, to 17. And then, of course, 1990 promises to be a year that far exceeds that number. So we, in fact, are seeing a general increase at a very rapid rate. Though we started out with a small base, if it continues in this case, as we think it will, it will become very significant.

This means that this becomes a strain on the investigator assigned to work the case. In many cases that investigator is the Office of Inspector General in our Department, because between the Department of Defense and the Department of Health and Human Services, we pretty much have most of the market for the kinds of cases that lend themselves to *qui tam*.

If you talk about having 17 cases, that is not very large, when you are talking about an organization such as ours that last year produced about 1,300 criminal convictions through the Department of Justice and another 800 civil administrative prosecutions. But the problem with the *qui tam* is that it is very time sensitive. Sixty days means that you have to set aside everything else you are doing and make sure that you meet that time deadline. Our experience has been that thus far we have been able to manage, but almost on a routine basis we are asking for extensions.

Because of the kind of cases that we have, not only in HHS but in the Defense Department, which tend to be fairly complex—in our case we have a lot of medically related issues—we have to seek special expertise to help us evaluate what the evidence would sug-

gest. That means for us that we have to strip gears and drop transmissions every time one of these cases comes down the road.

My concern is that, if this progression continues on its present course, we are going to find ourselves cutting corners more and more. Then we may have to render bad recommendations to the Department of Justice as to whether to proceed or not because of the fact that we may not have taken that extra step that would, in fact, be more definitive as to whether it was a meritorious prosecution or not, and in which case we may find that we will have an error rate where, for some very meritorious cases, we may recommend against intervening. That we may have recommended to proceed on something only to realize the next investigative step washes it out of the process.

For that reason, as Mr. Gerson noted, we suggested that going from 60 days to 120 days would certainly allow us to better manage that kind of a caseload. I thought I might mention some of the kinds of cases that we have had experience to date with, and very quickly kind of highlight the kind of matters that relate to our Department's programs.

We have had actions against medical device manufacturers and pharmaceutical companies which submit false and fraudulent statements and evidence in applications with FDA for approval. We have had cases involving health maintenance organizations and various individuals which bill Medicare for noncovered services. We have had allegations against a mobile medical diagnostic company, which involved billing for diagnostic services as though they were provided to patients in a hospital setting, when really they had been provided by a mobile unit. We have had a number of matters against major health insurance companies, and, if you want to know where there is a complicated environment to investigate, let me assure you nothing can be more complicated than health insurance companies.

We have cases involving alleged falsification of research data and misrepresentation in connection with—

Mr. FRANK. Mr. Kusserow, I think those can probably be left to the written record.

Mr. KUSSEROW. They will be in the written record.

Mr. FRANK. I mean I think it would be better to talk about the policy-related issues. The illustration of cases I think we can have in the written record.

Mr. KUSSEROW. Let me just say then, Mr. Chairman, that we have now a pipeline that is running. We have had two solid cases come off that have been resolved that brought in about \$6 million. We have another four cases where the investigation is developed in the Department of Justice and moving forward with them that promise to have at least that much money in those cases. Behind that we have other cases that are under development. Nine others that look very, very promising and should provide a return far in excess of those that were already under development.

So the process is working pretty well. We are seeing that. We are getting cases—most of the cases that we are having referred to us are matters, as Mr. Gerson suggested, that we would not have had information on were it not for the fact that the relators had come forward on their own.

We had recommendations, which I have alluded to, in part, with the 60 days. If we can increase it a little, it will give us a little bit more maneuvering—

Mr. FRANK. You have told us that. Next point.

Mr. KUSSEROW. That if we could have, again underscoring, I have a case in particular where one individual who worked for me on the last hours that he had with the Federal Government xeroxed the files and went out and filed a *qui tam* actions.

Mr. FRANK. Had he worked in the Inspector General's Office?

Mr. KUSSEROW. He worked in the Inspector General's Office and precipitated the action before we were fully able to prepare the investigation. There is something very wrong about a Federal employee or somebody who is receiving Federal money who has knowledge of fraud who fails to disclose it during the course of their period of employment or contract and then later tries to act on that investigation to personally benefit themselves.

And I think that the solution is here. Again, Senator Grassley mentioned it, and that is, that if somebody has tried to move with information to due process and has been thwarted, and then they go forward with *qui tam*, I don't think anybody is going to object to it. But, if they have not done that, I just don't think that they should benefit from the failure to do their duty as a recipient of Federal money.

I would just mention in passing that somewhere along the line as the cost of investigations of these cases begin to rise and we see these kinds of cases showing up more frequently on investigative screens of organizations such as ours or at the Defense Department, consideration should be given to figure out some way in which that process could be encouraged so that we would continue to invest resources. Thus far there has been no money appropriated to do this kind of work.

There is money appropriated in our Department to do investigations, prevent the criminal attacks against our programs, and to do our other activities. We have been doing this. We can see doing it in the foreseeable future. But somewhere down the road it may become so expensive that it would be hard for us to devote sufficient resources in this area rather than fulfilling our appropriated commitments to the other responsibilities that we have.

On that, Mr. Chairman, it would probably be just best to reserve whatever time that remains to any questions that you or the committee may have.

Mr. FRANK. Thank you, Mr. Kusserow.

[The prepared statement of Mr. Kusserow follows:]

PREPARED STATEMENT OF RICHARD P. KUSSEROW, INSPECTOR GENERAL, DEPARTMENT
OF HEALTH AND HUMAN SERVICES

*GOOD MORNING, I AM RICHARD P. KUSSEROW, INSPECTOR GENERAL OF
THE DEPARTMENT OF HEALTH AND HUMAN SERVICES. WE ARE PLEASED
TO BE HERE THIS MORNING AT YOUR INVITATION TO DISCUSS OUR
INVOLVEMENT WITH THE FALSE CLAIMS ACT, WITH EMPHASIS ON OUR
PROGRESS WITH QUI TAM CASES. THE GIST OF OUR TESTIMONY WILL BEAR
WITNESS THAT IT HAS BEEN WORKING IN GREAT MEASURE AS INTENDED BY
CONGRESS. THIS IS DUE IN LARGE MEASURE TO THE STRONG LEADERSHIP
AND SUPPORT BY THE CIVIL DIVISION OF THE DEPARTMENT OF JUSTICE
(DOJ).*

*OUR TESTIMONY, TODAY, WILL ATTEST TO THE SUCCESSES OF THE ACT, AS
WELL AS SUGGEST HOW IT MIGHT BE CLARIFIED OR IMPROVED. WE WILL
BEGIN WITH AN OVERVIEW OF OUR QUI TAM INVESTIGATIVE CASELOAD
AND THE TYPES OF QUI TAM CASES INVESTIGATED BY OUR OFFICE TO
DATE. SECONDLY, WE WILL DESCRIBE SOME OF THE CASES WHICH ARE
PRESENTLY BEING DEVELOPED AND DISCUSS OUR QUI TAM
ACCOMPLISHMENTS. FINALLY, WE WILL CONCLUDE OUR TESTIMONY WITH
RECOMMENDATIONS FOR LEGISLATIVE CHANGES WHICH WE BELIEVE WILL
ENHANCE THE EFFECTIVENESS OF THE QUI TAM PROVISIONS OF THE FALSE
CLAIMS ACT.*

HISTORY OF THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT

THE FALSE CLAIMS ACT WAS SIGNED INTO LAW BY PRESIDENT ABRAHAM LINCOLN IN 1863. THE LAW WAS PASSED AS A MEANS OF COMBATING FRAUD IN CIVIL WAR DEFENSE CONTRACTS. THE ORIGINAL LAW PROVIDED FOR

A CIVIL REMEDY OF DOUBLE THE AMOUNT OF DAMAGES SUFFERED BY THE UNITED STATES PLUS A \$2,000 FORFEITURE FOR EACH FALSE CLAIM SUBMITTED TO THE GOVERNMENT.

A QUI TAM PROVISION WAS INCLUDED IN THE ORIGINAL STATUTE. THE TERM QUI TAM IS DERIVED FROM THE LATIN PHRASE "QUI TAM PRO DOMINO REGE QUAM PRO SE IPSO IN HAC PARTE SEQUITUR" AND IS TRANSLATED TO MEAN "WHO BRINGS THE ACTION FOR THE KING AS WELL AS FOR HIMSELF." THE QUI TAM PROVISIONS BASICALLY ALLOW A PRIVATE PERSON OR "RELATOR" TO BRING SUITS FOR THEMSELVES AS WELL AS FOR THE UNITED STATES. UNDER THE ORIGINAL PROVISIONS OF THE LAW, THE RELATOR WHO PROSECUTED THE CASE TO FINAL JUDGEMENT, WOULD BE ENTITLED TO HALF OF THE DAMAGES AND FORFEITURES RECOVERED. AMENDMENTS TO THE FALSE CLAIMS ACT IN 1943 SEVERELY LIMITED THE RELATORS CAPACITY TO BRING SUITS UNDER THE QUI TAM PROVISIONS OF

THE LAW. THE AMENDED LAW DURING THIS PERIOD OF TIME PRECLUDED A QUI TAM SUIT BASED ON INFORMATION WHICH WAS ALREADY IN THE POSSESSION OF THE GOVERNMENT. THIS PROHIBITION WAS SO FAR REACHING THAT IT WAS EVEN APPLICABLE TO SITUATIONS WHERE THE RELATOR WAS THE ORIGINAL SOURCE THAT PROVIDED THE INFORMATION TO THE GOVERNMENT.

THE FALSE CLAIMS ACT WAS SUBSTANTIALLY CHANGED BY THE FALSE CLAIMS AMENDMENTS ACT OF 1986. THESE AMENDMENTS REVITALIZED THE QUI TAM PROVISIONS OF THE LAW BY ALLOWING, AMONG OTHER THINGS, RELATORS TO BRING ACTIONS IRRESPECTIVE OF THE GOVERNMENT'S PRIOR KNOWLEDGE OF THE ALLEGATIONS. IN ADDITION, THE AMENDMENTS PROVIDE FOR A RELATOR TO RECEIVE 10 TO 20 PERCENT OF QUI TAM AWARDS IN INSTANCES WHERE THE GOVERNMENT TAKES OVER THE ACTION AND 20 TO 30 PERCENT IN CASES WHERE THE RELATOR PROCEEDS WITH THE ACTION ALONE. THE STATUTE, AS AMENDED, PROVIDES FOR A 60-DAY COURT SEAL PROVISION FOR ALL

QUI TAM COMPLAINTS. THE PURPOSE OF THE COURT SEAL IS TO ENABLE THE GOVERNMENT TO PROTECT ONGOING CRIMINAL INVESTIGATIONS AS WELL AS ALLOW IT TIME TO CONDUCT ITS OWN INVESTIGATION OF THE

RELATOR'S ALLEGATIONS WITHOUT THE KNOWLEDGE OF THE DEFENDANTS. THE GOVERNMENT'S INVESTIGATION OF THE RELATOR'S ALLEGATIONS WILL PROVIDE A BASIS UPON WHICH THE GOVERNMENT MAY DECIDE WHETHER TO INTERVENE AND TAKE OVER THE PROSECUTION OF THE CASE OR ALLOW THE RELATOR TO PROCEED WITH THE ACTION ALONE.

ONCE THE QUI TAM RELATOR FILES THE SUIT WITH THE COURT, THE DEPARTMENT OF JUSTICE IS ALSO SERVED WITH A COPY OF THE COMPLAINT. ONCE THE DOJ DETERMINES WHICH DEPARTMENT OR AGENCY THE QUI TAM ACTION AFFECTS, THEY WILL FORWARD THE COMPLAINT TO THAT AGENCY OR DEPARTMENT FOR INVESTIGATION AND DEVELOPMENT

INCREASE IN THE OIG'S QUI TAM CASELOAD

WE ARE RESPONSIBLE FOR INVESTIGATING QUI TAM SUITS WHICH INVOLVE ALLEGATIONS OF FRAUD PERTAINING TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS). WITH THE PASSAGE OF THE FALSE CLAIMS AMENDMENTS ACT OF 1986, THE OIG HAS EXPERIENCED A STEADY GROWTH IN THE NUMBER OF QUI TAM CASES. THIS HAS RESULTED IN SIGNIFICANT EXPENDITURES OF OUR LEGAL AND INVESTIGATIVE RESOURCES. OUR

EXPERIENCE HAS BEEN REWARDING, BUT AT THE SAME TIME, FRUSTRATING. WE HAVE BEEN EXTREMELY PLEASED WITH HOW WELL THIS PROCESS WORKS WITH THE DEPARTMENT OF JUSTICE. UNDER THEIR LEADERSHIP AND DIRECTION, WE HAVE MANAGED TO TAKE A RATHER DIFFICULT AND COMPLICATED PROCESS AND PROVE THAT IT CAN WORK. IT HAS PROVEN TO BE A PRODUCTIVE PARTNERSHIP.

IN 1987 THE OIG RECEIVED ONLY 2 QUI TAM CASES INVOLVING DHHS PROGRAMS. IN 1988 THIS INCREASED TO 8 CASE REFERRALS FOR THE YEAR AND IN 1989 THE OIG RECEIVED A TOTAL OF 17 NEW QUI TAM CASES. THUS, THE EARLY YEARS OF THESE AMENDMENTS HAVE BEEN CHARACTERIZED BY A GEOMETRIC PROGRESSION IN THE NUMBER OF CASE REFERRALS FOR OIG INVESTIGATION. WE ANTICIPATE THAT THIS TREND WILL CONTINUE AS THE GENERAL PUBLIC AND THE LEGAL COMMUNITY BECOME INCREASINGLY AWARE OF THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT. THE JUSTICE DEPARTMENT HAS INFORMED US THAT HHS IS SECOND ONLY TO THE DEPARTMENT OF DEFENSE IN THE NUMBER QUI TAM CASES THAT HAVE BEEN FILED.

WHILE THE NUMBER OF QUI TAM CASES TO DATE DO NOT APPEAR

OVERWHELMING, IT MUST BE NOTED THAT THE CASE INVESTIGATIONS ARE VERY INTENSIVE. EVEN MORE IMPORTANT IS THE DIFFICULTY TO CONFORM WITH THE STRICT TIME LIMITS SET FORTH IN THE STATUTE. THE STATUTE PROVIDES FOR A 60-DAY PERIOD IN WHICH THE CASE REMAINS UNDER COURT SEAL TO ALLOW THE GOVERNMENT TO INVESTIGATE THE ALLEGATIONS TO DETERMINE IF INTERVENTION BY THE UNITED STATES IS APPROPRIATE IN A PARTICULAR CASE. THE GOVERNMENT CAN, FOR GOOD CAUSE, SEEK AN EXTENSION OF THE 60-DAY PERIOD TO COMPLETE ITS INVESTIGATION.

WITH REGARD TO THOSE CASES RELATING TO THE DEPARTMENT, IT MUST BE NOTED THAT QUI TAM CASES USUALLY INVOLVE COMPLEX FACTUAL, MEDICAL OR SCIENTIFIC ISSUES THAT WOULD NORMALLY REQUIRE INTENSIVE INVESTIGATION OVER EXTENDED PERIODS OF TIME. THE TIME CONSTRAINTS MANDATED BY THE STATUTE SERVE TO MAKE A QUI TAM INVESTIGATION A TOP PRIORITY WHICH REQUIRES IMMEDIATE REASSIGNMENT OF OIG RESOURCES FROM OTHER INVESTIGATIVE TARGETS. UNFORTUNATELY, MANY OF THESE INVESTIGATIONS ARE EQUALLY SIGNIFICANT IF NOT MORE SO THAN THE QUI TAM ACTION. THE RESULT IS THAT OTHER, POSSIBLY MORE FRUITFUL INVESTIGATIONS MAY BE DELAYED AS A RESULT OF THIS INCREASED

EXPENDITURE OF RESOURCES FOR A QUI TAM INVESTIGATION. WE ANTICIPATE THIS AS A PROBLEM WHICH WILL GROW WITH THE INCREASED REFERRAL FROM THE DEPARTMENT OF JUSTICE. I MIGHT NOTE, PARENTHETICALLY, THAT THE PASSAGE OF THE 1986 AMENDMENTS CREATED A NEW AND GROWING WORKLOAD WITHOUT ANY ADDITIONAL RESOURCES BEING PROVIDED TO CARRY OUT THIS RESPONSIBILITY.

TYPES OF QUI TAM CASES

THE TYPES OF QUI TAM CASES WHICH WE HAVE INVESTIGATED, INCLUDE THE FOLLOWING:

- O ACTIONS AGAINST MEDICAL DEVICE MANUFACTURERS AND PHARMACEUTICAL COMPANIES WHICH SUBMITTED FALSE AND FRAUDULENT STATEMENTS AND EVIDENCE IN APPLICATIONS TO THE FOOD AND DRUG ADMINISTRATION (FDA) IN THE FDA APPROVAL PROCESS IN ORDER TO OBTAIN THE BENEFITS OF APPROVAL IN ORDER TO MARKET PRODUCTS TO THE PUBLIC.*

- O CASES AGAINST A HEALTH MAINTENANCE ORGANIZATION AND VARIOUS INDIVIDUAL PHYSICIANS WHICH BILLED MEDICARE FOR NON-COVERED SERVICES.*

- O ALLEGATIONS AGAINST A MOBILE MEDICAL DIAGNOSTIC COMPANY WHICH INVOLVE BILLING FOR DIAGNOSTIC SERVICES AS THOUGH PROVIDED TO PATIENTS IN HOSPITALS WHEN IN REALITY THE SERVICES WERE PROVIDED IN A MOBILE MEDICAL UNIT.*

- O SUITS AGAINST A NUMBER OF MAJOR HEALTH INSURANCE COMPANIES FOR FAILING TO COMPLY WITH THE MEDICARE SECONDARY PAYOR PROVISIONS OF FEDERAL LAW AND THEREBY PASSING COSTS TO MEDICARE WHICH SHOULD HAVE BEEN BORNE BY THE COMPANIES.*

- O CASES INVOLVING ALLEGED FALSIFICATION OF RESEARCH DATA AND MISREPRESENTATION IN CONNECTION WITH GOVERNMENT BIO-MEDICAL RESEARCH GRANTS.*

- O SUITS AGAINST PROFESSIONAL REVIEW ORGANIZATIONS (PROS) WHICH ARE RESPONSIBLE TO ENSURE THAT INPATIENT HOSPITAL SERVICES PROVIDED TO MEDICARE BENEFICIARIES ARE MEDICALLY NECESSARY AND OF GOOD QUALITY.*

THE QUI TAM RELATOR

AS WE EXPLAINED PREVIOUSLY, THE TECHNICAL STATUTORY NAME FOR THE QUI TAM PLAINTIFF IS THE "RELATOR". THE RELATORS IN OUR QUI TAM CASES HAVE INCLUDED LAW FIRMS, FORMER EMPLOYEES OF QUI TAM DEFENDANTS, CITIZEN GROUPS AND PUBLIC INTEREST ORGANIZATIONS SUCH AS TAXPAYERS AGAINST FRAUD, AND EVEN FORMER GOVERNMENT EMPLOYEES. ONE RECENT CASE WAS BROUGHT BY A QUI TAM DEFENDANT'S OWN LEGAL COUNSEL. THE COMMON DENOMINATOR THAT THE MAJORITY OF RELATORS SHARE, IS THAT THEY POSSESS ORIGINAL AND INDEPENDENT KNOWLEDGE OF WRONGFUL OR FRAUDULENT CONDUCT WHICH HAS BEEN PERPETRATED AGAINST THE GOVERNMENT, EITHER DIRECTLY OR INDIRECTLY. WHEN THIS KNOWLEDGE OF EVIDENCE IS BROUGHT TO THE ATTENTION OF THE GOVERNMENT THROUGH A QUI TAM ACTION AND PERPETRATORS OF FRAUD ARE BROUGHT TO JUSTICE, THEN SOCIETY AND THE PUBLIC AS A WHOLE BENEFIT.

IT IS OUR OPINION THAT THE MAJORITY OF THE QUI TAM CASES, THAT HAVE BEEN OR ARE BEING INVESTIGATED BY THE OIG, SERVE TO BENEFIT THE PUBLIC. THESE CASES INVOLVE CONDUCT WHICH THE OIG OR ANY OTHER INVESTIGATIVE AGENCY MAY NOT HAVE DETECTED OR

INVESTIGATED, HAD IT NOT BEEN FOR THE INFORMATION AND EVIDENCE THAT WAS BROUGHT TO LIGHT BY THE QUI TAM RELATOR.

OIG QUI TAM ACCOMPLISHMENTS

LET ME TAKE A FEW MOMENTS TO CITE SOME EXAMPLES PROVIDE A BETTER ILLUSTRATION OF HOW THE PROCESS WORKS. THEY RANGE IN POTENTIAL SETTLEMENT RECOVERIES FROM UNDER \$250,000 TO SETTLEMENT AMOUNTS IN EXCESS OF SEVERAL MILLIONS OF DOLLARS.

ONE OF THE SMALLER POTENTIAL RECOVERY CASES INVOLVES ALLEGATIONS THAT AN INDIVIDUAL MISUSED FEDERAL GRANT MONEY TO FINANCE AND FURTHER A PRIVATE BUSINESS ENTERPRISE. THE INDIVIDUAL IS ALSO ALLEGED TO HAVE MISDIRECTED EMPLOYEES UNDER THE SUBJECT'S SUPERVISION TO COMPLETE TASKS WHICH BENEFITED THE INDIVIDUAL'S PRIVATE BUSINESS INTERESTS.

ON THE OTHER HAND, AN EXAMPLE OF A LARGER POTENTIAL RECOVERY CASE INVOLVES A HOSPITAL WHICH INTENTIONALLY FALSIFIED DIAGNOSTIC RELATED GROUP (DRG) CODES AND DISCHARGE INFORMATION TO OBTAIN GREATER REIMBURSEMENT FROM MEDICARE FOR INPATIENT HOSPITAL STAYS. THE RELATOR WAS A FORMER

ADMINISTRATOR OF THE HOSPITAL. THE CASE IS PRESENTLY UNDER SETTLEMENT NEGOTIATIONS, AND WE ARE CONFIDENT THAT THE CASE WILL BE SETTLED FOR OVER \$2 MILLION.

ANOTHER CASE WE ARE CURRENTLY PURSUING INVOLVES A BILLING COMPANY WHICH WAS HIRED BY A PHYSICIANS GROUP TO AUDIT THEIR PAST BILLINGS TO THE MEDICARE PROGRAM TO DETERMINE IF THE PHYSICIANS WERE BILLING THE PROGRAM FOR ALL THEY WERE ENTITLED TO RECEIVE. HOWEVER, THE BILLING SERVICE AND THE PHYSICIANS GROUP BEGAN MANIPULATING BILLING CODES AND FRAGMENTING THE SERVICES FOR WHICH THEY HAD ALREADY BEEN PAID. A FORMER PARTNER IN THE PHYSICIANS GROUP WAS THE QUI TAM PLAINTIFF IN THE CASE. SETTLEMENT NEGOTIATIONS ON THIS MATTER ARE IN PROGRESS.

FURTHER, THERE ARE ALSO FOUR CASES IN WHICH THE OIG IS CONCURRENTLY CONDUCTING CRIMINAL INVESTIGATIONS ON QUI TAM CASES. TWO OF THOSE CRIMINAL INVESTIGATIONS HAVE RESULTED IN CRIMINAL GRAND JURY INDICTMENTS. WE WILL REFRAIN FROM DISCUSSING THE FACTS OF THESE CASES AS THEY ARE STILL UNDER CRIMINAL INVESTIGATION.

AS WE HAVE PREVIOUSLY MENTIONED, THE EXPERIENCE OF THE OIG IN HANDLING QUI TAM CASES HAS BEEN BOTH REWARDING AND FRUSTRATING. THE EXPERIENCE HAS BEEN EXTREMELY REWARDING IN TERMS OF THE CASES THAT HAVE LED TO POSITIVE RESOLUTION WITHOUT COSTLY COURT LITIGATION. WE ANTICIPATE THAT MANY OF THE PENDING CASES WILL ALSO BE RESOLVED THROUGH SETTLEMENT NEGOTIATIONS AND NOT THROUGH COURT ACTION.

ONE OF OUR MOST SIGNIFICANT QUI TAM SETTLEMENTS WAS THE \$5.6 MILLION SETTLEMENT AGAINST THE CORDIS CORPORATION, A CARDIAC PACEMAKER MANUFACTURER. THE RELATOR IN THIS ACTION ALLEGED THAT BETWEEN 1980 AND 1985, THE CORDIS CORPORATION KNOWINGLY SOLD CARDIAC PACEMAKERS WITH SIGNIFICANT DEFICIENCIES. THE RELATOR ALLEGED THAT THE DEFECTIVE PACEMAKERS WERE LATER IMPLANTED IN MEDICARE BENEFICIARIES AND VETERANS.

ANOTHER SIGNIFICANT ACCOMPLISHMENT INVOLVED A NEGOTIATED SETTLEMENT OF A QUI TAM ACTION BROUGHT AGAINST THE SCRIPPS CLINIC AND RESEARCH FOUNDATION OF LA JOLLA, CALIFORNIA. THE RELATORS, AN ORGANIZATION CALLED TAXPAYERS AGAINST FRAUD, ALLEGED THAT SCRIPPS CLINIC AND RESEARCH FOUNDATION AND AN

INDIVIDUAL PHYSICIAN FRAUDULENTLY CODED NON-SURGICAL PROCEDURES AS MORE EXPENSIVE SURGICAL OPERATIONS. THE SCRIPPS CLINIC CHOSE TO SETTLE ITS CIVIL LIABILITY FOR \$455,000. THE QUI TAM ACTION AGAINST THE INDIVIDUAL PHYSICIAN IS STILL PENDING.

RECOMMENDATIONS

BEFORE CONCLUDING MY TESTIMONY, I WOULD ALSO LIKE TO PROVIDE SOME SUGGESTED LEGISLATIVE CHANGES TO IMPROVE THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT.

THE ABOVE CASES ARE INSTANCES WHERE OUR EFFORTS PROVED FRUITFUL. HOWEVER, WE WOULD LIKE TO NOW DISCUSS SOME OF THE DIFFICULTIES ENCOUNTERED IN WORKING QUI TAM CASES AS WELL POSSIBLE LEGISLATIVE RECOMMENDATIONS TO THE FALSE CLAIMS ACT.

FIRST, THE ADAGE THAT TIME WAITS FOR NO ONE IS ESPECIALLY TRUE IN THE INVESTIGATION OF QUI TAM CASES. THIS UNFORTUNATELY IS ONE OF THE FRUSTRATING ASPECTS OF THE INVESTIGATION OF QUI TAM CASES. AS WE MENTIONED EARLIER, THE STATUTE PROVIDES FOR A 60-DAY PERIOD IN WHICH THE QUI TAM COMPLAINT REMAINS UNDER COURT SEAL TO ALLOW

THE GOVERNMENT TO INVESTIGATE THE ALLEGATIONS TO DETERMINE IF INTERVENTION IS APPROPRIATE. AS A PRACTICAL MATTER, THE PERIOD THE OIG HAS TO ACTUALLY INVESTIGATE THE ALLEGATIONS IS SUBSTANTIALLY LESS THAN 60 DAYS DUE TO TIME CONSUMED IN THE ADMINISTRATION STEPS REQUIRED TO FORWARD THE CASE FROM DOJ TO THE PROPER GEOGRAPHICAL FIELD OFFICE FOR INVESTIGATION. IN ORDER TO MEET ARTIFICIALLY SET DEADLINES, WE MUST GIVE THEM PRIORITY OVER OUR OTHER WORK. IN MANY CASES THIS OTHER WORK IS MORE SIGNIFICANT TO PUBLIC INTEREST THAN THE QUI TAM MATTER.

OUR EXPERIENCE HAS SHOWN THAT THE STATUTORY 60-DAY PERIOD IS SIMPLY NOT ENOUGH TIME TO CONDUCT AN ADEQUATE INVESTIGATION TO PROPERLY DETERMINE WHETHER THE FEDERAL GOVERNMENT SHOULD INTERVENE IN A QUI TAM ACTION. MANY OF THE ALLEGATIONS IN QUI TAM CASES ARE EXTREMELY COMPLEX AND WOULD USUALLY REQUIRE MANY MONTHS OF INTENSIVE INVESTIGATION TO DETERMINE THEIR VALIDITY. FOR EXAMPLE, A CASE INVOLVING ALLEGATIONS THAT A MAJOR HEALTH INSURANCE COMPANY, WITH OFFICES THROUGHOUT THE COUNTRY, HAS VIOLATED THE MEDICARE SECONDARY PAYER (MSP) PROVISIONS, WOULD REQUIRE AN EXTENSIVE INVESTIGATION. IN MOST OF

OUR CASES, WE HAVE USUALLY ASKED FOR ADDITIONAL EXTENSIONS OF TIME. WHILE WE DO NOT MEAN TO MINIMIZE THE IMPORTANCE OF QUI TAM CASES, THE DISRUPTIVE EFFECT CAUSED BY THE STATUTORY 60-DAY PERIOD LEADS TO THE UNMISTAKABLE CONCLUSION THAT THE DEPARTMENTS AND AGENCIES NEED MORE TIME TO PROPERLY PREPARE INITIAL INVESTIGATIONS.

ACCORDINGLY, WE WOULD LIKE TO RECOMMEND THAT THE LAW BE AMENDED TO ALLOW THE GOVERNMENT A PERIOD OF 120 DAYS IN WHICH TO ELECT TO INTERVENE IN A QUI TAM ACTION. THE ADDITIONAL 60 DAYS WILL AFFORD THE DEPARTMENTS AND AGENCIES BETTER OPPORTUNITIES TO ADJUST THEIR WORK SCHEDULES AND PREPARE A BETTER CASE AS A RESULT OF THEIR INVESTIGATIONS. AT THE SAME TIME IT WILL STILL REQUIRE THAT THE GOVERNMENT MAKE ITS DETERMINATION AS TO INTERVENTION WITHIN A REASONABLE TIME.

SECONDLY, THERE HAVE BEEN CASES WHERE THE RELATOR'S ORIGINAL AND INDEPENDENT KNOWLEDGE OF WRONGDOING HAVE CONSISTED OF A NEWSPAPER ARTICLE RELATING A CRIMINAL INDICTMENT, CRIMINAL INVESTIGATION OR NEW SPECULATION. FORTUNATELY THE STATUTE

PROVIDES FOR BARRING RELATORS FROM PURSUING QUI TAM ACTIONS BASED ON INFORMATION THEY OBTAINED IN PUBLIC DISCLOSURES BUT UNFORTUNATELY INDIVIDUALS MAY PURSUE PUBLIC DISCLOSURE LEADS SUFFICIENTLY AS TO MUDDLE THIS PROVISIONS. IT SHOULD ALSO BE NOTED THAT THE GOVERNMENT CAN DECLINE TO INTERVENE IN CASES IT DETERMINES ARE WITHOUT MERIT OR ARE FRIVOLOUS. HOWEVER, SOMETIMES IT IS VERY DIFFICULT TO MAKE THAT DETERMINATION ON THE FACE OF THE ALLEGATION WITHOUT CONSIDERABLE FIELD INVESTIGATION.

WHAT IS OF GREAT CONCERN ARE THOSE POTENTIAL CASES WHERE THE RELATORS ARE FORMER FEDERAL EMPLOYEES WHO HAVE OBTAINED INFORMATION IN THE COURSE OF THEIR EMPLOYMENT, BUT FAILED TO DISCLOSE IT AS REQUIRED. THEN UPON LEAVING THE GOVERNMENT, THE EMPLOYEE USES THE INFORMATION AS THE BASIS FOR A QUI TAM ACTION. WE ARE CONCERNED THAT THE NUMBER OF THESE RELATOR CASES WILL INCREASE IN THE FUTURE. THE STATUTE AS CURRENTLY WRITTEN DOES NOT DETER FEDERAL EMPLOYEES, AGENTS OR CONTRACTORS FROM CONCEALING ALLEGATIONS OR INFORMATION OF WRONGDOING THAT THEY BECOME AWARE OF DURING THE COURSE OF THEIR EMPLOYMENT AND LATER USING THE INFORMATION OR ALLEGATIONS AS THE BASIS FOR

A QUI TAM SUIT FOR PERSONAL BENEFIT, ESPECIALLY SINCE THESE BENEFITS COULD RESULT IN WINDFALLS OF HUNDREDS OF THOUSANDS OF DOLLARS. WE WOULD RECOMMEND THAT LEGISLATIVE LANGUAGE BE AMENDED TO THE FALSE CLAIMS ACT THAT WOULD PREVENT FEDERAL EMPLOYEES AND GOVERNMENT CONTRACTORS FROM TAKING ADVANTAGE OF THE QUI TAM PROVISION WHERE THEY HAD FAILED IN THEIR OFFICIAL AND LEGAL RESPONSIBILITY TO BRING IT TO THE GOVERNMENTS ATTENTION WHILE BEING PAID BY THE GOVERNMENT.

AS WE NOTED EARLIER, THE FALSE CLAIMS AMENDMENT ACT OF 1986 CREATED A NEW AND GROWING WORKLOAD WITHOUT PROVIDING FOR ADDITIONAL RESOURCES TO CARRY OUT THE RESPONSIBILITY. THE QUI TAM WORKLOAD DEMANDS IMMEDIATE AND EXTENSIVE PRIORITY INVESTIGATIONS, WHICH DIVERT INVESTIGATIVE RESOURCES FROM OTHER EQUALLY SIGNIFICANT, IF NOT MORE IMPORTANT INVESTIGATIONS. AS THE NUMBER OF QUI TAM ACTIONS CONTINUE TO ESCALATE, WE CAN ALSO ANTICIPATE THAT THE STRAIN UPON LIMITED INVESTIGATIVE AND LEGAL RESOURCES WILL INTENSIFY. IT IS OUR OPINION THAT HIS PROBLEM CAN ALLEVIATED BY AMENDING THE LAW TO PROVIDE FOR A PORTION OF THE RECOVERY IN A SUCCESSFUL QUI TAM ACTION TO OFFSET THE COST OF LITIGATION TO INVESTIGATE AND PROSECUTE THE ALLEGATIONS. THIS

WOULD PROVIDE A MEANS FOR INVESTIGATIVE AGENCIES TO BE COMPENSATED IN PART THE ADDED COSTS OF THESE CASES. IN THE ALTERNATIVE THERE SHOULD BE SOME APPROPRIATED MONEY TO PAY FOR THE ADDED COSTS OF THIS NEW LEGISLATIVE WORKLOAD.

FINALLY, WE WOULD ALSO LIKE TO TAKE THIS OPPORTUNITY TO DISCUSS A NEW, BUT MORE IMPORTANT "WRINKLE" IN THE IMPLEMENTATION OF THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT. THIS NEW CONCERN HAS BEEN CAUSED BY A RECENT OPINION OF THE OFFICE OF LEGAL COUNSEL (OLC) OF THE JUSTICE DEPARTMENT CONCERNING THE SCOPE OF AN INSPECTOR GENERAL'S AUTHORITY AT THE DEPARTMENT OF LABOR. BRIEFLY, THAT OPINION, ISSUED MARCH 9, 1989, CONCLUDED THAT THE OIG AT THE DEPARTMENT OF LABOR HAD INHERENT AUTHORITY TO CONDUCT INVESTIGATIONS ONLY INVOLVING AGENCY EMPLOYEES, AND CONTRACTORS, GRANTEEES AND OTHER RECIPIENTS OF FEDERAL FUNDS. THIS OPINION HAS CAUSED CONFUSION IN OIG INVESTIGATIONS THROUGHOUT THE FEDERAL GOVERNMENT, INCLUDING OUR DEPARTMENT.

THE MEDICARE SECONDARY PAYOR (MSP) PROVISION UNDER REVIEW REQUIRES THAT MEDICARE ACT AS A SECONDARY PAYER TO EMPLOYER

GROUP HEALTH PLANS WHEN MEDICAL SERVICES WERE RENDERED TO THE "WORKING AGED." WE BEGAN FOCUSING ON THE MSP PROVISIONS AS A RESULT OF A QUI TAM SUIT AGAINST AN INSURANCE COMPANY FOR IMPROPERLY DENYING CLAIMS FOR PAYMENT BY POLICY HOLDERS, AND CAUSING FALSE CLAIMS FOR PAYMENT TO BE FILED WITH MEDICARE. IN SHORT, IT WAS ALLEGED THAT THE COMPANIES FAILED TO MAKE PAYMENT AS PRIMARY PAYORS, THUS PASSING THE COSTS TO MEDICARE. WE HAVE ESTIMATED THAT NATIONWIDE, THIS MEDICARE SECONDARY PAYOR ISSUE MAY BE COSTING MEDICARE AS MUCH AS \$400 MILLION TO \$1 BILLION PER YEAR.

WE ARE CURRENTLY INVESTIGATING AND/OR AUDITING 5 OTHER HEALTH INSURANCE COMPANIES FOR VIOLATING THESE PROVISIONS. IN ONE SUCH CASE, WE SUBPOENAED RECORDS PERTAINING TO THE INSURANCE COMPANY'S PAYMENT OF CLAIMS ON BEHALF OF THE WORKING AGED. THE COMPANY REFUSED TO COMPLY WITH OUR SUBPOENA, STATING THAT THE CORPORATION WAS OUTSIDE THE SCOPE OF OIG JURISDICTION AS DELINEATED IN THE DOJ OPINION, INASMUCH AS THEY ARE NOT RECIPIENTS OF APPROPRIATION FUNDS. IN THIS INSTANCE, WE REQUESTED AND RECEIVED FROM THE JUSTICE DEPARTMENT ASSURANCES THAT OUR REVIEW OF THE INSURANCE COMPANY WITH RESPECT TO COMPLIANCE

WITH MSP IS AUTHORIZED BY THE INSPECTOR GENERAL ACT.

IN A SECOND GROUP OF CASES, RELATORS IN THREE QUI TAM ACTIONS ALLEGED THAT THREE DRUG COMPANIES HAD SUBMITTED FALSE INFORMATION TO THE FDA TO OBTAIN APPROVAL TO MARKET CERTAIN GENERIC DRUGS. THE RELATORS ARGUED THAT SUBSEQUENT CLAIMS FOR PAYMENT UNDER MEDICARE AND MEDICAID WERE FRAUDULENT BECAUSE OF THE UNDERLYING FRAUD IN OBTAINING THE APPROVAL FOR MARKETING THE DRUG. WE ARE READY TO CONDUCT THE INVESTIGATIONS NECESSARY TO DETERMINE THE DESIRABILITY OF GOVERNMENT INTERVENTION. HOWEVER, WE ARE NOT CERTAIN OF OUR AUTHORITY TO INVESTIGATE THE ORIGINAL FALSE STATEMENTS IN APPLICATIONS FOR APPROVAL TO MARKET DRUGS FILED WITH FDA, SINCE THERE WERE NO FEDERAL EMPLOYEES OR FEDERAL DOLLARS INVOLVED. WE HAVE REQUESTED CLARIFICATION OF OUR INVESTIGATIVE JURISDICTION IN THIS MATTER FROM THE JUSTICE DEPARTMENT.

A THIRD TYPE OF CASE INVOLVES SCIENTIFIC MISCONDUCT ASSOCIATED WITH RESEARCH AT GRANTEE INSTITUTIONS WHERE THE EXACT CAUSE OF THE FRAUD MAY NOT BE DIRECTLY RELATED TO A SPECIFIC GRANT BUT TO

OUR PROGRAMS.

WE NEED CLARIFICATION FROM CONGRESS THAT WHEN WE ARE INVESTIGATING ALLEGATIONS, ESPECIALLY IN QUI TAM ACTIONS, OUR AUTHORITY EXTENDS TO ALL CAUSES OF ACTION THAT ALLEGE FRAUD AGAINST THE GOVERNMENT AND NOT JUST WHERE THE BENEFIT DERIVED FOR THE FRAUDULENT ACTS AND FALSE CLAIMS ARE PROGRAM DOLLARS. IT SHOULD INCLUDE ALL BENEFITS IN CASE OR KIND, SUCH AS BENEFITS FROM THE USE OF GOVERNMENT PROPERTY, ROYALTIES PAID TO THE GOVERNMENT, APPROVALS AND CERTIFICATION THAT MAY RESULT IN BILLINGS BEING PAID TO INDIVIDUALS OR AS IN THE CASE OF GOVERNMENT APPROVAL TO MARKET PRODUCTS. WE BELIEVE THAT IF THERE IS SUFFICIENT CAUSE OF ACTION TO CHARGE FRAUD AGAINST THE GOVERNMENT UNDER THE FALSE CLAIMS ACT, THEN SUFFICIENT EVIDENCE EXISTS FOR THE DEPARTMENT OF JUSTICE TO TURN TO THE INSPECTOR GENERAL FOR INVESTIGATION AND AUDIT SUPPORT TO EVALUATE THE CHARGES.

CONCLUSION

THE FALSE CLAIMS AMENDMENTS ACT OF 1986 HAS RESULTED IN AN INCREASE IN THE NUMBER OF QUI TAM LAWSUITS WHICH THE FEDERAL GOVERNMENT MUST ADDRESS AND INVESTIGATE. IT APPEARS THAT THE TREND TOWARDS MORE OF THESE SUITS WILL CONTINUE AS THE GENERAL PUBLIC AND THE LEGAL COMMUNITY BECOME MORE AWARE OF THE UTILITY OF THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT. WE BELIEVE THAT THE MAJORITY OF THE SUITS HAVE SERVED A PUBLIC INTEREST BECAUSE MONEY OF THE CASES WOULD NOT HAVE BEEN IDENTIFIED AND INVESTIGATED HAD IT NOT BEEN FOR THE QUI TAM RELATOR'S PERSONAL KNOWLEDGE OF FRAUDULENT CONDUCT AND THEIR FILING OF A SUIT. THE ACCOMPLISHMENTS THAT HAVE BEEN DERIVED FROM QUI TAM ACTIONS HAVE BEEN SUBSTANTIAL IN TERMS OF THE MONETARY SETTLEMENTS AND THE CASES THAT WE ARE PRESENTLY DEVELOPING APPEAR TO BE EVEN MORE PROMISING.

WHILE WE HAVE BEEN SUCCESSFUL IN WORKING DOJ IN PURSUING CASES UNDER THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT, WE BELIEVE THAT THERE IS ROOM FOR IMPROVEMENT IN THE STATUTE REGARDING INVESTIGATIVE TIME LIMITATIONS, AWARDED INVESTIGATIVE AGENCIES A PERCENTAGE OF QUI TAM RECOVERIES, AND THE EXCLUSION OF CERTAIN GOVERNMENT EMPLOYEES AS QUI TAM REALTORS. WE ALSO BELIEVE

THAT THE COMMITTEE SHOULD CLARIFY THE INVESTIGATIVE AUTHORITY OF INSPECTOR'S GENERAL OFFICE SO AS NOT TO RESTRICT OUR ROLE ONLY TO MATTERS OF FRAUD INVOLVING FEDERAL DOLLARS OR FEDERAL EMPLOYEES.

THIS CONCLUDES MY TESTIMONY. WE WISH TO THANK THE SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS FOR THIS OPPORTUNITY TO ADDRESS YOU ON THIS MATTER. WE LOOK FORWARD TO WORKING WITH YOU IN ANY WAY TO IMPROVE THE EFFICIENCY AND EFFECTIVENESS OF THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT. I AM NOW AVAILABLE TO ANSWER ANY QUESTIONS THAT YOU MAY HAVE.

Mr. FRANK. Let me begin with that last one there on the situation that you were talking about. Obviously, we do appropriate money for the Civil Division. But what you are saying is that the Inspectors General, I would guess that would be you and the DOD Inspector General, haven't gotten any kind of commensurate increase in budget to deal with the higher caseload that has come as a result of the amendments?

Mr. KUSSEROW. That is correct.

Mr. FRANK. I think if you would work with the staff I would ask them, and it might be done on behalf of both of us, to write to the Appropriations Subcommittees to urge them to take that into account. And, if you would work with the staff on that, I think we would be glad to do it.

Mr. KUSSEROW. Thank you, Mr. Chairman. I would also just add along the same line, and that is that on occasion we do have some confusion as to whether we are in a position to fulfill our obligations to Justice when it is requested. It seems to me if there is some provision also that makes it clear that whenever the Civil Division asks us to engage in this kind of investigation that we in fact are empowered to, because it really wasn't made clear as to how these things would be investigated or through what agency.

Mr. FRANK. You think that is unclear now statutorily?

Mr. KUSSEROW. In some cases it becomes unclear.

Mr. FRANK. So that you would like a clarification of your—

Mr. KUSSEROW. Yes.

Mr. FRANK. Who has told you couldn't act if you got a request—

Mr. KUSSEROW. No. There is confusion sometimes as to where the authority—

Mr. FRANK. On whose part?

Mr. KUSSEROW. Certainly on my part, and I think on the part of the Department of Justice.

Mr. FRANK. Well, you don't need a law to tell you that you can do what you want to do. I mean, I need to know has somebody tried to—did the Civil Division ask you to investigate.

Mr. KUSSEROW. There is some question as to the limits of the Inspector General's inherent authority and the fact that it may be unclear as to what Congress had originally intended. What we are doing is we are—

Mr. FRANK. Well, Mr. Kusserow, you have repeated that. Now I just want to try and follow it through.

Mr. KUSSEROW. OK.

Mr. FRANK. I need to know specifically what you are talking about.

The Civil Division receives one of these and asks you to investigate.

Mr. KUSSEROW. That is correct.

Mr. FRANK. You are telling me that you don't know if you have the authority to do that?

Mr. KUSSEROW. In some cases it is unclear, yes.

Mr. FRANK. In what kind of cases would it be unclear?

Mr. KUSSEROW. It might be unclear if, for example, we had a case of scientific misconduct alleged where, in fact, the nexus to the grants in our Department is not clear on the face of the allega-

tion. It might be—for example, we were challenged in doing work in what we have identified as a \$600 million a year loss to Medicare each year as a result of health insurance companies failing to pay their obligation as primary payer. In that situation we were challenged—

Mr. FRANK. By whom?

Mr. KUSSEROW. The defendants.

Mr. FRANK. Yes.

Mr. KUSSEROW. Asserting the fact that we don't have the jurisdiction because it does not involve program dollars, that is, appropriated dollars. This is money owed to the Government, not money—

Mr. FRANK. Mr. Kusserow, stop. Please stop. Because I want to not get confused by this.

The problem then you are talking about now is not—no one is saying that your authority isn't coterminous with the Government's role. The question is whether or not this is the Government's role, or your Department's role.

Mr. KUSSEROW. It is specific to the Inspector General. What the role of the Inspector General would be in that process.

Mr. FRANK. No. It sounds like the question here is not the role of the Inspector General, but the role that people see as the Federal Government's. Because in the first place you are telling me that in the case of the scientific fraud it might not be your Department. Well, I can understand that, if it is not Health and Human Services.

Mr. KUSSEROW. No. The question is whether the specific grant in question was a grant from—in other words, whether the action had nexus to a specific grant that we had, our Department had.

Mr. FRANK. But, in other words, people were arguing that it wasn't the Government role.

Mr. GERSON. No. No, if I can clarify just a little bit.

Mr. FRANK. Yes.

Mr. GERSON. I agree with Mr. Kusserow. Clearly he has the authority to proceed because we have asked him to. But what was alleged in that case is that the fraud that we believe has occurred it was alleged it didn't involve any program money.

Mr. FRANK. Well, that is what I am saying. So it is not the role—

Mr. GERSON. But we would still have jurisdiction over it because it could still be a civil or criminal fraud.

Mr. FRANK. Well, all right. Is it then in your judgment, I assume you have looked at this. The question would be is there a lesser power in the Inspector General than there is in some other entity of the Federal Government? If there is, I would like to create that.

Mr. GERSON. Yes.

Mr. FRANK. You are saying?

Mr. GERSON. Yes, there is.

Mr. FRANK. There is.

Mr. GERSON. Slightly. Slightly less.

Mr. FRANK. In what regard?

Mr. GERSON. In matters that don't involve Federal employees or fraud against programs of the Government.

Mr. KUSSEROW. Where the fraud is in appropriated dollars. See, the difficulty, Mr. Chairman, is this—

Mr. FRANK. I understand. Please, Mr. Kusserow, I want to get more specific.

Mr. GERSON. Let me stay with this.

Mr. FRANK. What kind of a program—would it be you are saying that there are cases where the Civil Division could sue them but the Inspector General couldn't help?

Mr. GERSON. No. In fact—

Mr. FRANK. Well, that is the issue.

Mr. GERSON. Well, the issue is how the Inspector General can help. And I don't want to take a lot of time—

Mr. FRANK. Mr. Gerson, don't worry about time now. Just please answer the question.

Mr. GERSON. I will worry—

Mr. FRANK. Please just answer the question, Mr. Gerson.

Mr. GERSON. There are some cases that do not involve any matter that we have discussed here, where there is somewhat of a difference—where there has been at least a difference of interpretation between the Department of Justice and the Inspector General as to how he can proceed.

An example of that particular kind of case has been in some of the cases involving the generic drug investigations. However, irrespective of the fact that we have had somewhat of a disagreement about interpretation, a disagreement that I hope I have put to rest with some recent correspondence, I know of no such case in which it is not permissible some way for the Inspector General to act.

Mr. FRANK. But let me ask, Mr. Kusserow, has that disagreement been put to rest in your judgment.

Mr. KUSSEROW. I think it has been helped, but I don't think it has been put to rest. Let me just give you one type of case example. A hypothetical example, Mr. Chairman, I think will put it in perspective.

If, in fact, we have an appropriated dollar and there has been a fraud, there is no question the Inspector General of whatever agency could investigate that.

Mr. FRANK. Right. So let's not talk about it. We know that.

Mr. KUSSEROW. But let's say, for example, it was a timber royalty or it was an oil and gas lease situation where appropriated dollars do not go out but money is owed to the Federal Government. There is a great deal of question as to whether on any kind of a situation like that the Inspector General of any department could, in fact, investigate, even at the rest of the Department of Justice.

Mr. FRANK. All right. Well, that is a broader question, and it is not one that we have jurisdiction over. That is the Government Operations Committee. But I am going to ask the staff to take that up with the Government Operations Committee. I appreciate you bringing that to us. We won't go any further with it here on my time because, as I said, it has got to be resolved elsewhere.

Mr. GERSON. I do know that there is some correspondence—

Mr. FRANK. Mr. Gerson, please. Don't tell me anything that isn't going to help us right now. If there is correspondence or not, it is irrelevant at this point. We have an issue. You disagree on it some. It is in the jurisdiction of the Government Operations Committee

on the House side, and it sounds like something that we ought to look at, and I would like to have you get in touch with Chairman Conyers' people.

Mr. KUSSEROW. You can see how unusual it is, Mr. Chairman, that we in fact are sitting at the same side of the table.

Mr. FRANK. Mr. Kusserow, please. We are running out of time.

Mr. James.

Mr. JAMES. Yes. I am looking at the figures here. We have fiscal year 1985, \$27 million, and it goes on to 1989, \$225 million, was collected under these type of lawsuits. My question is this. What percentage of this is the total Government collections for fraud cases? Is this 5 percent? Ten percent? Fifty percent?

Mr. GERSON. Let me see if Mr. Hertz has a handle on that.

Mr. JAMES. For example, in 1989, how much did the Government collect because of fraud against the Government other than *qui tam*?

Mr. GERSON. I don't know offhand, Congressman James. That number is false claims cases. You could add—remember that in addition we have a whole bunch of other kinds of fraud cases. I would be guessing. Why don't we provide that?

Mr. JAMES. How many were false claims, do you know?

Mr. GERSON. These were all false claims.

Mr. JAMES. I mean how many would be false claims that no individual was involved in?

Mr. GERSON. I don't know offhand.

Mr. JAMES. It would seem to me that would be very pertinent to determine whether or not the act has helped, percentagewise, in relationship to find these otherwise discoverable claims.

Mr. GERSON. Oh, I am convinced beyond any measure that the act has helped materially in that regard. I can tell you, we think we are more efficient in the cases that we turn up ourselves and develop ourselves in terms of the time and the amount of money that is recovered. But it doesn't much matter because the recovery in the false claims cases, the *qui tam* cases are significant too. We are not going to look away from either category.

Mr. JAMES. Well, yes. You understand my curiosity. Did you have any at all in 1989 other than the *qui tam* cases?

Mr. GERSON. Oh, sure. Sure.

Mr. JAMES. You would have judgments then. You don't know whether they are equal to or in excess of.

Mr. GERSON. We think the ones that we develop are more fruitful, on an average, than the *qui tam* cases.

Mr. JAMES. I am looking at total dollars. You may have had one more fruitful case or a million.

Mr. GERSON. Our total dollars significantly exceed the *qui tam* requirements because we are just in—

Mr. JAMES. OK. Or false claims.

Mr. GERSON. And false claims. Because we are in so many different areas.

Mr. JAMES. All right. What about income tax. Your discussion—just before I got to ask questions, your question involved income tax—not income tax, but involved cases where money is owed to the Government in royalties, et cetera. Suppose you knew of some-

one that, for example, cheated the Government out of income tax. Would that be a possible subject matter of a suit for an individual?

Mr. GERSON. I know of no such case that the Civil Division is pursuing. Remember—Mr. Hertz points out something. Put the False Claims Act aside for a second. Income tax is excluded.

Mr. JAMES. It is excluded entirely?

Mr. GERSON. That is not under the False Claims Act. Now we have other matters in the Department—

Mr. JAMES. Why wouldn't it be? Does it specifically exclude it in the act itself?

Mr. GERSON. Yes. The kinds of cases that come closest to the ones that you are talking about, where people actually owe the Government money, are the ones that are discussed in some detail in Mr. Kusserow's testimony, as an example, the Medicare secondary payor cases. That is a very high priority area for both him and me and that comes within the metes and bounds of what your question is.

Mr. JAMES. The point I am getting to, you go to the IRS—I have had clients that have done that—and say, "Look. Here's a fraud." They say, "Well, that's subject to public information, therefore you can't collect." In other words, very few people collect under that, but they can't bring a suit even though the IRS doesn't move on it.

In other words, I can see a very close—I am convinced there are many cases out there that would be in that category. Whether it was good policy or not, I have questioned whether it would be good policy because then you would have neighbor suing neighbor under that action, perhaps if they got mad with them, claiming they hadn't paid their income tax appropriately.

Mr. GERSON. I understand. Those are not within the compass of considerations either for the Civil Division or for the relators. It is clear that the relators are able to collect, and we have some disputes with relators but they are not about that.

Mr. JAMES. OK. But it is not clear whether under that act you have jurisdiction for money owed to the Government as opposed to a false claim that gets money out of the Government.

Mr. GERSON. I understand what you are saying, but I don't—to me it is clear enough. If somebody owes money to the Government that is a product of a—

Mr. JAMES. A fraud.

Mr. GERSON. If the nonpayment is a product of a fraud, we have the jurisdiction to deal with that. And, as I say, the Medicare secondary payor cases are an example of just such a thing, where the Congress has declared that Medicare will be a secondary payor where there is private insurance. If that provision is abused, the result is that the Government hasn't gotten money that should be paid to it. We are pursuing that and so is—

Mr. JAMES. But IRS payments are exempted. Anything else exempted?

Mr. GERSON. No. IRS, income tax is specifically exempted. There isn't anything else that is.

Mr. JAMES. OK. Thank you very much.

Mr. FRANK. Mr. Berman.

Mr. BERMAN. I am interested in the question of the extent to which the Defense Department is as positive in dealing with Jus-

tice Department requests to investigate and pursue *qui tam* cases as, it is apparent to me, the Health and Human Services is through the Inspector General. I was wondering if, first of all, you have any general comments you might make in how DOD is handling these kind of cases, and second, for more specific kinds of information, if it would be possible. It doesn't seem to me there have been so many cases yet that you could not provide a case-by-case evaluation of what DOD has done with cases referred by the Justice Department in terms of audits, actions taken, debarment of contractors who have been found to engage in fraud, this type of information.

Mr. GERSON. Well, the latter would not be within my purview. The latter would be in the purview of the Defense Department and the credentialing agencies thereof. The former would be.

When you were out at the other matter that you described earlier, I talked about the numbers of cases and where they were, with particular reference to your district and to the State of California in general. Clearly most of those cases are defense-related cases reflective of the breadth of the industry in your State. You alluded to that yourself in your opening comments.

As far as relationships, I am glad that Mr. Kusserow is working here. He is working hard on these matters with us, and on his own where that is appropriate.

The Inspector General of the Defense Department is someone with whom I believe that I have a more than effective working relationship, as I do with the General Counsel of the Department of Defense, a good and old friend of mine who I know is as strongly committed as the Secretary to rooting out fraud, especially in a time when the defense budget and defense activities are constricting. It is always important but it is as important as it can be now. They have joined me in some pretty far-flung actions, some of which are not *qui tam* but which show their general intent in fighting fraud. And I think our record in defense cases—and I am not now just talking about the Civil Division, I am talking about the executive branch of the Government—I think has been reasonably good. We go through some of the numbers of these cases in the testimony, and if you want some more specific information, I will take a look at what we can provide. I would not have the debarment information, though.

Mr. BERMAN. All right. Well, the general assertion is that at the contracting officer level particularly, not so much the Inspector General but the contracting officer, a climate has developed where these people view the *qui tam* plaintiffs as enemies and that they don't aggressively provide information and development information to aid in the Government's effort to investigate and then prosecute these kinds of cases.

Mr. GERSON. I might gainsay that there is—that you can find pockets of resistance almost anyplace and that you certainly can come up with evidence of examples where people think that this form of activity is an intrusion. You probably could find it in the Justice Department, if you looked hard enough, too. The only thing I can say about that, especially in view of what we have done, is that there can't be much doubt, not just in terms of what the Attorney General's commitment is and my commitment is, but what

the Defense Department's commitment is, and if there are people like that they are going to get pushed pretty hard, not by the people who are not in the Government, but by the people who are in the Government. If you know of specific cases, if it comes to your attention, we share that common purpose, let me know about it.

Mr. BERMAN. OK. Just in conclusion, let me just say that I was happy to hear both your testimony. My general sense is that even though in some ways this becomes a lifestyle kind of hassle and a bureaucratic hassle, as you are forced to deal with things that may not have been on your agenda that morning, your willingness to see the ultimate purpose and benefits of this, to try to deal with its burdens in a reasonable fashion, and your general support for the process, I find very encouraging and a very different tone than we heard a couple of years ago.

Mr. GERSON. Well, I can't speak to that, but I will tell you it is on my agenda every morning, and it is not just *qui tam*. It is fraud itself and it is an important agenda item. It is going to stay that way. And I know the Attorney General feels the same way about it.

Mr. BERMAN. Thank you very much.

Mr. FRANK. Thank you, Mr. Gerson. I guess in a peculiar way we are delighted to know that you get up every morning and think about fraud. That is reassuring.

Actually, I am reassured, I must say, in general because we had some of these concerns when we first set this hearing that the statute is working well. Not perfectly but well. That is the general sense that we get, and I appreciate what both of you are doing on this.

Mr. Douglas.

Mr. DOUGLAS. Thank you, Mr. Chairman.

Mr. Gerson, it has already been mentioned that Government Operations may get into the act, and the subcommittee I am on in Government Operations had a hearing a couple of weeks ago where we had your brother from the Criminal Division, and the main thrust of the hearing was the fact that, while hundreds and hundreds of bank presidents and bank officials are getting convicted for the S&L fraud, the collection process and the restitution process is really not on the watch of the Criminal Division. I don't know if you have ever been a prosecutor, but everyone who has experienced it will tell you that, you know, when they get their conviction they really lose interest in chasing someone on the restitution end of the house.

Mr. GERSON. I have been a prosecutor.

Mr. DOUGLAS. OK. And I think you can understand the psychology. You have won your case. You have closed the file. The guy has been sentenced. A year later you are not going to go pawing back through to see if he has paid his restitution.

Is this not an area where we need to privatize that collection? In other words, in some way to make the restitution and the bank fraud discovery of assets, all of that opened up in a process similar to what we are dealing with here today. And I say that because a lot of it is an argument we can't find the assets, we are not willing to pursue it, we don't have the staff time to pursue.

But maybe the private bar would. Maybe they have access to information or would be willing to pursue it. The Criminal Division at least is thinking about that idea, and I didn't know to what extent you have thoughts on that, having been a prosecutor.

Mr. GERSON. Well, this in some ways parallels the discussion that Chairman Frank and I had the last time I was here, when we were talking about what money we were going to spend or try to spend the next year. I have a few views about it, Congressman Douglas.

Mr. DOUGLAS. All right.

Mr. GERSON. I have been—I was an assistant U.S. attorney for a number of years, and I think I was a reasonably aggressive one and was interested in where the money was going. Most of the problem that we have had in these cases has not been a lack of aggressiveness in seeking assets. It has been a lack of assets that we have been looking for, and let's remember that that is the root of the problem. I mean, no one is going to gainsay the incredible level of abuse that there has been in this system. And what that abuse has led to is the bleeding away and wasting of the assets that should have stayed in these institutions. That is the fundamental problem. A lot of times you just get to the case and you get all the way through it, and once you have gotten your exacted criminal penalties—and the criminal cases should go first for a variety of the reasons I have talked about earlier—there isn't anything left. That is a crime on a crime, if you will. It is a disgusting, lamentable situation. But whether it is a private lawyer or a public lawyer, it is not going to produce any additional recovery.

Now I do agree that there are effective times and places to use the services of the private bar, and we have a debt collection pilot program going on now that has some, I think, favorable aspects to it. I look with some chagrin at the fact that the Federal Deposit Insurance Corporation, and I don't mean any criticism of it or its Chairman—it is just the fact that I am about to talk about—is preparing to spend \$500 million on private counsel fees in the current year. We are more efficient than that.

Our rates are lower, our overhead is a lot less, and our lawyers are quite familiar with this area. You have given me an increase that affects the Civil Division and the number of people that I will have available to pursue bank-related fraud cases, and Mr. Hertz and Mr. Schiffer, who he reports to, are prepared to work vigorously in that field. I look for an expansion of that form of activity. It is I who have been, myself, who have been arguing for the maintenance of the Thrift Rescue Program and for the approval of what the incumbent is doing.

Mr. DOUGLAS. Well, let me——

Mr. GERSON. But all of that is to say that private lawyers can play a role. Doing it on the basis of fees paid out, as opposed to recoveries gained, in my view, generally is not as efficient as keeping that within the Government. There are times and places where effective management says use that outside resource.

Mr. DOUGLAS. Well, I guess what I am trying to do is set up a system where we don't have the problem we had in the subcommittee. Your brother said you can't get blood out of a stone. I agree with that. But you can get blood out of a rat. And the difference is knowing whether it is a stone or a rat.

When you say it is a stone, we are done with it. There should be a time period, 60 days or some other period, where Justice says, "That is it. We think it is uncollectable." Fine. Sign off and now allow the private bar, if they want to, to chase these guys. Because they may have information, they may have more of a financial incentive to chase than the Justice Department does, which has still more cases the next week to deal with than before and at some point—maybe I am wrong, but restitution was not a big thought on your mind a year after you closed the file, was it, for the average case?

Mr. GERSON. Well, again—

Mr. DOUGLAS. I mean, just being realistic in terms of your psychology.

Mr. GERSON. I understand the issue that you are talking about. I am aware of the mentality of which you speak.

I would consider any reasonable proposition that you would want to advance along that that score. My suggestion would be, if the Civil Division or the Department itself is determined that whatever rat it might have been it is a dead rat and it is not going to produce anything, if you wanted some—if you wanted the ability of private people to go after it, that should be done on some kind of a bounty basis rather than on a fee basis.

Mr. DOUGLAS. All right. I was assuming a contingent basis. In other words, I was not assuming at all that you pay any money, merely that you have some amount, a third on the first half a million, 25 percent above that. If someone wants to go after some guy, thinks they can find assets in the Caymans or wherever they want to find them, why not let them chase them? You are still going to get more money than you would get if you just closed the file and walked away from it, because at that point you are getting nothing.

Mr. GERSON. It is the Treasury that gets it, and if there was a reasonable way to enhance that we would—

Mr. DOUGLAS. As long as it is a contingent basis, in other words.

Mr. GERSON. It would at least have to be that.

Mr. DOUGLAS. All right.

Mr. GERSON. Of course, you are also talking about something that neither you nor I have mentioned up to now, which is to what extent would that tax already overboard judicial resources. We need to think about that too.

Mr. DOUGLAS. All right. OK, Mr. Chairman, I yield back the next hour of my time.

Mr. FRANK. Thank you. Mr. Campbell.

Mr. CAMPBELL. All of which I shall consume. Thank you, Mr. Chairman.

General Gerson, it is a pleasure to have you here. And, General Kusserow. I wanted to address my comments to Mr. Gerson, if I may.

First, borrowing from Judge Douglas' inquiry, I had the honor to serve in the Justice Department under the administration of William French Smith, and, in 1981, I was given the task of oversight of the debt collection procedures. And I talked to your colleagues, Mr. Schiffer and Mr. Ford, who were my friends and still are. By the way, please recognize that they are splendid employees and pass along my kindest regards. And, it was my judgment at the end

of that that a farming out or a selling of the claims of the United States to a debt collection agency would indeed be more efficient from the point of view that the last thing a new assistant U.S. attorney wants to do is debt collection.

And, if you don't believe that, do as I did: visit the U.S. attorneys offices, the big ones that were involved in debt collection. I went up to Baltimore. They run a great operation there. Brooklyn runs a great one. And you will find that it is the youngest, most recent employee in every U.S. attorney's office who gets the debt collection work, who wants to get out of it as quickly as possible, and thus it led me to that conclusion. So I offer that since my colleague Mr. Douglas raised it.

Mr. GERSON. May I add one thing to that? I certainly think that there are cases and times when that is decidedly so. Another thing that I would add to that, and I know you are aware of it, one of the problems that U.S. attorneys offices have is in the training and the ability of even their youngest lawyers to pursue these matters. We would be substantially helped by uniform debt collection legislation that is pending.

Mr. CAMPBELL. All to the good, and I simply offer you my observation having studied it probably more than any new employee of the Justice Department because I was given that task.

Mr. FRANK. Let me just say, just as a point of fact, if the gentleman would let me and yield, on the 2d of May we have a full hearing scheduled solely on the subject of debt collections.

Mr. CAMPBELL. Oh, splendid.

Mr. FRANK. So we are going to be pursuing that—involving the private/public. The uniform bill, I am informed, is in Chairman Brooks' subcommittee because it has a lot of bankruptcy involvement. But we are going to have a hearing on the 2d of May solely on the subject of debt collection because many of us share that view that we could expand our approach here.

Mr. CAMPBELL. Look forward to that. Who, may I ask, will the Civil Division be sending up for those hearings? Do you know yet?

Mr. GERSON. Well, at this point—

Mr. FRANK. They are going to hire a private attorney to come up. [Laughter.]

Mr. CAMPBELL. An actor. They will hire an actor. Charlton Heston will represent the Civil Division.

Mr. GERSON. I haven't heard yet that we have been invited. I assume that we are about to be.

Mr. CAMPBELL. I know that Mr. Schiffer would be most welcome, whoever he would choose to send.

I had one question. This was prompted by Mr. Douglas. My independent line of inquiry dealt with the constitutionality, and I am going to put the following to you and then ask your response, and then I am done.

I put to you that you do not have the luxury to wait for the right case. With every *qui tam* case where the defendant wins a claim, not even the entire case but a claim, you run the danger of being precluded in a subsequent criminal action. The Government therefore has an interest in every *qui tam* action proceeding right now where it does not itself intervene, or it chooses not to intervene.

I think the Supreme Court in its *Marcus v. Hess* opinion told us fairly clearly that the business of sharing—of collecting money owed to the Government can be shared privately, but not to my constitutional likes the business of prosecuting. That is uniquely governmental and uniquely executive.

Mr. GERSON. I agree.

Mr. CAMPBELL. Well, the question I put to you then is do you not see a serious constitutional problem with the present *qui tam* system in that, if the Government chooses not to intervene, if the defendant wins any claim, that claim is closed, potentially closed, and I think probably actually closed, against a subsequent criminal prosecution?

Mr. GERSON. I do. I mentioned that very problem earlier in my testimony and it is covered in some more detail in the written testimony. We have not had the case in which that specific point has been a mandatory point. To take up something that the Inspector General mentioned a little earlier, our efforts would be enhanced to protect the public in that regard with an expanded investigatory period. Again, to make sure that we know what we are doing when we get out of a case or decline to commit to a case and leave it to the relator to pursue.

But no, you are raising a very legitimate issue. It is raised similarly in the Supreme Court's *Halper* decision.

Mr. CAMPBELL. But even if the period of time is extended by twice, subsequent prosecutions may be based on additional information which is appropriate in the exercise of prosecutorial discretion. And nevertheless, it seems to me you run the risk of preclusion.

Mr. GERSON. There is such a risk.

Mr. CAMPBELL. And so I suggest to you that to answer, as you do, intelligently and very fairly that you haven't yet had that case may not be completely accurate. You have that case every day because the issues are precluded every day. And thus, I suggest to you, I, at least, as a member of this subcommittee and full committee, would be interested in the opinion of your division as to whether the *qui tam* provisions are constitutional given that risk.

Mr. GERSON. Well, I would prefer to argue it a different way. If there was a case that came up in which we attempted to exert prosecutorial authority, I would think that that has constitutional primacy, notwithstanding the False Claims Act. That would be the case. And we just—in a sense we are vigilant as to this issue. It informs our decisions as to whether to get in or get out, especially given the short time frames.

The argument that I just described or some variant of it is what we would have to argue in such a case. We are not going to decline to prosecute because—I am speaking now on the criminal side. I have some criminal jurisdiction. Let's say a food and drug related case where I have criminal jurisdiction besides civil. I am not going to decline to prosecute merely where subsequently learned information develops probable cause to believe that a criminal offense has taken place merely because we have declined to enter the case. If someone would challenge that, on double jeopardy or other grounds, and we would fight them like the dickens and would expect to prevail.

I don't know, other than declaring the *qui tam* provisions of the False Claims Act categorically unconstitutional, I don't know any other way to deal with that. I don't know that we have to deal with it.

Mr. FRANK. If the gentleman would yield. One way to deal with it might be for us to do—and this is a new issue to me. I am just thinking about it. One way might be for us to put in an explicit statutory provision that the Department had the right to freeze the *qui tam* proceedings pending its right to make a determination on the criminal prosecution.

Mr. GERSON. Yes, that is true. And there is even a down side to that.

Mr. FRANK. You are arguing, perhaps, that you may have that right inherently. Am I correct?

Mr. GERSON. I believe that we have—

Mr. FRANK. But we could certainly clarify it that way statutorily.

Mr. CAMPBELL. Mr. Chairman, I am pleased you raised that. I was actually going to suggest that, and then I thought that even that wouldn't cure the subsequent choice to prosecute on the basis of new information. You might not, in other words, know, then as new information comes along and you find yourself estopped by the previous *qui tam*.

I am done with my line of inquiry but I do have a parting shot, which is not a shot, maybe a friendly warning. I don't agree with you that you can wait for the criminal case where this is raised in the double jeopardy or fifth amendment claim. And the reason I say that is, every *qui tam* case, civil case that goes forward has an x probability of foreclosing the criminal prosecution against that person. You cannot tell me x is zero. You just told me you didn't think it was zero. Therefore, we are losing something each day. That is why I don't think you can actually say, "Don't worry, we will face it when we come to it." You may come to it and realize that you have lost 10 potential criminal prosecutions.

Mr. GERSON. I have not said—I want to be as clear about this as possible—don't worry. We are worried about it. What I am saying is that there is not an effective way to raise it other than categorically declaring the act to be unconstitutional at this point, and we are not prepared to do that.

Mr. FRANK. I gather their position was that there is not a constitutional problem, but that would have to be—

Mr. GERSON. That is right.

Mr. FRANK. When you talked about deferring on some of the constitutional issues, I thought that was specifically in the context of a *qui tam* private plaintiff contesting your right to have the case dismissed.

Mr. GERSON. That is right.

Mr. FRANK. That that was the one—

Mr. GERSON. That is the one that is uppermost in my mind.

Mr. FRANK. That you are looking at, yes. I appreciate it, and we will have to look at how we deal with this.

Mr. CAMPBELL. Thanks, Mr. Chairman. My thought was, simply, if we are running that risk it would be appropriate for the Justice Department to give us the benefit of their opinion. I know generally Justice doesn't like to give opinions on constitutionality until

they have to. But here is an instance where we might be losing something.

Mr. FRANK. Not in this administration. The previous administration they might not have.

Mr. CAMPBELL. Thank you.

Mr. FRANK. I just never was sure which Constitution they were basing it on.

Thank you both very much.

Mr. CAMPBELL. Objection.

[Laughter.]

Mr. FRANK. We will now hear from Mr. Phillips, Dr. Michelson, and Mr. Carton.

Gentlemen, there is no music, so please sit.

[Laughter.]

Mr. FRANK. Thank you. We will start with Mr. Phillips, who is first on my list.

STATEMENT OF JOHN R. PHILLIPS, HALL & PHILLIPS, LOS ANGELES, CA

Mr. PHILLIPS. Thank you, Mr. Chairman. I have submitted extensive comments.

Mr. FRANK. Without objection, the written comments that any of you wish to submit or any supporting material will be entered into the record.

Mr. PHILLIPS. I will try not to repeat anything already in my written comments. I have read the testimony of Mr. Gerson of the Justice Department and will try to address my comments here to some of the points he made in his written and oral testimonies.

I first had the opportunity to appear before this committee 4 years ago to discuss barriers that existed prior to the pre-1986 amendments that discouraged people from stepping forward to take advantage of the False Claims Act. I had the opportunity based, on experience with real live clients, to determine why they weren't using that law or were reluctant to step forward. As to what changes should be made, Congress responded to these barriers by enacting the 1986 amendments. We now have 4 years of experience with these amendments, and I am pleased to be able to report on the progress to date.

I would like to comment on some of the dollar amounts recovered as presented by the Justice Department to put them in a proper perspective. Mr. Gerson reported that in 1985 False Claims Act cases, not *qui tam* cases, but the False Claims Act cases filed by the Justice Department, produced \$27 million in revenues back to the Treasury. Now this must be viewed in the context of the estimated fraud against the Government, which according to the report prepared by the Judiciary Committee of both the House and the Senate, was estimated to be \$100 billion a year. The \$27 million recovered out of \$100 billion estimated fraud is, of course, paltry, and Congress wisely decided that some other means needed to be developed. A different approach was needed to try to get these dollars back to the Treasury. Instead of increasing the size of the bureaucracy by adding more Government employees and more auditors, Congress attempted to enlist the citizenry to do the Govern-

ment's work as informed plaintiffs by bringing an action on behalf of the Government, and seeking recovery for the Government. It was totally consistent with the Reagan philosophy of creating marketplace incentives and having private citizens aid in the work of the Government.

I can report to you that based on our experience 4 years later, the new *qui tam* amendments are working well. The \$40 million in recoveries that have been cited by Justice Department in *qui tam* cases since 1986, may appear to be substantial and exceed the total recovery Justice Department was able to get in 1985, but it is a very understated amount when you consider the *qui tam* cases that are already in the pipeline. Numerous cases where the Justice Department has joined have in excess of \$100 million in single damage claims each. These are necessarily complex cases that will take a long time to be resolved. But when they are resolved, they will yield huge recoveries to the U.S. Treasury.

We fully anticipate based on our experience that the recoveries that will be achieved by the *qui tam* lawsuits will soon exceed those achieved in cases filed by the Department of Justice, not unlike the enforcement action in the antitrust field. But one of the biggest payoffs that is more illusory and more difficult to pin down is the deterrent effect that this law has had. I can tell you that many companies are changing the way they do business internally. No longer can they conduct business as usual where the middle level manager is trying to meet budgets and defense contractors are willing to shift around costs and play games with accounting. Companies can't do that today because of their fear of being detected. There was no such fear before these amendments were in place. Now Government contractor workers understand that they and their companies could be exposed to a lawsuit. Because of the professional and personal risks, many people are unwilling to try to defraud the Government. This is by far the biggest payoff of the 1986 amendments.

I do have some observations based on the Justice Department's comments and our own experiences regarding the question of resource imbalance. It is becoming increasingly apparent that the Department of Justice cannot adequately staff these cases today given the high stakes that are involved. We have a number of cases, three specifically, where claims are in excess of \$100 million. Some of these cases are in the Central District in California, and I can tell you with respect to at least one of those cases that the Department of Justice simply cannot assign any attorneys to pursue the cases to get the recoveries back that are necessary.

On the other side, we see a cadre of attorneys representing the defense contractors and others that literally can overwhelm the prosecutors and the Government attorneys. They have filed every conceivable motion. They have taken every action they can to delay and defer the implementation of this law, and they have even, of course, as we have heard today, challenged the constitutionality of this law. And I think it will be interesting to note that if you check into this constitutional challenge you are going to find that the Government has paid for that challenge. Those defense contractors are actually sending their attorneys fees bill to the taxpayers to challenge your law. Thus, the Government has had to

pay both sides. I think that is a question that deserves some inquiry.

The question raised by Congressman Berman I think is an important one, and that is, the cooperation that the Department of Justice has received from the Department of Defense. It is our sense that they have not given adequate support to the Department of Justice. They tend to look at the defense contractors more as clients delivering hardware to the Government. They are more concerned about timely deliveries than prosecuting fraud. And, as it turns out, they send mixed signals to these defendants. When Department of Justice may be pursuing criminal indictments they are getting signals back from Department of Defense personnel saying don't worry about it. It is not as insignificant as you may think. And this results in fewer settlements and, ultimately, more resources having to be expended by the Department of Justice.

I would like to comment on cases filed that may fall into the frivolous category. That was a concern expressed by Congress when you enacted these amendments in 1986. I can say 4 years later that with relatively few exceptions these cases are not frivolous. Some are filed that are frivolous. Some are not well developed. But it is our view that the Department of Justice can easily dispose of those cases without expending much in the way of resources. There is no reason that the Government has to spend a lot of time investigating cases that on their face appear to have no merit.

With respect to the criminal and civil clash here, I do not see the problem, and our experience has not demonstrated any problem. The criminal cases always take precedence over the civil cases. The Justice Department will always move to stay the civil case while the criminal case is going forward. It gets priority. Judges give it priority. There hasn't been the problem. A theoretical problem that has been mentioned here today hasn't materialized in fact.

The Government maintains control of these cases, as they should. They are the senior partner. When they join the cases they take over the primary responsibility of litigating them. We work closely with the Government in the cases that we file and we are willing to follow their lead and advice as to how to proceed. That may take many different forms. In the case we are about to hear, two real live plaintiffs—

Mr. FRANK. Well, if we are about to hear them, you don't need to tell us.

Mr. PHILLIPS. I am not going to tell you what they are going to say, but I am just telling you that in the case of Dr. Michelson we have done 80 percent of the work. The Justice Department has done 20 percent of the work on a very cooperative basis, as they have directed us to do. In the *Litton* case we have done 50 percent of the work. We are working as a partnership, as attorneys with the Department of Justice fulfilling your purpose of expanding the resources of government.

There are two problems that ought to be addressed that require legislation in the future. One is in the case of the criminal cases going forward where the Justice Department receives criminal penalties or criminal offsets or restitution back to the Government and the prosecution goes forward based on information provided by the *qui tam* plaintiff. It is important that that amount of criminal re-

covery not diminish the civil recovery or not be credited against the civil recovery when it comes time to calculate what the entitlement should be for the *qui tam* plaintiff. We have one case where the Government may achieve substantial recoveries on the criminal side, but because the defendant may have no additional resources left to pay the civil case damages, the *qui tam* plaintiff may wind up getting nothing after taking tremendous risks and spending tremendous time to receive very little.

It is important, if legislation is necessary, to have the proceeds of the recovery include the total recoveries the Government receives.

Another problem that we think may need some clarification is a situation where you have a negligent overcharge, where a company may not have intended but through negligence overcharged the Government. They discover it later down the road and do not tell the Government. They consciously decide not to step forward. We believe that a strong argument can be made that this is already covered by the law but it may need to be clarified to make it expressly clear that it is covered under the False Claims Act.

There are a new type of people coming forward now that were not coming forward under the old act. That is what is most exciting about these new amendments: People are willing to take the risks, to make a cold calculation based upon what is good for the Government, to do what is good for them, to rely on the protections that are there, and to utilize the guarantees provided. I think in the next 4 years we are going to see not \$40 million or \$100 million, but you are going to see billions of dollars returned to the Treasury because of your legislation.

Thank you, Mr. Chairman.

Mr. FRANK. Thank you.

[The prepared statement of Mr. Phillips follows:]

TESTIMONY OF JOHN R. PHILLIPS
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE
OF ADMINISTRATIVE LAW AND GOVERNMENT
RELATIONS
April 4, 1990

Four years ago, I appeared before this Subcommittee to testify on behalf of legislation to modernize and strengthen the qui tam provisions of the False Claims Act. Then, what I had to offer was my best estimate -- based on many calls and inquiries I had received from whistleblowers during my 17 years of practice as a public interest lawyer -- of how the qui tam provisions could be restructured to become an effective weapon in fighting and deterring government fraud.

Today, while I'm still appearing as a public interest lawyer, my comments are based on three and a half years of extensive and varied experience working with the Act. My firm, Hall & Phillips, serves as counsel for qui tam plaintiffs in 15 cases. Settlement documents are being finalized in one case, five more are in active litigation and the remainder are still under investigation by the Department of Justice. In addition to these matters, Hall & Phillips has filed amicus briefs on behalf of Taxpayers Against Fraud and the Center for Law in the Public Interest on several false claims issues, we have coordinated the effort to oppose constitutional challenges to the Act, we serve as an informal clearinghouse for false claims information and regularly provide advice to attorneys around the country on false claims issues. In addition, in 1988 when we recognized that, as drafted, the Act could permit a false claims recovery an to individual who was the mastermind behind a fraud, we brought this to the attention of Congress and assisted in drafting a corrective amendment.

The question of how well the qui tam provisions of the False Claims Act are working cannot yet be answered by a simple dollars and cents calculation. Because false claims cases involve complex factual situations, they inherently take a long time to develop and litigate. We usually spend two to six months preparing a case for filing. Once filed, the government investigation may take as long as a year. After the case is unsealed and served, the defense (which is always well funded and staffed to the hilt) typically wages a war of attrition. As a result, while the three and a half years since the 1986 amendments took effect has seen more than 200 new cases filed, to date there have not yet been substantial recoveries.

We do know, however, that there are many cases in active litigation that the Government has joined where the potential recoveries run into the hundreds of millions of dollars. For example, in the Central District of California alone, the :

Government has joined four pending qui tam cases where the damages in each case is conservatively estimated at \$100 million. Of the 15 matters we are handling, damages in at least three, when trebled, will be in the \$100 to \$300 million range.

We also know that the mechanism Congress created in 1986 to permit the Government to focus on the best cases is working well. Congress wanted to develop a mechanism to encourage false claims information to be forwarded to federal authorities for expeditious and efficient review. The 1986 Amendments did this by providing that qui tam complaints be filed under seal for 60 days to permit the Government to investigate secretly the false claims allegations. At the end of this 60 day period (and any extensions granted by the Court), the Government is to make a decision whether to commit additional resources to the case and join the litigation, whether to seek to dismiss the action, or whether to sit back and monitor the case. By providing this trio of options, Congress provided the Justice Department with the maximum flexibility to expend its resources on the most meritorious claims.

According to observations made by various government investigators and U.S. Attorneys, the 1986 qui tam plaintiffs have presented the Government with the best false claims cases in the Act's 127 year history. The reason for this, of course, is that the 1986 Amendments provide incentives and protection that encourage "insiders" with information to come forward and take on the risks associated with being a "whistleblower".

In large part the motivation for these new qui tam plaintiffs is financial. The monetary rewards offered by the Act can be quite substantial. But in our experience, money is not the sole or even primary motivation for most of our clients.

While a client like Dr. Michelson, who acts out of a sense of civic and professional responsibility, and who donates his entire recovery to charity, is the exception, I do not believe that any of our clients have approached the False Claims process solely as a money making venture.

For example, we represent one individual, I'll call Mr. A, since he is a qui tam plaintiff in a case still under seal, who was employed by a relatively small company that provides hardware to the military. Mr. A learned that his employer was routinely installing defective and substandard parts in the goods it sold the Government. Mr. A knew this was illegal and he knew that uncorrected it could cause death and injuries to servicemen, so he reported his employer to federal criminal authorities. The employer was subsequently convicted and sent to prison.

Mr. A then went to work for another company only to learn that his new employer was doing the same thing. About that time, Mr. A learned of the False Claims Act, and at the time he reported

his second employer to the criminal authorities, he filed false claims cases against both employers.

Another of our clients is Chris Urda. While Mr. Urda was employed by the Link Flight Simulator Division of the Singer Company as a Bid Supervisor, he learned that the Division routinely falsified the cost data it submitted to the Government contracting authorities. Mr. Urda left Singer to become a Price Analyst with the Defense Logistics Agency. In this new capacity, he realized how harmful and how wrongful Singer's actions were. When he heard about the False Claims Act, he recognized that it offered him an opportunity to bring his information forward.

We have other clients who are looking to the False Claims Act as a way to atone for years they have spent forced into a conspiracy of silence while those they worked with defrauded the Government. In this sense, the Act's qui tam provisions really do empower "the little guy" to take corporate management head on, and to salvage their self-respect.

We have a client, for example, who is about to file a case challenging the foreign military sales program of a major national corporation. The career and social risks to him in doing so will be substantial since he is well respected and well placed in the corporation. At the same time, his share of the qui tam recovery will not make him a rich man. When I asked him why he was willing to take on this burden, he told me that having been a silent participant in the wrong doing, in order to now "look his children in their eyes", he had to try to make things right.

A common and less noble motivation for qui tam plaintiffs is revenge. We frequently receive calls from individuals who are terminated by their employer when they complain about irregular billing or costing practices. There is an obvious potential for abuse here, and in this situation we are particularly careful to make certain that we can independently verify the false claims violation.

We have also talked with individuals who are interested in bringing False Claims actions against their competitors. For example, one area we have examined is health care equipment supply. There because competition is intense and many small businesses are involved, and a supplier who fraudulently obtains Medicare reimbursements gains a substantial competitive advantage over his more honest competition. Again, such cases should be carefully screened and investigated to avoid abuse.

One clear by-product of 1986 Amendments is that the Act is beginning to attract management personnel and other upper level businessmen and women who are likely to know about more sophisticated, and therefore better disguised fraud. These individuals, however, have the most to lose by an unsuccessful

suit. As Jim Carton and others like him win their cases, I believe that they will increasingly come forward, and bring with them substantial recoveries to the Treasury.

Regardless of their motivation, all of our qui tam clients share one quality -- their willingness to make a longterm commitment of time and effort to the litigation. Before we file a case we may spend as long as eight months meeting repeatedly with our clients to go over every detail and fill in any gaps in our knowledge to make sure that we have a full picture of the industry, its common practices, and the way contracting laws and regulations apply. We also frequently use outside experts to help us evaluate our cases. Defense procurement regulations are complex and in many areas, a standard industry practice has developed. When we consider a case we need to know not just whether the conduct in question technically violates the law, but to what extent it goes beyond the bounds of acceptable behavior.

We then work with our client to prepare a disclosure statement to provide the Government with the material information and relevant documents we possess. The last step we take is to prepare the complaint. Once the complaint is filed, we make our client available to the appropriate authorities to assist in their investigation.

In the last two and a half years, we have received between 500-600 inquiries from people who thought they might have a false claims case. While many of these cases probably did involve at least technical false claims violations, we have chosen to limit our practice to instances where the facts and circumstances of the violation indicate that litigation would serve a clear public interest.

In some cases, for example, the defendant's resources (and therefore the potential return to the Treasury) were insufficient to justify the costs of litigation. Where that has occurred, we have encouraged our client to provide the information to the relevant Inspector General and to urge that they take corrective action. For example, we recently spent several months and dozens of hours working up a medicare case that involved fraudulent claims for reimbursement of medical equipment expenses. Ultimately, we decided not to take the case because, despite the defendants egregious conduct, the litigation costs would dwarf any potential recovery from the small business defendant. Our client's main concern is stopping additional abuses from occurring and he has authorized us to hand the file over today to the Inspector General.

One area where a "public interest" test is now relevant is the question of whether a government employee should be permitted to bring a qui tam action covering activities he learned of in the course of his employment. As a policy matter, we have

not pursued any of these cases. However, with the increasing public focus on the issue, we have reviewed the question from the perspective of whether and how the Act could be amended to deal with this hard question. We believe that the appropriate way to deal with this issue is to permit a financial recovery to a government employee who learns of a False Claims violation in the course of his employment only when the Court determines that the employee reasonably and in good faith attempted to bring the violations to the attention of the appropriate government employees. Further, we recommend that when the Court does make such a finding, it retain sole discretion to determine the size of the award up to a maximum of 25% of the proceeds.

This approach would provide a mechanism of last resort to government employees who have tried and failed to obtain internal Government action. At the same time, it will discourage Government employees from seeking to enrich themselves at the taxpayers' expense.

Critics of the qui tam provisions argue that the Act encourages lawyers to file frivolous cases, which wastes Government resources. Our experience in monitoring false claims activity around the country suggests that this is not the case.

In the first place, the Act does not compel the Government to investigate a meritless case. To the contrary, the law gives the Government the best of both worlds by permitting it to join any case it wants to at the outset, while reserving the option of moving to intervene later.

Moreover, the False Claims Act contains provisions expressly providing that the plaintiff may be charged with paying the defendant's attorneys fees and expenses if the court finds that the claim was "clearly frivolous, clearly vexatious, or brought primarily for the purpose of harassment." Since these cases are so expensive to litigate, few attorneys or qui tam plaintiffs are going to be willing to fund meritless cases on the chance that they can con a well-funded defendant into settling. Instead, what we are seeing is that qui tam cases are being hard fought on both sides throughout the nation.

The 1986 Amendments added a number of new features to the Act that we believe have worked quite well in actual practice. One of the more unique features of the Act is its provision for filing under seal. In order to accommodate the Justice Department's desire that its ability to investigate fraud not be compromised by disclosure to the defendant of the filing of a qui tam action, the 1986 Amendments provided that qui tam complaints were to be filed under seal for at least 60 days. The Act further provided that the seal period could be extended by the court. Once the Government decided whether or not to join the case, the seal was to be lifted and the complaint served on the defendant. ;

In practice, we have found that while the 60 day period is almost always extended at the Government's request, the existence of the statutory deadline does ensure that cases don't fall into limbo and also provides an opportunity for ongoing dialogue with Government attorneys and investigators.

Generally, the seal provisions keep most defendants unaware that an investigation is ongoing. However, in our case against Litton Systems, Inc., Litton discovered that a qui tam complaint had been filed. Litton's counsel asked the Government for a copy of the complaint so that Litton could make a presentation to the Government before the Justice Department made a decision about whether to intervene. Ironically, in that case, once the Department of Justice decided to intervene and asked that the seal be lifted, Litton objected to unsealing the case and contended that the seal provision was included in the law for the defendant's benefit. While Litton was unsuccessful, we expect that other defendants who become aware of qui tam cases filed against them will also seek to misconstrue the Congressional intent and ask courts to extend the seal provisions to prevent public knowledge of the lawsuit.

Another innovation added by the 1986 Amendments is the public/private litigation partnership which occurs when the Department of Justice enters a qui tam case. In our experience, this Congressional attempt to encourage the use of private sector resources to supplement Government services has been extremely successful.

We are now litigating six cases where we are working closely with Government attorneys (the Government has joined five of these cases and is actively participating as an amicus in the sixth). In two of these cases, we are working exclusively with counsel from the Civil Division of the Department of Justice here in Washington and in the others we are working both with local Assistant U.S. Attorneys and with Civil Division attorneys. In all cases, we have a close and cooperative working arrangement with the Government counsel.

The Act clearly provides that where the Government proceeds with the action "it shall have the primary responsibility for prosecuting the action". In light of this statutory directive, we work closely with the Government to develop and implement a uniform and consistent case strategy. In some cases the Government attorneys have determined that the best use of Government resources is to have us carry the primary burden of developing the facts and carry the majority of the day-to-day litigation work while the Government maintains overall and ultimate control of the case. A good example of this is Dr. Michelson's litigation.

When the claim is large and the litigation especially hard fought, such as in the Litton litigation, we are working day in and day out with the Government attorneys to maximize the available resources for prosecuting the case. We have increased our legal staff to make certain that the case is fully staffed, we have divided up the more mundane discovery chores, we work together developing and researching the legal issues, and we are sharing the expense of hiring experts.

While the concept of deferring to other counsel is not something that is natural to litigators, in this context it has not been difficult to play the supporting rather than the leading role, because we are working with capable and dedicated Government counsel. I have the greatest respect for the Government attorneys we have worked with, and know that they share the same goal we do - ferreting out fraud against the Government and people of this country and discouraging ill-gotten gains from wrongdoers to discourage future fraud, encourage reports of wrongdoing and reimburse the Treasury.

It may seem ironic, but as a private public interest attorney representing individual qui tam plaintiffs, my principal concern is whether sufficient resources are being made available to permit the Justice Department to aggressively pursue these major procurement fraud cases. While, in our opinion, major policy decisions affecting the enforcement and interpretation of the False Claims Act should be made in Washington by the Department of Justice, it is crucial that local U.S. Attorneys offices be allocated the necessary resources to staff these important matters. This is especially true in Los Angeles. Not only does the three-hour time difference distance and burden of travel make it impractical to litigate complex Los Angeles cases from the East Coast, but Los Angeles is an extremely active area for these types of cases. This can be attributed to the extensive defense contractor community in and around Los Angeles and to the experience of the bar with these matters.

The local U.S. Attorneys offices need more resources. For every example I can give you of active Government participation in a case, there is a case that is languishing because there is no staff available to run with the case.

It is just common sense that you cannot achieve the greatest possible recoveries without vigorously pursuing these cases. By litigating hard at the ground level, the investment in attorney time can be returned to the Treasury more than 1000 times over. There is nothing like a success story to inspire other qui tam plaintiffs to come forward. On the other hand, failure to pursue strongly the good cases already on file, will only show the defense contractors that by hiring large numbers of attorneys, they can protect hundreds of millions of dollars of fraudulently obtained profits.

So far, the False Claims defense bar has shown creativity and tenacity in seeking to limit at every turn the applicability of the Act. While none of these initial efforts have hit "pay dirt" they do pose a series of expensive hurdles for qui tam plaintiffs.

For example, the first major generic challenge to the Act is the defendants' claim that the 1986 Amendments did not apply to pre-1986 conduct. Ten or so courts have rejected this claim, and have found that Congress clearly intended that the Amendments apply to such conduct and that no "manifest injustice" was created by such application.

With the retroactivity challenges failing, defendants next have contended that the qui tam provisions violate constitutionality mandated separation of powers principles because Congress empowered a private qui tam plaintiffs to assume functions that are reserved exclusively for the Executive. To date, this challenge has been conclusively rejected on eight separate occasions. Similar challenges are pending in at least two other cases.

The remarkable thing about this constitutional challenge is that defense attorneys have been able to convince their clients to sink thousands and thousands of dollars into raising such claims of unwarranted Executive intrusion. The 1986 Amendments were supported by a Justice Department and signed by a President who are legendary for jealousy guarding Executive prerogatives. At no point in the lengthy hearings on the Amendments was any serious separation of powers concern raised. Nor at any point in these court challenges did the Justice Department ever support the defendants' position that the Act interferes with its ability to enforce the law.

The Legal Counsel for both the House of Representatives and the Senate appeared in many of these challenges to defend the Act. We followed these challenges closely, and from our first hand observation, the work done by your legal counsel's office and that of the Senate played an important role in preserving the statute. I hope that you will continue to encourage the House Legal Counsel to participate in the few remaining challenges so that this false challenge can be put to rest.

False Claims defendants have also tried to derail false claims prosecutions by asking the trial court, over the objection of the Government, to stay false claims litigation pending the resolution of administrative contract dispute proceedings, a process that could take 5 years or more. Because contract dispute proceedings have no jurisdiction to resolve fraud claims, staying the court proceedings would serve no purpose other than to make it more difficult for the Government and qui tam plaintiffs to prove

their case as memories grew stale and witnesses became unavailable.

Although defendants have tried to persuade the courts that Congress intended that such stays be issued, to date they have failed. If courts were to begin to buy this bit of "revisionist history", false claims recoveries could be seriously jeopardized. It might then be necessary to amend the statute to provide expressly that false claims actions are not to be stayed pending Contract Disputes Act proceedings unless the Government requests such a stay.

We have also identified a number of areas where, with the benefit of experience, we think the Act could be further improved. Most of these changes are truly clarifying amendments needed to make sure that the Act's actual application corresponds with the original Congressional intent.

1. Negligent Overcharges or Underpayments

The Act now provides that it is unlawful to submit a false claim or record to underpay or overcharge the United States knowing at the time the claim or record is submitted that it is false. It is clear, however, that the purposes underlying the False Claims Act require that if a person learns that he has negligently overcharged or underpaid the Government, false claims liability should attach if he takes advantage of the error to Government money. We recommend that the Act be amended to make it clear that once a person knows of an overcharge or underpayment he must correct the situation. Thus, when "red flags" are raised concerning the accuracy of a person's claims, the person has the same duty to investigate and ensure the accuracy of those claims whether the flags are raised before or after the claims or statements are submitted.

2. Calculation of Recovery

When the 1986 Amendments were enacted, Congress intended to provide an incentive for qui tam plaintiffs to come forward by providing them with a guaranteed share of the proceeds of the qui tam actions. However, once the Government knows of the qui tam allegations, it usually can proceed against the defendant and obtain recoveries in several other contexts. It does so then the qui tam plaintiff will be inadvertently harmed if these other recoveries reduce the proceeds of the qui tam action.

When we take on a new qui tam client, one of the first things we consider is whether the matter is an appropriate one for criminal prosecution and if so whether there is an urgent need for the Government to execute a search warrant to preserve evidence. When this is the case, we always take our client to meet with federal criminal authorities without waiting to finalize before the civil case.

In a case being litigated right now, the qui tam plaintiff first reported the fraudulent activities of the defendant company and its officers to government investigators in 1987. As a result of the information he provided, the Government executed a search warrant on the facility, discovered extensive records documenting the fraud and obtained an indictment against the company and its officers for submitting false claims, making false statements and defrauding the Government. The qui tam plaintiff worked closely with government investigators during the criminal investigation, assisting them in reviewing and interpreting voluminous company records. The company and its officers subsequently pled guilty to felony violations. Pursuant to a plea agreement, the company paid \$1,000,000 in restitution arising from its submission of false claims. The individuals were sentenced to terms of imprisonment and fines.

After the conclusion of the criminal case in 1989, he filed a civil False Claims Act case which the Government joined. Under the law, the Government is required to give the defendants credit against any judgement or settlement obtained in the civil False Claims Act action for the \$1,000,000 in restitution paid in the criminal case. This represents a significant portion of the recovery that the Government is likely to obtain. Thus, unless the False Claims Act provides that a qui tam plaintiff is to share in recoveries obtained in criminal cases as a result of a qui tam plaintiff's information, qui tam plaintiffs like our client may receive reduced recoveries solely because the evidence of fraud that they disclosed was so strong that it resulted in a criminal conviction and payment of restitution.

Moreover, in this case, the Department of Justice has agreed to allow the Department of Defense to proceed to negotiate an administrative settlement with the defendants for damages resulting from the defendants' fraudulent activities. It is likely that the administrative settlement will be obtained before the civil false claims case is concluded. If this occurs, the Government also will be required to give the defendants credit against any false claims judgment or settlement obtained for the monies paid out in the administrative settlement. Again, this may well result in an arbitrary and unfair diminution of the qui tam plaintiff's eventual recovery, unless the statute is amended to provide that the qui tam plaintiff shares in this administrative recovery.

This same problem is recurring in at least two other cases we are presently pursuing. In the first case, after meeting with our client, we immediately disclosed the information he provided to us to the criminal division of the U.S. Attorney's Offices because there appeared to be a pressing need for the government to execute a search warrant before records were destroyed. A search warrant was in fact executed and valuable records were recovered. Although we filed a qui tam action shortly

thereafter, it is likely that the criminal case will be concluded before the civil action. If the Government obtains restitution in the criminal case, as is likely, the amount of money obtained should be included in any recovery obtained by the qui tam plaintiff in the civil action.

In another case, we also expect that criminal and civil false claims actions will be proceeding simultaneously, with the criminal case likely to conclude first. In this case, although the conduct at issue is egregious, it may be difficult for the government to prove damages. Thus, the focus of both the civil and criminal cases will be on obtaining penalties, namely criminal fines and civil forfeitures. However, under the recent Supreme Court decision in U.S. v. Halper, 109 S.Ct. 1892 (1989), the government may not recover civil forfeitures which are penal rather than compensatory in nature, if fines or imprisonment have already been imposed for the same conduct in a criminal proceeding. Thus, in the case at hand, the qui tam plaintiff may not recover anything, despite the valuable information he provided to the government, if the criminal case is resolved first.

To prevent this unfair result we urge that the Act be amended to clarify that the recovery to the qui tam plaintiff includes funds recovered in other proceedings that were "started" by the qui tam plaintiff and that were based on the same facts and allegations set out in the qui tam complaint.

Although this is an oversight hearing on the implementation of the qui tam provisions to date, I firmly believe that their potential has barely been tapped. And I would like to conclude my testimony by looking to the future.

While much of the testimony here today has been about defense procurement and medicare fraud, the Act is not so limited in scope. Since the Act can recover funds and deter fraud any place the Government spends money, you only have to look at the federal budget to identify dozens of areas where qui tam actions would be appropriate. For example, we spend millions of dollars each year in housing and farm subsidies, on public works projects, on small business loans, and environmental clean up. Similarly, the False Claims Act applies almost anywhere the Government collects funds. For example, we are about to file our first customs case, charging that a foreign corporation underpaid its import duties.

The only impediment to expanding the application of the Act is a practical one. If individuals do not know about the Act, they can not use it. While there are ongoing private efforts to publicize the Act and educate the public, the Government should also play a role in this process. Public awareness could be raised by something as simple as requiring those receiving federal funds

to post a notice describing the qui tam provisions on the company bulletin board.

Widespread awareness of the Act and its qui tam provisions is important not just for the recoveries they bring into the Treasury, but more importantly for the fraud they deter.

In Dr. Michelson's case, for example, the total recovery to the Treasury will approximate \$600,000. The contribution his actions have made to the taxpayer, however, far exceed this sum. As you can imagine, this medicare fraud case has been widely reported in professional journals and is well known within the select ophthalmological community. The message the case carries with it is clear: No one should falsify medicare bills and plan to escape detection because the HHS medicare auditors may be overworked.

This message is now being heard in the defense industry. Past practices of taking advantage of the Government with little risks of detection are changing. This effort must continue. No recipient of government funds, no defense contractor, no importer ought to entertain the thought of fraudulently profiting at taxpayers' expense. The qui tam provisions of the False Claims Act provide a powerful, pervasive and effective mechanism to remove the temptation of dishonesty and help ensure that the Government recovery of wrongfully obtained funds by fraud be recovered.

Thank you.

Mr. FRANK. Dr. Michelson.

STATEMENT OF PAUL MICHELSON, M.D.

Dr. MICHELSON. Good morning. My name is Paul Michelson. I am an eye surgeon, practicing in La Jolla, CA.

In 1977, I left a practice and affiliation with Harvard Medical School to move to southern California, where I took a position with a prestigious multispecialty medical group. In the mid-1980's, I discovered that a colleague was doing unnecessary surgery and billing fraudulently. This ophthalmologist was performing infrequent procedures with dramatic frequency. I felt compelled to investigate and reviewed some of his medical records.

I learned that he performed laser procedures to treat patients with secondary cataracts and glaucoma but billed Medicare for more expensive invasive surgical operations. Most troubling to me as a physician, however, was the discovery that this doctor had subjected his trusting, mostly elderly patients to dangerous treatments for glaucoma without having first attempted to treat them with simple, safe eyedrops and, in other instances, without having established a definite diagnosis.

Because of the risks involved, lasers are used to treat the common type of glaucoma only after maximum tolerated medical therapy has failed. Notwithstanding this standard of practice known to all, my sampling of records proved that this colleague had repeatedly violated these guidelines. In many instances, he had treated unsuspecting patients who did not even have glaucoma. In each case, the patients and Medicare were billed over \$1,000.

My efforts to correct the situation internally failed. I was forced to consider alternatives. I knew, however, of well-publicized instances in which doctors and medical organizations had attempted to curtail unethical or illegal actions by errant colleagues, only to find themselves the objects of truly punitive legal retribution by the accused party. I was certain that I, too, would expose myself to a potentially ruinous defamation or restraint of trade case in the event the authorities failed to act conclusively and expeditiously.

Had I reported him to authorities, I could then only hope that an investigator had the opportunity and the inclination to pursue my allegations, and that he or she would possess sufficient understanding of my specialty to appreciate the magnitude of the violations. To my knowledge, such investigations rarely, if ever, succeeded.

Fortunately, while searching for a solution, I read a newspaper article about the recent 1986 amendments to the Federal False Claims Act. I learned that this act would guarantee me the right to my own legal counsel, require that the authorities investigate promptly, permit me to—

Mr. FRANK. Dr. Michelson, we know what the act requires. I mean, we wrote the act.

Dr. MICHELSON. OK. Sorry.

Mr. FRANK. Go ahead.

Dr. MICHELSON. OK. Because the act allowed me with my attorneys to participate, I did find enough confidence to proceed. My assessment that I would be an integral part of this action was certainly correct. The case was filed against the doctor and his em-

ployer in April 1987. I spent hundreds of hours assisting Government investigators and prosecutors interpreting innumerable medical records. In September 1987 the Government joined the case and my attorneys, working hand in hand with the Government, obtained a settlement from the employer in April 1988. The Government's portion was returned to the Treasury and I donated my share to charity: To Taxpayers Against Fraud to support their work; to my alma mater, Johns Hopkins; and to support programs in medical ethics and vision research.

We are now finalizing a settlement with the doctor, and again I intend to donate my portion of the recovery to charity.

The False Claims Act worked well to resolve this particular instance of unethical conduct and Medicare fraud. In return for an investment of my time and expertise, the *qui tam* provisions allowed me to stop abusive and dangerous medical practices and the taxpayers to recover substantial funds.

Also, I believe the publicity generated by this action will deter others. With the False Claims Act operative, any participant in the medical care system can help to insure its integrity and the public's interest.

My colleagues have been uniformly enthusiastic in their support of my actions. The overwhelming majority of physicians believe as I do. We bear the major responsibility for safeguarding the integrity of the medical profession. Only we, as peers, can properly and effectively monitor each other. The amended False Claims Act has given us a potent instrument with which to do so.

Thank you.

Mr. FRANK. Thank you.

[The prepared statement of Dr. Michelson follows:]

PREPARED STATEMENT OF DR. PAUL MICHELSON

My name is Paul Michelson and I am an eye surgeon practicing in La Jolla, CA. When I became a physician, I assumed an ethical responsibility to practice the highest standard of medicine, to act in the best interest of my patients and to promote sound medical practices. Five years ago, I discovered that a colleague was performing unnecessary procedures and unsafe experimental treatments on his patients and billing Medicare, other insurance carriers and the patients for these treatments. Faced with unequivocal evidence of these practices, I felt compelled to stop my colleague from exploiting and endangering his mostly elderly patients. The False Claims Act Amendments of 1986 gave me the opportunity and confidence to confront this troublesome and agonizing situation.

In 1977, I left a practice and affiliation with Harvard Medical School to move to Southern California and take a position with a prestigious multi-specialty medical group. By the mid-1980's, I began to suspect that a fellow ophthalmologist was engaging in a number of irregular medical practices. As a junior member of the group, this particular colleague saw fewer patients yet generated more income and performed more complicated, typically infrequent procedures with dramatically unusual frequency. My suspicions were confirmed when I reviewed some of his medical charts and when his secretary suggested to me that I, too, could make more money if I, like my colleague, billed simple laser procedures as invasive surgeries and billed a variety of other minor office procedures as major operations.

I subsequently conducted a thorough review of some of this colleague's laser cases. I compiled a list of 37 of the patients who had received laser treatments from my colleague and (1) examined their medical records to see what procedures had actually been performed, and (2) checked billing records to see how the procedures had been charged to insurers. From this comparison, I learned that this doctor frequently performed laser procedures to treat patients with secondary cataracts but billed Medicare for invasive surgical treatments that would require more time and care, an operating room and staff and anesthesia services. The Medicare reimbursement

for the laser procedure actually performed would have been about \$344, while the reimbursement for the surgical procedure billed was in excess of \$1,000. Similarly, my colleague used the laser to treat glaucoma patients for which he would have been reimbursed by Medicare about \$600. Instead, by billing these glaucoma laser treatments as invasive surgery he gained more than \$1,000 reimbursement.

One of the most disturbing discoveries that compelled me to act, however, was the realization that this doctor had subjected patients to potentially dangerous, expensive laser treatments for glaucoma without having first attempted to treat them with simple, safe eye drops and, in other instances, without having established a definite diagnosis of glaucoma. Because of their known and potential risks, lasers are used to treat this common type of glaucoma only after maximum tolerated medical therapy has failed. The American Academy of Ophthalmology, and the medical group itself, has promulgated clear standards indicating that laser therapy for glaucoma is appropriate only when medication has failed. Notwithstanding these standards of practice known to all, this small sampling of records proved that my colleague had repeatedly violated these guidelines and performed laser therapy on patients who had not been appropriately treated with medications, and in many instances on patients who did not even have glaucoma. In each case the patients and Medicare were billed in excess of \$1,000.

When my efforts to confront the situation internally failed, I was forced to consider the alternatives. Unfortunately, for a variety of reasons, the underfunded and understaffed California Board of Medical Quality Assurance was widely regarded as often ineffective and notoriously slow. I had also known of a number of well publicized instances in which doctors and medical organizations had attempted to curtail unethical or illegal actions by errant colleagues, but instead had found themselves subject to truly punitive legal retribution by the accused party. I was certain that I, too, would be exposing myself to a potentially ruinous defamation or restraint of trade case in the event the Board failed to act conclusively and expeditiously. While I was confident that I could ultimately prevail, the time, effort and expense that such litigation would require might not be supportable with a seriously compromised or even lost practice from which to maintain my livelihood. And, there was no assurance the unethical doctor would ultimately be called to account.

I also considered reporting my colleague to Medicare authorities. My role in such a process would have been simply to present my accusations and information. I would then hope an investigator had the opportunity and inclination to pursue my allegations and possess the sophisticated understanding of my specialty to appreciate fully the magnitude of the violations. Given my doubts that such a report would stop these abuses, the reports in our professional literature that such investigations rarely succeeded, and, again, the considerable threat of retribution in the form of punitive litigation, I sought other approaches.

Fortunately, while I was searching for a solution, a newspaper article about the recent 1986 amendments to the False Claims Act was brought to my attention. I learned that the False Claims Act would guarantee me the right to my own legal counsel, would permit me to participate fully in the development of the evidence and the litigation, would require that the authorities promptly investigate my allegations and would provide court supervision of the progress. Because the act allowed me, with the assistance of my attorney, to take part in the process, I had sufficient confidence in the outcome.

My assessment that I would be an active and integral part of the false claims action was correct. The case was filed against the doctor in question and his employer in April 1987. I was immediately called upon to spend hundreds of hours to aid Government investigators and prosecutors, reviewing and interpreting innumerable files and medical records. In September 1987, the Government joined the case, and my attorneys worked hand in hand with the Government lawyers. In April 1988, the employer settled the case with the Government. The Government's portion of the settlement was returned to the Treasury and I donated my share to charity: To Taxpayers Against Fraud to support their admirable work, to my alma mater, Johns Hopkins Medical School, to support programs in medical ethics, and to national vision research efforts. We are now in the process of finalizing a settlement with the doctor and again I intend to donate my share of the recovery to charity.

Did the False Claims Act work to resolve this particular instance of unethical conduct and Medicare fraud? The answer is an enthusiastic yes. In return for a considerable investment of my time and technical expertise, the *qui tam* provisions offered me an opportunity to stop abusive and dangerous medical practices and allowed the taxpayers to recover substantial funds. More importantly, in the long run, I believe that the publicity generated by this false claims action has and will continue to

deter others. With the False Claims Act operative, all participants in the medical care system can help to insure its integrity and best serve the public.

My colleagues have been uniform in their support of my actions. The overwhelming majority of physicians believe as I do that we bear the frontline responsibility for safeguarding the integrity of the medical profession, and that only we as peers can properly and effectively monitor each other. The amended False Claims Act has given us a potent instrument with which to do so. Thank you.

Mr. FRANK. Mr. Carton.

STATEMENT OF JAMES CARTON, MOORPARK, CA

Mr. CARTON. Good morning. My name is Jim Carton and I am a *qui tam* plaintiff in an action pending in Los Angeles, CA, against Litton Systems, Inc. About a year ago, the Government had decided to join the case and has estimated that the actual damages to the Government are somewhere between \$90 and \$100 million. I am here today to tell you about my story and my experience with the False Claims Act, and also, hopefully, to give you some insight into the life of a *qui tam* plaintiff.

Between 1984 and 1986, I was employed as the technical director for Litton Computer Services. Litton Computer Services is an organization within the Litton Systems organizational structure, and it was formed many, many years ago to provide computer services to Litton Systems defense divisions.

Sometime after it was formed, it embarked on a sales program where it marketed the same computer services that it was providing its defense divisions to private commercial customers. In 1986, another Litton employee and I were asked to do a profitability study of these commercial sales from the Litton Computer Services at the Woodland Hills Data Center. As a result of that study, we found that Litton was using Litton-developed customized software that created a mechanism, very well hidden in their billing process, that resulted in overcharge to the Government.

When we found this situation, we reported it to our immediate management. We reported it to division management. It was interesting at the time because there was very wide attitudes about it. Management attitudes ranged from being appalled and upset, concerned, and even amazed that such a cost misallocation practice was in effect, to attitudes ranging from an air of confidence that the overcharges would never be discovered. Another was, basically, "Well, why don't we just enhance on what we are already doing." The reason that this was being put forward and suggested was because at that time that data center was not meeting its profit targets, so the suggestion was to cause the Government to be overcharged even further.

At that point in time, I was an employee. I felt I brought it to the proper people's attention. I went on with my other duties and assignments. I guess it was September 1986, I was approached by my immediate management to sign a document stating that I was not aware of any suspicious practices. I refused to do that. Out of that conversation, I became very upset. When the conversation finished, I called the GAO Hotline.

At this time, I had read maybe one or two articles in newspapers concerning false claims. The person at the other end, a government representative, was very polite and courteous to me, but he certain-

ly was not very helpful. I inquired as to the False Claims Act and I said, "How do I get started on this?" He said, "You need an attorney."

Mr. FRANK. What agency was this that you talked to?

Mr. CARTON. GAO Hotline—that I needed an attorney. I said, "Fine. Could you tell me who I could talk to?" and I was basically told that they don't make referrals, so I hung up. I kind of rationalized at that point that the problem was in the proper hands. They were going to look at it. I just needed to give the company a little more time to address this problem.

In December 1986, I left the company, on good terms, but I stayed in touch with a colleague. Through this person I found out that the president of the division had left. He was one of the people that I had the most confidence in to correct the problem. A few months after that, I found out through this colleague that Litton was making changes to its cost system, but at that point in time I felt that these changes were more cosmetic. They were meant to camouflage the real problem.

That left me with a dilemma. Until then, I could rationalize and say, "Just give them more time, they will take care of it," since everybody had been aware of this problem for well over a year. I didn't know where to turn. When I mentioned to my wife that I was going to go forward, she was very concerned for me. Her comments were, I remember very well, "Where are you going to get a job?" I work in southern California. The majority of the employers that would make use of my talents are defense contractors.

I was deciding I was going to go forward. At this time I read more articles on the False Claims Act and I also did some research at the library concerning the law. It seemed to give me the mechanism of having legal representation. Since and my first experience going to the Government was not very successful, I was very concerned. If I did go to the Government, I didn't want them just to call Litton and say, "Are you doing this?" They would say, "No. Who's accusing us," and then I would get tagged whistleblower with an unfounded allegation. So I wanted some participation and the False Claims Act has given me that.

At this point I contacted two legal referrals, one in Ventura County, one in Los Angeles County, and asked for people that were familiar with the False Claims Act. The types of attorneys that they were referring to me were attorneys that did contract law, apparently with the Government at the Navy bases at Port Hueneme and Port Mugu, and I ended up knowing more about false claims than they did. Fortunately, and quite by accident, I came across an article, Dr. Michelson's article, which mentioned John Phillips name. I called him.

I did not intend to give him my name or the name of the company. I just wanted to see what he knew about false claims. I was impressed. I volunteered the name of the company, and John was also aware of the other problems that Litton had with a different division in Pennsylvania. That impressed me. I went in to talk to him. Six months later our claim was filed under seal. The Government had our case, not just for 60 days, but it was almost an entire year of extensive investigation.

I put in a lot of hours. I have put in time reviewing documents, talking to consultants before the case was filed and under seal, after the case was given to the Government. Numbers of consultants were brought in. I put in a lot of time.

The False Claims Act, it is working, believe me. You gave me the ability to participate and you gave me a chance for financial recovery. The financial recovery, you might say, "Well, geez. It's more than adequate." I am going to get hundreds and hundreds of dollars an hour if you really add them all up. But it doesn't compensate me for the emotional stress that my wife has gone through and that I have gone through.

I mentioned to you very briefly about her concerns about my being able to obtain employment. That was one. I did not want to be a bystander. I did not want to be one of these people that see a crime perpetuated and then pay no attention to it. So you gave me protection for my job, you gave me a mechanism to come forward, you are compensating me. But I also want to say that compensation is good and it is keeping me involved. But, there is a lot of emotional stress.

I currently work for a defense contractor. It is very unnerving to have to tell your immediate manager that he is going to read about you in an article the following day. The worst day of my life was, really, was the day that my case was unsealed and made public. I walked from my car, going into the defense contractor's building, I did not know how my employer was going to take it. I did not know how my peers were going to take it. I didn't know how I was going to be received, whether I was going to be ridiculed or not. All right? What I found out was that I it was very well received. Not only by the people at my company, the defense contractor, but it was also well received in the community. People have gone out of their way to comment about it.

So you have given me everything that I really need to come forward. The False Claims Act is a good tool. You would have never found out about this fraud without it. This is my opinion. The recovery to the Treasury will be substantial, I mentioned that the actual damages are between \$90 and \$100 million. If you treble it and you look at the penalties, this is a pretty sizable case.

You have given me everything but one thing. I need more help from the U.S. attorney's office. They just seem to be so overloaded, in and out of the case, working a number of other cases, and the defense contractors know that. They are going to bank on that.

John Phillips mentioned earlier that they are on notice right now about the False Claims Act. I know a defense contractor that is very much aware of the False Claims Act and they are policing their own activities. It works. It works very well.

Thank you for having me.

Mr. FRANK. Thank you.

[The prepared statement of Mr. Carton follows:]

TESTIMONY OF JIM CARTON
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE
ON ADMINISTRATIVE LAW AND GOVERNMENT
RELATIONS

April 4, 1990

My name is Jim Carton and I am a qui tam plaintiff in an action pending in Los Angeles against Litton Systems Inc. ("Litton"). The Government has joined the case and has estimated that the actual damages at stake approach \$100 million. And, because actual damages must be trebled, our claim not including penalties could reach \$300 million.

If it were not for the 1986 Amendments to the False Claims Act, however, there would be no case and there would be no potential recovery for the Treasury. The type of fraud employed by Litton would have been virtually impossible for government auditors to detect on their own. And, without the protection the 1986 amendments afforded, neither I nor any other "insider" would have assumed the risks associated with exposing this fraud.

My background and technical expertise is in the area of data processing. In September of 1984, I was employed by a Litton organization, Litton Computer Services ("LCS") as Technical Director of LCS. I left Litton's employment on good terms in December of 1986.

LCS was originally established to provide computer services to the Government through other Litton defense divisions. The total Government payment to the Litton defense division would then include payment for the computer services provided by LCS.

Later, LCS began a new sales program through which it would also provide computer services to commercial customers using the same computer mainframes that provided computer services to the Government. In order to increase its profits from sales to commercial customers, LCS developed a hidden mechanism whereby it shifted computer costs properly allocable to these commercial customers to the Government. The following is a general description of the way in which this mechanism operated.

The calculation of costs allocated to each LCS customer was based on a mathematical formula known as a "billing algorithm." The algorithm -- which is used to calculate the amount of processing used by each LCS customer -- has three components: memory, input/output, and central processing unit time. Together, these three components comprise a computer resource unit ("CRU"). LCS allocated computer costs to each LCS

customer in accordance with the number of CRUs used by that customer.

To manipulate this cost accounting system and allocate a disproportionate share of costs to the government, Litton created a special "memory cap" for the majority of its commercial customers that it hid in its computer software program. The memory cap prevented the computer program from measuring memory usage for these commercial customers after a predetermined limit had been reached. As a result, the number of CRUs used by these commercial customers was grossly understated. Because costs were allocated to customers based on and in proportion to the amount of CRUs used, the net effect of the memory caps was to understate the amount of costs attributable to commercial customers and overstate the costs attributable to the government.

To illustrate this, assume that a commercial customer was provided with a memory cap that stopped recording memory usage once 100 units had been used. Next, assume that the same customer actually used a total of 6000 units and that the Government used 1000 memory units in connection with its separate contract during the same one-year period. In allocating costs, Litton, by imposing memory caps in its computer software system, failed to record the additional 5900 units of memory used by the commercial customer. When it came time to allocate costs to the Government based on actual usage, Litton figured the percentage of units used by the Government as against the amount of memory usage recorded for all customers, knowing full well that the amount recorded for the commercial customer was understated because of the application of the memory caps. In this example, Litton would allocate costs as if 91% the total memory use had been associated with computer use for the Government (1000 units used out of a recorded 1100 units) while in reality the government was responsible for only 14% of the total memory use (1000 units out of 7000 units).

At present we have not determined the exact total of inflated charges submitted to the Government. The Government's initial estimates, however, indicate that actual overcharges associated with improper cost allocation to the Government exceed \$90 million.

LCS's memory cap billing algorithm scheme would have been virtually impossible for Government auditors to detect, because the system was designed to prevent commercial customers' full computer usage, and therefore its associated costs, from ever being recorded or revealed to any outside auditor. However, in January 1986, I and another Litton employee, Ray Thor, were asked by LCS management to perform an analysis of the profitability of the LCS-WH commercial contracts. In the course of this study, we discovered the existence and function of memory caps and that Litton, though the use of memory caps, was charging

the Government for costs that should have been allocated to its commercial customers. We pointed out these problems to LCS' management. Some senior management officials seemed not to know of the misallocation of costs practice and appeared upset and sincere about correcting the situation. I later learned that other officials present at the meeting were participants themselves in the misallocation process. During this same period of time, I attended meetings where others were very concerned about achieving their profit targets rather than the legality of their actions, and wanted not only to continue the practice but also to enhance it.

In retrospect, my expectation that Litton would change its practice once the scheme was uncovered was naive. In the first place, Litton's whole scheme was premised on misallocating costs through the use of Litton-developed software. Litton could safely assume that the government auditors would never find the fraud. Second, because the pre-1986 False Claims Act contained no effective qui tam provisions, there was little likelihood that any Litton employee would reveal the fraud. Given these facts, I now believe that if any Litton official had tried to halt this lucrative cost shifting, that official would have risked his or her job.

It took me a long time to accept the fact that Litton really intended to continue the fraud. Over the next year and a half, I continued to check with a former colleague at Woodland Hills to see if management had changed its position. When I realized that Litton was not going to correct the problem unless it was forced to do so, I decided that I should do something.

With high hopes and the best of intentions, I called a Government anti-fraud hotline. I was extremely discouraged when the operator did not seem to care about my report. At that point I contacted two legal referral agencies in California but that did not help either. I read several newspaper articles regarding the False Claims Act and researched the law. Then my Litton colleague saw a newspaper article about Dr. Michelson's false claims case and we decided to pursue the matter with an attorney. We spent many months and dozens and dozens of hours working with our counsel preparing the case. Ultimately, my colleague decided not to go forward because he thought he might jeopardize some old family friendships with Litton employees if he sued Litton.

I also thought long and hard about whether I was ready and willing to take on one of the country's largest companies. In the end, I went forward because I was convinced that the 1986 amendments to the False Claims Act provided me with a process in which I had confidence that justice would prevail.

For example, I had confidence that the objective Government investigation provided by the Act would verify my

conclusion that Litton's actions were illegal. Because the Act guaranteed my own counsel, gave me a role in the process and provided for ongoing judicial oversight, I had confidence that my interests would be protected. For these same reasons, I had confidence that Litton would, in fact, be called to account for its illegal actions. Finally, I knew that at the end of this long road, I could receive a financial recovery.

While it is true that without the potential for a financial recovery I would not be a qui tam plaintiff, I do not view any recovery to me as "free money". By suing Litton for False Claims Act violations, I may have limited my professional options, particularly in a State where major employers are defense contractors. In addition, throughout the last three years, I have spent hundreds and hundreds of hours -- including time off without pay -- working on this case. I have attended dozens of meetings with attorneys and I have spent weeks reviewing and analyzing documents. With extensive discovery ahead of us and a July, 1991 trial date, I can only anticipate that the time demands on me will increase dramatically in the next 15 months. By the time the case is finally tried, I will have devoted 4-1/2 years of constant attention to this case.

Do the qui tam provisions work? From my perspective as a plaintiff they do. My case was filed in April of 1988. A year later, after an extensive investigation the Government joined the case. The case is being run jointly out of Washington and Los Angeles, with the lawyers in the Los Angeles U.S. Attorney's Office bearing the brunt of the hands-on litigation responsibility. The Government and my attorneys are working cooperatively to share the heavy litigation responsibilities and costs. This joint effort is particularly necessary because Litton is represented by three major law firms. With its platoon of attorneys, Litton has already filed four motions seeking to stay or dismiss the case. While the court has ruled against Litton on each and every occasion, the time and expense required to respond to these motions has been significant.

In closing, I would urge the Subcommittee to consider the two factors that I think will ultimately determine how successful the qui tam provisions are in fighting fraud.

First, there must be an adequate commitment of Government resources. As my own experience has shown, qui tam defendants will hire lawyers by the dozens. We have been able to respond only because at the time my case was filed, there were attorneys available in the Los Angeles U.S. Attorney's office ready and willing to pick up the ball and run with it. More recently, however, it has become clear that the growing false claims case load in Los Angeles is straining the resources available to pursue vigorously my case and other qui tam actions. Without sufficient resources available in the U.S. Attorneys

offices, defendants will almost certainly be able to delay, diminish or derail false claims recoveries to the taxpayers.

Second, unless the public knows about the qui tam law, they can't use it. I was lucky to stumble across the Act, but I firmly believe that there are others just like me, who know about fraud and want to stop it but don't know how. While I hope that my case will educate and inspire others to come forward, I think a concerted Government public education campaign could produce good, solid false claims cases that would return millions to the Treasury, and, more importantly, would deter others from defrauding the Government. The False Claims Act, along with its strengthened qui tam provisions, is a powerful tool for the Government and will produce very real benefits to taxpayers.

Thank you.

Mr. FRANK. I am delighted to hear that the current employer is as supportive. If would you care to mention them, they seem to me to be—if you don't want to mention them, that is fine. But it seems to me they are entitled to some credit because people would not have expected that. So please feel free.

Mr. CARTON. I work for Northrop.

Mr. FRANK. All right. They are entitled to credit because I think that goes contrary to the expectation.

I just have a couple of quick questions. The Government said that one of the things they needed was more time to study the case. Is that a problem from your standpoint, Mr. Phillips?

Mr. PHILLIPS. It is not a problem. The 60 days, we could see that reasonably being extended to 120 days. That number was designed to be flexible. If they show good cause, the courts always give them the time.

Mr. FRANK. Yes, Doctor?

Dr. MICHELSON. Could I just comment on that for a moment? One of the problems with peer review medically, and I suspect in other professions as well, is the problem of countersuits, these punitive retributions, and that time period may be a problem in that respect.

I can certainly understand the need from your side. But from the physician's standpoint, I mean, these people have been incredibly fast in filing restraint of trade or defamation suits.

Mr. FRANK. Well, I understand that. But do you think they would be more likely to do it in 120 days than 60?

Mr. PHILLIPS. It wouldn't make any difference.

Mr. FRANK. It seems to me, if they were going to file it in a retaliatory way, they would file first and try to substantiate it afterwards. So I am not sure, the way you describe it as a potential weapon against you, whether the time would be a major factor because it sounds as if they are doing it almost as a threat, aggravating you whether they win or lose.

Dr. MICHELSON. Well, the point is it does incur legal fees almost immediately, you know. I mean, even when it is totally frivolous. And we have, unfortunately, got precedents in Los Angeles.

Mr. FRANK. Right. But my staff reminds me that they don't get notice until that time period is over. So that wouldn't affect that.

Let me ask you one other question, because the case you talked about, Doctor, is the kind of case that the Inspector General of HHS was telling us he was unsure that is his authority. Did you—and this is for Mr. Phillips as well. Was the Inspector General involved in that?

Mr. PHILLIPS. Not the Inspector General's Office, but Health and Human Services.

Mr. FRANK. All right. Well, that confirms our views because that is the kind of case which we think they should be involved in and they are not.

Thank you. You have been very helpful.

Mr. FRANK. We will now hear from Mr. Budetti.

Mr. Budetti, I apologize that this has taken so long. Please get right to it.

STATEMENT OF PETER BUDETTI, M.D., J.D., HIRSH PROFESSOR OF HEALTH CARE LAW, GEORGE WASHINGTON UNIVERSITY, AND MEMBER, BOARD OF DIRECTORS, TAXPAYERS AGAINST FRAUD, ACCOMPANIED BY MARY LOUISE COHEN, ESQ., LOS ANGELES, CA

Dr. BUDETTI. Good morning, Mr. Chairman. Thank you very much for having me here. And accompanying me is Mary Louise Cohen, who is an outside counsel that serves taxpayers.

I can speak very quickly, and I will be delighted to. Let me just tell you very quickly what I am going to do.

Mr. FRANK. We will take in the record anything you want to submit.

Dr. BUDETTI. Thank you very much. My statement has been submitted.

I want to tell you a little bit about Taxpayers, then tell you a little bit about what—

Mr. FRANK. No. I don't want to know about your organization.

Dr. BUDETTI. OK.

Mr. FRANK. We are not here to talk about organizations. We are here to talk about legislation.

Dr. BUDETTI. OK. What we want to tell you is how we intend to use the False Claims Act in ways to build upon the kind of experiences that somebody like Dr. Michelson has had. One of the things that we think is a failing in the way that we go about going after fraud and abuse in health care is waiting for whistleblowers to come in. There are too few people like Dr. Michelson who are willing to take that risk and who have the evidence as well to back up their claims.

On the other hand, I spend a lot of time talking to physicians, and it is not at all uncommon for physician groups and other kinds of health care providers to ask me, "What are we going to do about the robber baron doctors out there who are out trying to milk the system and who are trying to get lots of money that they don't deserve?"

What we want to do in cooperation between taxpayers and GWU here in town is to set up a system that will more systematically look at what doctors are doing in order to identify people, so that you can get somebody like Dr. Michelson who knows fully well what is going on in the community and what his colleagues are doing in terms of trying to bill inappropriately, but who may not have the evidence. We have to put together panels of doctors like that and have them design a way to improve upon current methods of screening billing patterns and trying to collect information so that we can take the initiative in identifying fraudulent practices. We want to take advantage of the fact that a lot of physicians are willing to identify these practices but may not be able to serve as plaintiffs themselves in the suits.

We don't know how much is out there. Medicare is a very complicated area. We have every reason to believe that this is a very substantial problem out in the community. We have quotations from a number of people telling us about the extent of the problem. For example, just one quick quote from the former president of the California Medical Association, who is quoted in the Wall Street

Journal as saying that although he believes the majority of doctors are honest, at least 5 percent are out and out crooks. And my bet is that another 30 percent are overcharging in forms that vary from trivial to obscene.

That is a lot of money. There is a lot of money in Medicare. What we intend to do is to try to build upon the way the False Claims Act has worked with whistleblowers and to try to be more systematic about it.

And I understand your time constraints.

[The prepared statement of Mr. Budetti follows:]

PREPARED STATEMENT OF PETER P. BUDETTI, M.D., J.D., HAROLD AND JANE HIRSH PROFESSOR OF HEALTH CARE LAW, DIRECTOR, CENTER FOR HEALTH POLICY RESEARCH, THE GEORGE WASHINGTON UNIVERSITY, AND MEMBER, BOARD OF DIRECTORS, TAXPAYERS AGAINST FRAUD

TESTIMONY OF PETER BUDETTI

Mr. Chairman and Members of the Subcommittee, My name is Peter Budetti. I am a Pediatrician and Attorney and now hold the Harold and Jane Hirsch Chair as Professor of Health Care Law at The George Washington University. I am also the Director of GWU's Center for Health Policy Research, and serve on the Board of Directors of Taxpayers Against Fraud ("Taxpayers"). I am pleased to testify today on Taxpayers' behalf.

Immediately after passage of the 1986 Amendments to the False Claims Act, Taxpayers was founded by the Los Angeles based Center for Law in the Public Interest. The Center, which had worked closely with Congress on the legislation, wanted to make sure that at least a portion of the qui tam recoveries made possible by the 1986 amendments would be recycled back into enforcement efforts. Today Taxpayers is operated by an independent Board of Directors who all share a commitment to deterring fraud against the Government. Taxpayers' directors serve without compensation and Taxpayers' entire budget is dedicated to promoting and enforcing the False Claims Act.

The method Taxpayers uses to harness and recycle False Claims recoveries is simple. Taxpayers actually serves as a co-plaintiff in qui tam cases, currently numbering about a dozen. In each case, the individual "whistleblower," prior to filing the action, provided the members of Taxpayers' Board with extensive information about the facts underlying the False Claims violation. In return for sharing the case with Taxpayers, Taxpayers, to the extent it has available funds, assists in underwriting litigation costs and expenses including experts and consultants. Any net recovery Taxpayers receives through the case is then used by Taxpayers to support new qui tam actions. Each of the whistleblower plaintiffs Taxpayers is working with has enthusiastically endorsed our concept of investing a portion their qui tam recovery in new efforts to redress and deter fraud. The government auditors, investigators and prosecutors we have worked with have been similarly supportive of our efforts.

Before Taxpayers participates in any litigation, each member of its Board reviews a litigation memorandum prepared by its counsel, the proposed complaint, disclosure statement, and documentary evidence. Taxpayers only enters cases where the qui tam whistleblower is credible, where there is substantial evidence to support the allegations and where the action serves the public interest. In order to evaluate potential claims, Taxpayers frequently consults with outside experts. Taxpayers monitors the course of the litigation and through counsel works closely with its co-plaintiffs.

So far, of the five Taxpayers' cases that have been unsealed, the Government has formally joined four, and it is working cooperatively on an informal basis with the qui tam plaintiffs in the fifth matter. The potential recoveries to the Government in these five cases alone exceed \$500 million. The Taxpayers cases still under seal again represent potential recoveries to the Government running to hundreds of millions of dollars.

In addition to its work at the federal level, Taxpayers worked with the California legislature to develop and enact a state False Claims Act. While the bulk of Taxpayers' cases are directed at defense procurement fraud, the Act's potential application is much

broader. In fact, to determine where the Act could benefit the Treasury -- and the American taxpayer -- you need only look at the federal budget. Because the Act prohibits any false claim for payment by the Government as well as filing a false statement to avoid payments to the Government, the False Claims Act applies in any area where the Government spends or collects funds (with the exception of the Internal Revenue Service).

As a lawyer and a doctor, my primary area of concern is Medicare fraud. This year we will spend \$87 billion on Medicare, and estimates are that at least 10% of that or nearly \$9 billion will be paid on fraudulent claims -- to doctors, hospitals, laboratories, nursing homes and medical supply houses. In an age of budget cutbacks and spiralling medical costs, we can ill afford this 10% fraud tax.

We also have an affordable housing crisis. Every day the number of homeless individuals and families is rising. Yet, as the recent HUD scandal indicates, precious federal housing dollars have systematically been spent illegally and inappropriately.

As part of the 1986 amendments, the Act was changed to make clear that knowing underpayment of monies owed to the Government violates the False Claims Act. With the amendments, importers who falsify customs statements are liable under the False Claims Act. Because the war on drugs has placed large demands on Customs resources, and the volume of imported goods is steadily increasing, the False Claims Act could play a particularly useful role in detecting and deterring Customs fraud. Government officials in other areas have recognized the beneficial role that the Act could play. For example, the Interior Department is responsible for leasing of federal mineral lands and receiving royalty lease payments. The Department's Inspector General was recently quoted in the ABA Journal noting that he and his colleagues felt "warm and fuzzy about the law."

As the Labor Department's Inspector General noted, the Act encourages whistleblowers to come forward to reach carefully constructed and well hidden fraud that would be undetectable by government auditors.

The only serious limitation on the ability of the False Claims Act to reach these whistleblowers and truly become a government-wide anti-fraud weapon is the lack of public awareness about the Act. In the 3-1/2 years that Taxpayers has been working with the Act and with qui tam plaintiffs, it has become evident that the availability of the qui tam remedy is still largely a well kept secret. In almost every one of Taxpayers' cases, the qui tam plaintiff learned of the Act's existence by happenstance -- usually through a news article or a television interview. If the Act is ever to live up to its potential, a systematic method of public education must be developed.

The most frequent recipient of whistleblower inquiries and fraud is the United States Government. Yet in our experience, individuals calling Government hotlines or other government offices frequently come away discouraged and believe that their information will not be acted upon. If, instead, there were an effort made by these various government entities to inform individuals about the existence of a qui tam remedy, I believe that the number of solid false claims cases providing substantial recoveries to the American taxpayers would skyrocket. So Mr. Chairman, I respectfully recommend that you

request the General Accounting Office to consult with the various departmental Inspectors General, other officials and individuals with appropriate expertise to develop recommendations to Congress on how to establish a system to provide information to the Public and the False Claims Act's qui tam provisions.

For its part, in addition to supporting false claims litigation, Taxpayers is also working to publicize the Act. One area where Taxpayers hopes to play a major role in educating the public is Medicare fraud. In my capacity as Director of the Center for Health Policy Research at GWU, I am working to develop a national conference on the application of qui tam suits to Medicare. Through this conference, we hope to develop a plan for a more systematic approach to qui tam cases than waiting for whistleblowers to take the initiative. First, we will be identifying groups of individuals who work in areas such as medical staff support, billing and claims, and medical office and group management, to inform them about the opportunity to bring their concerns to our group at GW and Taxpayers. In addition, we hope to work with the Office of Inspector General Kueserow, the HCFA and private insurance carriers to develop ways to screen billing records for patterns of fraud and abuse. I hope in the not too distant future to be able to report back to the Subcommittee that this venture has been successful.

Thank you, Mr. Chairman.

Mr. FRANK. Well, my question is do you need statutory changes to do that? Can you do it, I mean, absent—who is your plaintiff going to be? Or is it you don't need to have a plaintiff? How will you deal with that?

Dr. BUDETTI. No. I am not here to discuss specific statutory changes with you, Mr. Chairman, but just to talk about the way that we see the law being implemented. At this point we don't believe that there are specific statutory changes, although some of the things that were discussed earlier—

Mr. FRANK. You think you can do what you are planning to do, which sounds like—

Dr. BUDETTI. We will need and we have every reason to expect the cooperation of lots of officials in HHS as well as in the private sector. But statutory changes, no.

Mr. FRANK. But this current law would support doing that? Well, who would your plaintiff be?

Dr. BUDETTI. Our plaintiffs will be both Taxpayers Against Fraud, which is this group that is a coplaintiff and which recycles proceeds from plaintiffs such as the two who just testified to you, as well as either individuals, Medicare beneficiaries themselves who recognize that—

Mr. FRANK. And you will get the information from people who don't themselves want to be plaintiffs. Is that the way it is going to work?

Dr. BUDETTI. That is correct.

Mr. FRANK. But you will get that information in a usable form. Will they be willing to be witnesses, these people?

Dr. BUDETTI. In general, I believe they would be much more likely to be witnesses than they would to be plaintiffs themselves.

Mr. FRANK. So that deals with, particularly, people in the medical profession who might be vulnerable to the kind of harassment and lawsuits that Dr. Michelson mentioned?

Dr. BUDETTI. That is exactly right. Let some of them who—

Mr. FRANK. And if they are subpoenaed in as witnesses, it is much harder to make that a basis for a lawsuit against them than if they became plaintiffs.

Dr. BUDETTI. Correct. And, if they just serve as expert consultants to us as we develop the improved computer systems to screen billing records they won't have to appear at all.

Mr. FRANK. No. No. I think that is a very creative use of them. It strengthens our view, however, that we have got to deal with what the Inspector General sees as a defect in his authority with regard to this case. Because the kind of cases you are talking about are exactly the kind of cases the Inspector General tells us he doesn't think he can deal with. So we are going to have to have that clarified by the Government Operations Committee.

Dr. BUDETTI. That is correct, Mr. Chairman. My experience in my previous life here on the Hill bears out some of the Inspector General's concerns. There are cases that I know that have been taken away from his jurisdiction because of that dispute.

Mr. FRANK. Well, that is one of the important things to come out of this hearing. Is that we will make sure that the Inspector General's jurisdiction is coterminous with the rights of the Federal Government. If there is a Federal claim, then the Inspector General

ought to be available to investigate it. And I don't think that was an intentional dropout, so I will pursue that.

Well, I thank you.

Dr. BUDETTI. Thank you.

Mr. FRANK. We will, obviously, be interested if someone raises obstacles to this. Please let us know because it doesn't sound to us like there ought to be any, and we would be very pleased to try and continue them.

Let me just say I am delighted to have a hearing in which the basic news is good, and I appreciate what the plaintiffs have said.

I do want to add that, through staff, we did make some effort to invite representatives of some of the industries that have been sued. We asked to see if any people who had done defense counsel work wanted to testify. And I say that because people might wonder where the other side was in this debate. We asked them. They were not eager to come forward. Obviously, we didn't ask everybody who might have. But I will say for those who might be monitoring this or reading this record, we will certainly be glad to listen if anybody wants to come in and tell us they think this is causing problem.

I just want to note for the record the things that we weren't told today. We weren't told by anybody that frivolity was a problem. Not by the Justice Department and not by anybody that we talked to, so we do not, apparently, have a problem with frivolous lawsuits.

The problem of an interference with criminal prosecutions, the Justice Department assures us, remains a potential one at this point which they think they can handle. We have not apparently lost any criminal prosecution that we should have had because of the use of this statute. And, in general, what we have heard is that it is working well. It can be improved in a couple of places.

But I think at this point I would just like to give credit to Mr. Glickman, a former member—a former chairman of this subcommittee, he is still a member; Mr. Berman; a former Member of the House, Mr. Kindness, who was the ranking Republican at the time; and Senator Grassley and Senator Levin on the other side, because they were the ones who pushed this through. There was some question about it. I think it was well done and it appears to be working well.

I have nothing further, and the hearing is adjourned.

[Whereupon, at 12 noon, the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

MAYER, BROWN & PLATT

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WRITER'S DIRECT DIAL NUMBER

FILE NUMBER

202/778-0620

June 11, 1990

The Honorable Barney Frank
House Judiciary Committee
Subcommittee on Administrative Law
and Government Relations
U.S. House of Representatives
B-351A Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

We have been approached by those involved in defending qui tam actions under the False Claims Act and have been asked for our opinion on how the administration of that Act might be made fairer and more efficient. Thank you for giving us this opportunity to supplement the record of your April 4, 1990 Oversight Hearing on this subject.

Prevention of fraud in connection with defense and other government procurement programs is a universally shared objective, and the detection and punishment of fraud are essential tools in striving for effective prevention. No one with whom we have had discussions questions these principles. We certainly do not.

However, we and many others believe that instilling and ensuring high ethical standards can make a more valuable contribution to the prevention of fraud than punishment, no matter how vigorous. You do not produce quality products by relying upon inspection at the end of the assembly line, and the same is true for the prevention of fraud.

The Department of Defense and many of its contractors have made and are making substantial commitments to raising ethical awareness to higher levels throughout their organizations. This effort is deserving of nurture in the fashioning of policies and rules for investigations and punishment.

MAYER, BROWN & PLATT

The Honorable Barney Frank
June 11, 1990
Page 2

Moreover, we and many others believe that encouraging contractors to voluntarily disclose misconduct of which they become aware, and to cooperate with the Government in its investigations, also have the potential for making a more valuable contribution to prevention of fraud than reliance exclusively upon government investigation and punishment. Most of our income taxes are voluntarily reported and paid. Punishment should be fashioned so as to encourage and reward voluntary disclosures and full cooperation.

We cannot help but note that despite the most comprehensive and aggressive programs put in place by some companies to discourage, detect and punish company employees found guilty of criminal conduct, there will always be those who believe they can beat the system. Their motivation may, on first glance, appear to benefit only the organization. However, closer analysis often discloses a personal interest on the part of the law-breaking employee to further personal interests, whether through hopeful receipt of higher compensation, promotion or other favorable personnel action. To significantly punish a company that has a comprehensive and aggressive program to prevent and detect fraud under these circumstances simply does not make sense to us.

Therefore, for example, we suggest that amendments to the False Claims Act be considered that would permit reduction or elimination of penalties, when the contractor can demonstrate that it has effective programs for instilling and ensuring ethical awareness and compliance, and when the contractor has voluntarily disclosed the matter and cooperated fully with the Government.

Turning to qui tam actions under the False Claims Act, which are increasingly arising in connection with procurement programs, several concerns have been identified during our discussions to date.

1. Qui tam actions are proving to be burdensome and time consuming to all the parties: relators, the Government and contractors.
2. A frequently heard complaint is that qui tam actions are placing excessive demands on available investigative resources -- that priorities are being set by the actions, not through rational analysis and allocation by responsible government officials.

MAYER, BROWN & PLATT

The Honorable Barney Frank

June 11, 1990

Page 3

3. Qui tam actions threaten predictability in government procurement programs. At the heart of many qui tam actions is a contract dispute as to the meaning or application of an acquisition statute, regulation or contract provision. The Contract Disputes Act of 1978 provided a judicial process for these disputes that facilitates their resolution impartially by experienced tribunals, and that provides predictability to the contracting community generally. This will not be true for qui tam actions tried before judges and juries across the country. Without predictability and uniformity in the interpretation of contract terms and conditions, the contracting parties cannot accurately price the contracts so affected.

We are continuing our review of these and various other potential issues that have been identified concerning the False Claims Act and its administration. We hope to include in this process cooperative, informal discussions with affected government agencies, representatives of the qui tam plaintiffs' bar, and members of the staff of your subcommittee and others in Congress who are following these issues. After this review process has progressed substantially, we hope to be in a position to submit concrete proposals for reform and improvement of the mechanisms for preventing, detecting and punishing false claims against the Government. At that point, we would appreciate the opportunity to meet with you and other interested members of the House and Senate.

It is our goal to strengthen legislation to create a process that:

- o detects more fraud;
- o processes fraud allegations more efficiently; and
- o resolves these disputes in a fairer and less litigious manner

We do not contemplate proposals that would discard the qui tam mechanism or that would unreasonably undermine the role and rights of responsible qui tam plaintiffs in helping to uncover and prosecute frauds. But we do hope to be able to propose revised procedures that would promote better cooperation between defense contractors, their employees and the Departments of Defense and Justice to detect and prosecute fraud. We think there is a need for a mechanism which ensures that the most

MAYER, BROWN & PLATT

The Honorable Barney Frank
 June 11, 1990
 Page 4

competent investigators and auditors serve both Defense and Justice on these matters and speak with one voice to expedite investigations. For example, perhaps it would also be valuable to create a centralized office with false claims expertise in order to expedite the government's decisions in some of these cases.

For identification purposes, Mark Gitenstein was, until April of 1989, Chief Counsel of the Senate Judiciary Committee and before that Minority Chief Counsel of the Committee at the time the Senate enacted the current version of the Qui Tam statute. Before joining Mayer, Brown & Platt, Stephen Shapiro served for five years in the Solicitor General's Office, first as an Assistant to the Solicitor General and then as Deputy Solicitor General where his jurisdiction included most of the Government's business cases. Andrew L. Frey served fourteen years in the Solicitor General's Office and spent the majority of that time as the Deputy Solicitor General in charge of the Government's criminal litigation.

Robert D. Wallick is a Past Chairman of the Section of Public Contract Law of the American Bar Association and Past President of the Federal Circuit Bar Association.

Respectfully submitted,

/s/ Robert Wallick

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