Deanne Benos
Domestic Policy Council
Box 6 of 12

John Schmidt Briefing Book Volumes 1-3

JOHN SCHMIDT BRIEFING BOOK
May 1994

JOHN SCHMIDT
BRIEFING BOOK
BOOK 1 of 3

33. Philadelphia Absentee Ballot Controversy
34. Affirmative Action/Quotas
35. In-School Segregation
36. Hate Crimes Legislation
37. Crown Heights
38. Abortion Clinic Legislation
39. Nondiscrimination on the Basis of Sexual Orientation Employment Policy
40. Religious Freedom Restoration Act
41. Podberesky v. Kirwan
42. Lee and United States v. Macon Co. Board of Education (Randolph County Alabama)
43. VMI case
44. Citadel case
45. Mississippi Higher Education case -- Ayers and United States v. Fordice
46. ADA Enforcement
47. Mortgage Lending
48. Denny's Public Accomodation Settlement

C. IMMIGRATION

49. Asylum Reform
50. Border Control
51. Crime Bill Provisions/Trust Fund
52. Criminal Aliens
    - Institutional Hearing Program
    - National Criminal Alien Tracking Center
    - DOJ Grants to States
    - Mexican Transfer Treaty Program
    - INS Violent Gang Task Force
    - State Criminal Alien Assistance Program
    - Urban Institute Grant
53. EEO issues
54. Employer Sanctions
55. Executive Office for Immigration Review
    - Status of Hiring Efforts
56. Fingerprints
57. Flood Tunnel
58. Gay Issues/Gay Games/Toboso
59. Haiti Migration Policy
60. Haitian Refugees/Cuban Refugees
61. Lawsuits by the States
    - California; Florida; and Arizona
62. Mariel Cubans
63. Mass Immigration Emergency Plan
64. Statistics on Illegal Immigration

D. ENVIRONMENT DIVISION ISSUES

General issues

65. Environmental Justice issues
66. Native American issues
67. International Activities
68. Northern Spotted Owl litigation
69. Federal Facility Compliance with and Liability under Environmental Laws
70. Mining Law Reform
71. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
72. Clean Water Act Reauthorization
73. Safe Drinking Water Act Reauthorization
74. Cost-Benefit Analysis
75. Unfunded Mandates
76. Takings issues

Environmental Crimes Issues

77. Environmental Crimes Section Oversight and Internal Investigations
78. Rocky Flats Prosecution
79. Bluesheets (amendments to the U.S. Attorneys' Manual)

E. ANTITRUST

80. International Competitiveness
81. International Antitrust Enforcement Program
82. Health Care
83. Defense Industry Downsizing
84. McCarran Ferguson Reform
85. Newspaper Preservation Act
86. Vertical Price Fixing

F. TAX DIVISION ISSUES

87. Debt Collection
88. International Tax Enforcement Efforts
89. Bankruptcy Litigation
90. Unitary Tax Litigation -- Barclay's Bank case
91. Motor Fuel tax evasion
92. Shift of Resources from Financial Institution Litigation to Health Care Fraud
93. Electronic Filing
94. Cash Fee Reporting by Attorneys

G. INDEPENDENCE/OPENNESS POLICIES

95. New FOIA openness policy
96. Pending FOIA legislation -- S. 1782
97. FOIA consultation process for White House Records

98. Dow Jones & Co. v. DOJ
99. Leach v. RTC & OTS
100. Contacts with White House and Congress

H. UNITED STATES TRUSTEE PROGRAM

101. S.540, "Bankruptcy Improvements Act of 1994."
102. Personnel/Administrative issues

I. CRIMINAL DIVISION ISSUES

103. Federal Prison System
104. Abortion Clinic Violence
105. Health Care Fraud
106. Financial Institution Fraud
107. Whitewater
108. Webb Hubbell/Rose Law Firm
109. White House Travel Office
110. Demjanjuk
111. Inslaw
112. Contacts with Represented Parties
113. Public Housing Sweeps Policy
114. Prosecution of Branch Davidians
115. Asset Forfeiture
116. Gun Control/Assault Weapons Ban
117. Mandatory Minimum Sentences
118. Child Pornography
119. Digital Telephony/Encryption

J. CRIME BILL AND RELATED ISSUES

120. Status and Overview
121. Funding of the Crime Bill
122. Police
    a. Community Policing -- 100,000 Cops
    b. Police Corps
123. Punishment
    a. Three Strikes and You're Out
    b. Death Penalty
    c. Prisons
    d. Bootcamps and Alternatives to incarceration
124. Crime Prevention Programs
125. Juvenile Crime/Criminal Street Gangs
126. Violence Against Women
127. Byrne Grant Funding
128. Habeas Corpus

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: 1

QUI TAM - FALSE CLAIMS ACT PROPOSED AMENDMENTS - Issue # 66

1. ISSUE STATEMENT:

The False Claims Act is the government's principal civil remedy to recover funds wrongfully obtained from the United States. The *qui tam* provisions of the False Claims Act allow private citizens with knowledge of fraud against the government to file suits on behalf of the United States. The Department of Justice is given an opportunity to intervene in the private action, and if it intervenes it has the primary responsibility for litigating the case and the private citizen may recover from 15-25% of the damages obtained by the government. If the Department declines to intervene in the action the private citizen may continue the lawsuit on behalf of the United States and may recover from 25-30% of the damages obtained.

Since the Act was amended in 1986 liberalizing the provisions allowing for the filing of private suits, 737 such suits have been filed. The Department of Justice has investigated all of these cases and has intervened or otherwise pursued 117 and has 179 cases under investigation. Department attorneys have obtained judgments in or settled 80 of the 117 cases, recovering about $600 million, which represents about 28% of the Department's total False Claims Act recoveries since 1986. In 1993 the Department recovered a record breaking $224 million in *qui tam* actions and another record breaking year is expected in 1994. To date, in cases where the relator's share has been finally determined, relators have received over $68 million.

The Department has investigated and then declined to prosecute 434 cases. Of these, 296 cases have either been dismissed from federal court with no False Claims Act recovery or are not being pursued by the persons bringing the action. In 20 cases, relators have recovered a total of about $9 million in False Claims Act damages. The remaining cases declined by the Department are still pending.

Congress is currently considering amendments to the *qui tam* provisions of the False Claims Act sponsored by Senator Grassley and Congressman Berman. The issues being considered include:

(1) Under what circumstances will a relator be barred from filing suit; should he be barred when his suit provides the government with no more information than what the government is already investigating (the "noncontributing relator)"? Or should he be barred only when he actually learns of the information that forms the basis of his lawsuit from the government's investigation (the so-called "parasitic relator")?

(2) Which government employees may file *qui tam* suits (if any) and under what circumstances?

(3) If wrongdoers voluntarily disclose fraud pursuant to formally established government voluntary disclosure programs, may they subsequently be the subject of a qui tam action?

(4) Are violations of pro rata restrictions established by weekly marketing orders under the Agricultural Marketing Agreement Act (AMAA) (particularly relating to oranges and lemons) exempt from False Claims Act sanction?

2. STATUS:

S. 841, as amended, was reported out of the Subcommittee on Courts and Administrative Practice in November 1993. It would expand the rights of relators generally, including prohibiting defendants from moving to dismiss relators and otherwise making it more difficult for the government to dismiss relators. It would provide as follows:

(i) noncontributing relators would not be barred;

(ii) government employee qui tam suits would generally be allowed as long as the employee followed certain procedures for notifying the government of the fraud as long as the government does not file a false claims suit within a certain time after notification. Certain governmental employees (Department of Justice or Inspector General employees) who are considered vital to the government's decision making process of whether an investigation should be advanced to the filing of a lawsuit would be excluded;

(iii) voluntary disclosures would not be exempted from qui tam suits.

3. DEPARTMENT POSITION:

The Department is supportive of qui tam and considers the 1986 Amendments to have been a success. The Department has worked with the Senate Judiciary Committee and particularly with Senator Heflin, Chairman of the Subcommittee on Courts and Administrative Practices, and with Senator Grassley.

The Department is essentially supportive of the proposed Amendments. In the Department's view, however, there are a few areas that need to be adjusted to make the proposed Amendment even more effective. For example, it is necessary to balance properly the legitimate interests of the government, the relators and potential defendants (a bar on opportunistic relators, broader exclusion of government employees, and protection for voluntary disclosures; the Department has taken no position on the AMAA issue). The Department has been working with Judiciary Committee staff to come up with acceptable language that goes beyond the proposed official Administration position outlined in the Biden letter referenced below.

The Department has never officially taken a position on the constitutionality of the _qui tam_ statute. The Ninth Circuit last fall upheld the statute's constitutionality in _United States ex. rel. Kelly v. Boeing Co._, No. 92-36660 (9th Cir. 1993). The Supreme Court recently denied _certiorari_. Had _certiorari_ been granted, the Department was considering filing an _amicus_ brief in support of the statute's constitutionality. The constitutionality was also upheld in _United States ex. rel. Kreindler v. United Technologies Inc._, 985 F.2d 1148 (2d Cir. 1993).

4. JUDICIARY COMMITTEE MEMBERS' INTEREST/POSITIONS:

Senator Heflin's staff has coordinated meetings between the Department and staffers for Democratic Congressmen in an attempt to put together a consensus position with Senator Grassley. These efforts are ongoing.

A few months ago, Senator Grassley criticized the DOJ for a "lack of leadership" on this issue and asserted that "the new Administration is no more committed to an aggressive stance on public contract fraud than the previous Administrations." This is unfounded in light of the continuing discussions to determine whether a consensus position can be achieved. Senator Grassley's staff has acknowledged that the Department has been more forthcoming in these discussions than past Administrations.

5. REFERENCE MATERIALS:

Attached is a draft letter to Chairman Biden outlining the Department's official position on the current _qui tam_ legislation (letter still subject to OMB clearance).

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

DRAFT - NOT SENT

2

Revised 5/17/94

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This provides the Department's views on S. 841, the False Claims Amendments Act of 1993, as reported by the Subcommittee on Courts and Administrative Practice. The Department supports the Act's goal of facilitating qui tam litigation to further augment the Government's war against fraud. We and the staff of the Subcommittee on Courts and Administrative Practice have been engaged in productive and worthwhile discussions aimed at reaching a consensus on this legislation. Our discussions have been productive, and we have candidly exchanged ideas to refine the areas of agreement and disagreement. We believe that those discussions have produced a markedly improved bill.

At the outset, let me reiterate this Administration's strong commitment to an effective and vigorous qui tam mechanism. In a clear break with the policies of previous Administrations, we have made a concerted effort to recognize the significant contribution of relators and whistleblowers to the Government's fight against fraud. We have encouraged the Department's litigators to make every effort to work cooperatively with relators to maximize the Government's recovery. We have scrutinized the legal arguments advanced to ensure that, in protecting the government's recoveries, we do not impair the incentives which are necessary to ensure that relators come forward, especially in light of the large personal hardships many must endure in bringing these suits. The Department and its client agencies have dedicated enormous resources to the investigation and prosecution of these cases.

Our success in acquiring the evidence to support these cases and in litigating them has been noteworthy. Ultimately our aggressive involvement -- through investigation, litigation and negotiation -- is the most important incentive for relators, because when we succeed, they share in that success. As a result of the 1986 amendments to the False Claims Act, the most important factors in determining the outcome of these cases are the government's active involvement in the development of the investigation, its resolution of cases before a formal election is made, and its decisions to intervene in matters and prosecute cases on behalf of the government and the relator.

Of the approximately $610 million that the government has recovered in qui tam actions since the enactment of the Act in 1986, about $600 million (almost 99% of the total) has been recovered in cases which the Department of Justice has pursued by negotiating a settlement prior to intervention or obtaining a settlement after it has intervened and prosecuted the case. Last year the Department of Justice recovered a record total of $372 million, of which $180 million came from qui tam actions. We have directed significant resources to this area: last year the Civil Division of the Department alone devoted 44,010 attorney hours to qui tam suits. This allocation of attorney resources was augmented by the vast array of other government personnel involved in these cases, including prosecutors and civil attorneys in the Offices of the United States Attorneys, and investigative, audit, and program personnel throughout the government's agencies. This year, the Civil Division expects to devote even more attorney hours to these suits, and we expect that recoveries for the taxpayer and the government will once again set new records.

In addition to the Administration's demonstrated resolve to give these cases the highest priority, in our discussions on pending legislation we have made two significant changes in the policies of the last Administration. First, we have agreed that motions to dismiss relators based upon the source of relators' information should be made only by the government. This is a major gain for relators. Under the current law, motions to dismiss on this basis can be made by defendants. In fact, as the current case law reflects, almost all of the relators who have been dismissed on this basis have been dismissed on motions made by defendants, not by the government.

We believe that the decision whether a relator should be allowed to participate in a suit and share in the recovery is a matter that is of primary concern to the government, and that, accordingly, it is the government that should decide whether such a motion should be made, based upon the statutory criteria. Under current law, defendants have too often made these motions simply as a routine litigation tactic to increase the expense and time required for a relator to bring these suits. We have agreed that this weapon needs to be removed from the defendant's arsenal. In doing so, we will measurably increase the incentives for relators to bring qui tam actions.

Second, we have agreed for the first time that most government employees should be allowed to bring qui tam suits as long as they follow the reporting procedures provided and the government is given a reasonable amount of time to act on the fraud first. This is a major reversal of the previous Administration's opposition to government employees bringing suit under any circumstances.

We believe, however, that there are certain classes of government employees whose duties are so integral to the decision making process in a fraud investigation that it is important to ensure that their decisions are made solely on the basis of the public's interest and that there be no taint of personal financial motivations. This policy concern is acknowledged in the pending legislation which prohibits qui tam suits by government employees who work for the Department of Justice and the Inspector General's Offices of the various agencies. We believe that this bar needs to be expanded to other limited classes of government employees who play an equally integral role in these decisions.

We believe that the Department's willingness to reverse the positions of previous Administrations on the two major issues discussed above amply demonstrates our agreement with the sponsors of this legislation on the overall goal of strengthening the ability of the government and private citizens to fight fraud against the government. There are certain aspects of the pending legislation, however, which we believe should be modified to improve the statutory qui tam process.

The qui tam provisions create a mechanism by which private citizens may not only assert claims against those who defraud the government, but also effectively assert monetary claims against the United States Treasury. The Department must assess and occasionally challenge these claims. A major component of the statutory scheme of the False Claims Act is to provide private financial incentives to individuals to bring these actions. While the interests of the United States in these actions obviously are at odds with those of defendants, they are also sometimes unavoidably in conflict with the private financial interests of the relators as well. While we are committed to working with and minimizing conflict with qui tam relators, it must be remembered that in the end only Department of Justice attorneys are legally and ethically charged with protecting the interests of the United States. Some of the provisions included in the pending legislation should be amended to better ensure that the interests of the taxpayers of the United States are kept paramount.

Pursuant to our discussions with the Subcommittee, we prepared a substitute bill that proffered certain changes to the Subcommittee's draft proposal. We attach that substitute

("Substitute") (Attachment A), for your consideration and urge its adoption in lieu of S. 841.

1. Government Right to Dismiss Certain Actions:

We are particularly concerned with the amendment to the public disclosure bar (Sec. 3). We completely agree with the primary legislative goals that: 1) only the government may move to dismiss relators who have brought parasitic suits; and 2) such motions should be filed early to conserve time and money by relators whose cases will be dismissed so that other relators will be encouraged to come forward. Other provisions of the bill will have the opposite effect, however, and will undermine these goals: they will simultaneously discourage relators from coming forward, and will unnecessarily deplete the Treasury by paying rewards to individuals when the government would have taken action without a *qui tam* suit.

Under the bill in its current form, a relator could file suit and recover even if the relator had contributed nothing to an ongoing and active government investigation or audit of the same matter. Dismissal of the relator would be allowed only if the relator "first learned" all or substantially all the information from a governmental investigation or from the news media. (Sec. 3, (e)(6)(A)(i)). This provision unnecessarily disadvantages the government, and thus the taxpayer, in the recovery process. The government may be put in the unfair position of having to split the recovery with a private relator who has not contributed anything to the case.[1] We urge the Committee to adopt language that would bar

---

[1] To illustrate, suppose that the government commences an investigation of a government contractor based on a tip, and that investigation proceeds as the government gathers evidence of fraud. The government prepares to indict and file suit against the company. However, before it is prepared to do so, either a news report is published discussing the government's allegations or the existence of the government's investigation otherwise becomes known (neither is an uncommon scenario where large contractors are under investigation). John Doe, who worked at the company and was aware of the wrongdoing when it occurred (but never reported it to the government) becomes aware of the investigation and realizes he can file a *qui tam* suit, charging the very same allegations as those already being investigated. He would not be dismissed under the bill because he did not "first learn" of the allegations from the investigation. Yet this opportunistic relator has in no manner contributed to the government's prosecution of the fraud.

recovery in this situation, regardless of where the person derived the information, as suggested in the substitute bill.[2]

One specific example of such noncontributing suits is the qui tam action that virtually mirrors a company's voluntary disclosure to the government. Our proposed revision bars an action where substantially the same matters have been disclosed and accepted into an established voluntary disclosure program and are the subject of an active investigation or audit. These actions, which do nothing more than make the very allegations that a company has already disclosed and that the government is pursuing through an existing enforcement mechanism, add nothing to the government's anti-fraud effort.

We also suggest additional language at Sec. 3 (e)(4)(i) to protect relators who bring valuable new information to the government's active investigation or audit, which significantly increases the government's recovery. Such a relator should be authorized to recover where the new information provides substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation or audit. (Substitute, Sec. 3, (e)(4)(i)) The Substitute limits the relator's recovery to the "proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person." (Substitute, Sec. 4, (3)(C)) These safeguards would also apply to qui tam actions which go beyond the matters revealed in a company's voluntary disclosure. Thus, where the qui tam action alleges that the voluntary disclosure itself is false or fraudulent or the action provides additional facts that are not substantially the same as those disclosed, such a case would not be subject to dismissal under this section.

Additionally, we are concerned that the bill does not protect the person who reports fraud to the government before filing a qui tam suit, while permitting suits by other relators who file suit first but add nothing to the government's knowledge. We would correct this oversight with language to permit the relator who alerted the government to file suit, even if the government, as a result of the publicity of the fraud from the Congress or the news media, opens an investigation first. (Substitute, Sec. 3, (e)(4)(i))

---

[2] In our view, mere information in the government's possession should not bar a qui tam suit. If the government was not utilizing that information in an active investigation or audit or had closed its consideration of a matter, a qui tam suit should be permitted. Ultimately, it would be up to the court to decide if the government's investigation was sufficiently active to bar the relator's suit.

Thus, the Department proposes language to better accomplish several goals underlying this legislation. First, this language would reward those who are sources of information in the first place and voluntarily provide it to the Department or to a media or congressional source before they file a case. Second, our language would encourage those with information about fraud to report it to the government promptly, thus advancing the taxpayers' interests and maximizing our ability to develop and prosecute these cases. Without this encouragement, we are concerned that individuals would wait to file their own lawsuits instead of coming forward, relying on the argument that they did not "first learn of" the allegations as a result of the investigation but on their own. Third, it has been our experience that many relators and counsel find it in their interest to report their information to the government before they file to facilitate a working relationship and to validate the information. We think that the bill in its present form will discourage this process entirely, because it would allow witnesses who learn of the investigation to recover and displace the original source from recovery if they beat the original source to the courthouse door in filing these suits.

2. Other Aspects of Dismissal Provision:

a. Court's Dismissal: We believe that as currently drafted, the bill would improperly allow the court to exercise discretion in deciding whether or not to dismiss actions under (e)(6)(A) (where the relator obtained substantially all of the allegations from a government investigation or the news media or Congress). The bill should explicitly state that the court "shall dismiss" the actions under these circumstances.

b. Period to Move to Dismiss the Relator: We have agreed to limit the ability to file motions to dismiss the relator to the government, eliminating the possibility of defendants moving to dismiss. However, the 90 day period within which the government could file such a motion is insufficient. We understand that it is preferable for the motions to be filed early in the lawsuit rather than later, after the relator has participated in the suit. However, we urge the Committee to adopt a more workable limitation, as set forth in the Substitute, so that the government will have an opportunity to acquire essential evidence regarding the relator's status, *e.g.*, whether the relator learned of the information from an active investigation, and, if not, whether he otherwise can proceed as a relator. Either investigation or discovery, or both, will be necessary. Such a procedure causes no prejudice because, during the early stage after filing a *qui tam* case, the relator typically does not invest significant resources in the litigation.

Moreover, the Department's time and limited resources following the filing of the complaint should be used to investigate whether the defendant has committed a fraud and whether the government should intervene. Once those decisions are made, the government then can turn its attention to determining whether a motion to dismiss the relator is appropriate.

c. Basis for Dismissal: The current language of the bill would bar only relators who learned substantially all of the facts underlying the material allegations from active investigations or the news media. We suggest additional language to extend the bar to those who learned the "basis" for those allegations from the public sources listed. This is meant to clarify that relators' attorneys who simply fashion their claims in legal language that differs from that used by perhaps non-lawyer government investigators (or made public by non-lawyer reporters) cannot avoid the bar if the basis for those claims was learned from those sources. (Substitute, Sec. 3(4)(ii)) We urge you to include this language.

d. "Fraud" Investigation: In its present form, the bill would bar suits only where the relator learned of the facts from an active and ongoing "fraud" investigation, which is an unduly narrow provision. Investigations cannot be easily labeled "fraud" investigations at the early stages -- we investigate allegations that could give rise to a finding of fraud, depending upon the evidence developed. The touchstone should be whether a-government inquiry into the matters alleged in the qui tam suit is pending, whether or not that inquiry is termed a "fraud" investigation.

Similarly, although the current language does not include "audit", the government's inquiry into allegations of fraud typically begin with a government audit. Whether a particular government action is called an "audit" or an "investigation" is often just a matter of nomenclature. Audit action without any separate inquiry termed an "investigation" often constitutes the entire basis for a False Claims Act case. Thus, an active audit is government action on the matter just as an investigation is government action (and, under the Substitute as well as the Senate bill, if the government does not take action and the audit is closed, a qui tam suit can be filed). We urge the Committee to add "audit" to the existing language in section (6)(A)(i)(I), as does the Substitute.

e. Proceedings to which the government is a party: Section 3 of the bill does not bar the relator who derives his information from a filed criminal indictment or information or other proceedings to which the United States is a party. This bar is necessary because there may be no formal investigations pending once criminal charges have been filed, even though the Government intends to proceed civilly once the criminal action is concluded. Moreover, a relator who derives his information from the government's proceeding but adds nothing to the government's case, has no legitimate basis for recovery. We suggest language to address this oversight. (Substitute, Sec. 3, (e)(4)(i)(a) and (e)(4)(ii)(I)).

f. Government Employees:

1. Exclusions of certain employees. As mentioned above, under the bill, only DOJ employees and employees of the Offices of Inspectors General are barred from becoming relators. (Sec. 3, (e)(6)(C)). This exclusion category should also cover federal employees whose responsibilities include the detection and investigation of fraud (investigators, auditors, agency contracting officers and attorneys), as set forth in the Substitute at Sec. 2(5)(E). These employees are not confined to the Offices of Inspectors General but include auditors who are charged by law with the responsibility of auditing for potential fraud and abuse. For instance, the Defense Contract Audit Agency audits both DOD procurements and selected agencies' contracts, has subpoena authority as well as document inspection authority pursuant to contract, and conducts audits of government contracts, contract proposals, and other contract actions. DCAA, furthermore, is charged with the responsibility to report suspected fraud to the Office of Inspector General. Similarly, the General Accounting Office is charged broadly by statute to investigate "all matters relating to the receipt, disbursement, and use of public money" and assist the Congress in obtaining information about federal expenditures. 31 U.S.C. § 712.

The Substitute would also exclude agency contracting officers from those eligible to file qui tam suits. Contracting officers are the employees who are the most familiar with the award and administration of a contract, and thus often the government employees most familiar with a contractor's practices, including its negotiations, charging of costs, and production or delivery of the procured items or services. Thus, they are among those most likely to uncover procurement fraud and be responsible for deciding to initiate fraud investigations. Likewise, attorneys employed by government agencies also are charged with the responsibility to pursue, and to refer to the Department of Justice, allegations of fraud in connection with government contracts and programs. Attorneys, of course, are also under an ethical obligation not to profit personally based on information belonging to their clients.

Without the expanded exclusion, the same government employees who are given the responsibility to decide whether the government should open an investigation and pursue fraud claims could profit personally if they decide not to do so. This would create disincentives for the government to investigate fraud and obvious conflicts of interest. We also are concerned that criminal cases could be jeopardized because government employee witnesses would be subject to impeachment based on their financial interests in the outcome of the fraud investigation.

2. Suits based on information learned in the course and scope of government employment: The bill's current language does not correct a potential problem of the laundering of governmental employees' information to others outside the government. We urge the Committee to correct this significant loophole by barring suits based "in whole or in part, upon information obtained in the course and scope of federal employment." (Substitute, Sec. 3, (e)(5)(A))

3. Continuing obligation to disclose: The bill requires full cooperation but does not provide for the continuing obligation of the government employee to disclose information obtained after reporting the fraud. (Sec. 3, (e)(6)(A)(ii)(II)). This provision, as set forth in the Substitute, is necessary to ensure that the employee does not withhold relevant information in order to pursue a personal claim. (Substitute, Sec. 3(5)(A)(2))

4. Extension of 12 month period: The bill does not allow for any extension of the 12-month period in which the government may file suit after disclosure by the government employee. The Substitute reduces the extension period to 12 months upon notice to the relator. (Substitute, Sec. 3, (e)(5)(A)(B)) This extension period is necessary because it is very difficult to predict the complexity and duration of an investigation. A total period not to exceed 24 months is wholly reasonable.

5. Obligation of government employees to report fraud: We have added language to the Substitute to make clear that notwithstanding the ability of a government employee to file suit under section 3730 where that employee has satisfied the requirements of the statute and is not otherwise excluded, that nothing in the statute is intended to eliminate or lessen the employee's independent and existing obligations to report fraud. (Substitute, Sec. 3, (e)(5)(F)) For example, Executive Order 12674 (April 12, 1989) and federal regulations (5 C.F.R. § 2635.101) require that every government employee must disclose "waste, fraud, abuse and corruption to appropriate authorities." We would expect that the legislative history should clarify this point further.

g. Protection of Information in Support of Motions to Dismiss: The bill does not afford the government clear protection for its investigative information supporting its motions to dismiss a relator. Hence, our entire investigative file can be disclosed to a defendant, endangering a subsequent False Claims Act case. We suggest a revision to protect against such a disclosure by keeping the motion to dismiss and supporting information under seal. The motion itself may be disclosed to the relator, although the court, in its discretion and where the interests of justice require (for instance, where disclosure of investigative information would compromise an active investigation or would reveal classified information), may limit disclosure of the supporting evidence. (Substitute, Sec. 3, (e)(6))

3. Extension of the Investigative Period to 120 Days: Although we appreciate the bill's extension of the investigative period from 60 to 90 days, we would urge an increase to 120 days. (Substitute, Sec. 2) In our experience, the 60 days is simply insufficient to conduct the investigation required in these typically complex, fact-intensive cases. For example, agency Inspectors General often issue Inspector General subpoenas for documents, or we issue Civil Investigative Demands. Depending upon the company's compliance, the process of obtaining and reviewing the documents can consume months. Witness interviews or testimony pursuant to CIDs are generally also necessary, which consume additional time. Significantly, many cases are delayed because of the pendency of a parallel criminal investigation and premature decisions on intervention caused by qui tam deadlines can seriously disrupt the criminal proceeding. While 90 days is an improvement over the current 60 day period, 120 days is not unreasonable and is a more realistic measure of the minimal time required to investigate a fraud case.

4. Provisions Relating to Actions Barred and Qui Tam Awards: The bill amends § 3730(d) to allow 15-25% of "all of the proceeds of the action or settlement", dropping "of the claim". (Sec. 4) Arguably, this would allow relators to obtain shares of non-fraud recoveries (where the government elects not to pursue the fraud claims, but resolves them as a matter of contract).

The qui tam statute and the diversion of federal funds to the private citizen have historically been justified by the compelling need for information about fraud against the government. There is no similar justification to allow the private plaintiff a share of taxpayer dollars for providing information about a contract dispute, where the government is entitled only to compensatory damages (as opposed to False Claims Act multiples and penalties) and will not be made whole if up to 30% of that must be diverted to a relator.

5. Waiver of Private Right of Action: Given the definition of "person" in section 5 of the bill, we do not think it is enough to rely on the legislative history to clarify that the waiver section deals only with private parties and is not intended to affect the rights of the Government. We propose a change in the language. (Substitute, Sec.4, (2))

6. "Person" Definition: Based upon discussions with subcommittee staff, we had understood that the relator's status should be defined by that of the person who provided the information. However, the bill does not amend the language accordingly. The Substitute would preclude a third party, for

example, recovery where the individual providing the underlying information is otherwise barred, as would be the case if that latter person were criminally convicted for the underlying fraud. 31 U.S.C. § 3730(d)(3). (Substitute, Sec. 6) We believe that this should be clarified in the bill.

7. Statute of Limitations: We support the equitable tolling of the six-year statute of limitations contained in the bill; this provision is consistent with the law providing for equitable tolling of fraud and other tort actions during the period when discovery of the fraud or tort has not occurred and is also consistent with the six-year equitable tolling of the general contract statute of limitations in Title 28 of the U.S. Code. The DOJ had obtained favorable case law under the pre-1986 6 year statute of limitations to the effect that the government had 6 years from its discovery of the fraud to file suit. The 1986 Amendments essentially cut this back to allow only a 3 year tolling period. The amendment will certainly improve the DOJ's ability to assert the government's claims and recover our losses. We do not object to the addition of the ten year statute of repose.

8. CID Authority: We support the amendment to the CID statute.

9. Retroactivity: We regret that the bill does not expressly make the 1986 and 1988 amendments retroactive. While the district courts have generally applied the 1986 amendments (including increased damages and penalties, lower burden of proof, etc.) retroactively, two courts of appeals have disagreed, and thus, the state of the law is unclear. The amendment is necessary to make clear Congress' intent so that additional resources are not consumed in litigating this issue. A number of large cases are still pending which include damages for conduct occurring pre-1986, and millions of dollars are at stake.

The bill also makes the statute of limitations amendment prospective only. Since the courts have held that amendments to limitations periods are procedural and may be immediately applied, as a matter of law this amendment can be made retroactive. Given the extreme practical difficulty in applying two different statutes of limitation to claims in the same case depending on whether they arise before or after the date of the amendments, the change to the limitations period should be made retroactive. The Substitute makes all of the amendments retroactive.

10. Reporting: The current bill imposes an even more onerous reporting requirement than the original S. 841. (Sec. 9). Many of the categories of data (*e.g.*, nature and number of investigations and "related proceedings" (A), and results achieved, including "related recoveries" (F)) are so vague as to be impossible to satisfy, and would require us to disclose nonpublic information concerning existing investigations that would prejudice our ability

to bring False Claims Act cases based on that information. We neither maintain nor do we have the mechanisms to collect much of the other data listed in this section. We have drafted a reporting provision which can be satisfied without unduly affecting our resources adversely (Substitute, Sec. 9).

We believe the ongoing discussions that we have had with members of the Senate Judiciary Committee have been most productive. We look forward to working with you further on this important bill.

Sincerely,

Sheila F. Anthony
Assistant Attorney General

Attachment

cc: Honorable Orrin Hatch
Ranking Minority Member

Honorable Howell Heflin
Chairman
Subcommittee on Courts and
Administrative Practice

Honorable Charles Grassley
Ranking Minority Member

Madam President, as my colleague from Oregon knows, that just is not going to happen. What we will do before we get there is we will do what countries have done historically, from ancient Florence down to Germany after World War I, and others: We will start printing money. We will devastate savings and retirement funds and everything. I think the Senator from Oregon has hit the nail on the head in his comments. I simply commend him for what he has said.

Mr. PACKWOOD. I thank my good friend.

Mr. SIMON. Madam President, I suggest the absence of a quorum, and I ask unanimous consent that the time of the quorum call be divided among Senator CRAIG, Senator REID and myself, but not Senator BYRD.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GRASSLEY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Who yields time?

Mr. GRASSLEY. Madam President, I ask unanimous consent to speak as in morning business for 8 minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Senator is recognized.

FRAUD IN PUBLIC CONTRACTING

Mr. GRASSLEY. Madam President, today I will speak for a few minutes on the topic of public contract fraud.

The taxpayers got good news Tuesday when the Supreme Court let stand the court of appeals' ruling in U.S. ex rel. Kelly versus Boeing that the whistleblower provisions of the False Claims Act are constitutional. That should settle the issue once and for all. Congratulations to Senate legal counsel Michael Davidson and assistant Senate legal counsel Claire Sylvia for their outstanding advocacy on the side of Congress and the taxpayers.

I had hoped the new Justice Department would step in and advocate the constitutionality of whistleblower lawsuits, but I am still waiting for Attorney General Reno and her assistants to follow up on their confirmation hearing promises to consider reversing the hostile neutrality of the previous administration.

This and other matters have caused me concern that the new administration is no more committed to an aggressive stance on public contract fraud than the previous two administrations were. That concern was compounded on Wednesday, when Attorney General Reno and President Clinton nominated Defense Department general counsel Jamie Gorelick to be second-in-command of the Justice Department. I am concerned that this nomination signals an administration willingness to let the fox guard the chicken coop when it comes to fraud on the taxpayers.

Ms. Gorelick has a fine reputation as an effective lawyer and bar activist. What concerns me is how she earned that reputation—by specializing in getting defense contractors off the hook for fraud against the United States. Mr. Gorelick spent the last 12 years working as outside counsel for companies like General Electric, Teledyne, and United Technologies. I have always been uncomfortable with the revolving door between the Justice Department and the public contract defense bar. In this instance, I am concerned that Ms. Gorelick has campaigned so hard and so long for the contractors' side of fraud issues that she will find it difficult to turn around and zealously protect the interests of taxpayers. I am anxious to hear the extent to which she will recuse herself from issues that affect the former clients in the defense industry, or her former colleagues in the public contract bar.

My concern about how Ms. Gorelick will handle fraud matters as Deputy Attorney General is heightened by the fact that her current office—Pentagon general counsel—is currently advocating positions on a major fraud statute which favor the defense industry over the taxpayers. I look forward to her confirmation hearing in order to discuss these issues in detail.

The Judiciary Committee is presently considering housekeeping amendments to the whistleblower provisions of the False Claims Act. Under the act, better known as the "Lincoln law"—after its enactment in 1863 to deal with fraud by Civil War arms manufacturers—private citizens with knowledge of fraud can sue the culprit on behalf of the United States, and share in the Government's recovery. Since Representative HOWARD BERMAN and I got amendments enacted in 1986 which revived the act, the Lincoln law has brought $588 million back into the Treasury. The Government now recovers more money through these whistleblower lawsuits than through suits initiated by the Justice Department.

Not surprisingly, Defense contractors hate the whistleblower law. They hate it because it is very effective at exposing their fraud. The law allows honest employees who don't want to be party to their employer's fraud, and who find the Federal bureaucracy lackadaisical in its representation of the taxpayers, to act as citizen attorneys general and make their employers accountable for the fraud.

When we enacted the amendments to the Lincoln law in 1986, I knew we would be hearing from the Defense contractors down the road. It has finally happened. The contractors and their slick lobbyists have descended on Capitol Hill. They are breaking out the crying towels, complaining about how hard it is to cope with the whistleblower lawsuits. A coalition of major defense contractors is pushing for a series of amendments which would emasculate the Lincoln law. They are also pushing a bill to streamline procurement law—which is another way of saying they want to gut much of the procurement reform legislation of the 1980's.

These same companies have paid out more than a half-billion dollars in penalties and settlements for fraud in just the past 3 fiscal years—a quarter of which comes from whistleblower lawsuits alone. My message to the contractors is: Stop the fraud, instead of blowing money on billable hours in futile efforts to gut the Government's antifraud tools.

While I expect companies who feed at the public trough to lobby to weaken fraud statutes, I am always surprised at the extent to which the administration, be it Republican or Democrat, seems more interested in protecting contractors than protecting taxpayers. But my experiences with the Reagan administration, the Bush administration, and now the Clinton administration have all shown me that's the case. The Defense Department is out to protect its contractors, and the Justice Department is out to protect the Defense Department. Which brings me back to Ms. Gorelick.

The Defense Department has been pressing within the Government for amendments which would significantly weaken the Lincoln law—amendments nearly identical to those promoted by the defense industry. I want to know from Ms. Gorelick why lawyers in her office have been advocating amendments which would gut the whistleblower law. I want to know whether she has directed these efforts, whether she agrees with the positions advocated by her office, and whether she will press the same antiwhistleblower agenda when she gets to DOJ.

This is especially important given the current lack of leadership on these issues at DOJ. While the Attorney General and her chief deputies all pledged to reverse the previous administration's hostility to whistleblowers, their actions speak louder than their words. So far, the Department has shown itself to be more responsive to the antiwhistleblower sentiments of career lawyers burrowed into the bowels of the civil division, and to the defense industry's protectors at the Pentagon.

I want the change in leadership at the Justice Department to accomplish a change in policy on fraud and whistleblowers, not a step back in the other direction.

I yield the floor.

BALANCED BUDGET AMENDMENT

The Senate continued with consideration of the joint resolution.

The PRESIDING OFFICER (Mr. ROBB). Who yields time?

Mr. CRAIG addressed the Chair.

Department of Justice

FOR IMMEDIATE RELEASE
FRIDAY, FEBRUARY 25, 1994

CIV
(202) 514-2007
TDD (202) 514-1888

DEPARTMENT INTERVENES IN QUI TAM SUIT

WASHINGTON, D.C. -- The Department of Justice has intervened in a lawsuit filed against a Sterling, Virginia, locksmith by a former employee who said the firm inflated labor hours on a contract with the Department of State.

Assistant Attorney General Frank Hunger, head of the Civil Division, said the suit was filed originally by Guy Welch against Spencer's Safe & Lock Service and its president, Allen D. Spencer, under the qui tam provisions of the False Claims Act. The Department advised U.S. District Court in Alexandria on February 11 it would intervene. The court unsealed the suit Thursday.

The government said Spencer, who had a contract to provide safe, lock and security systems at the State Department, inflated the labor hours of locksmiths and substituted cheaper and used lock and safe parts while billing the government for new material. The government is currently seeking to ascertain how much of the $2.6 million paid out under that contract constituted inflated labor.

(MORE)

The company also provided false certifications to other government contractors that the locks and safes it gave them were genuine and certified when in fact they were not.

Under the qui tam provisions of the False Claims Act, a private citizen may file a lawsuit on behalf of the federal government and collect a portion of the money if the government's action is successful.

#####

94-094

U.S. Department of Justice
Office of Legal Counsel

Washington, D.C. 20530

April 27, 1993

MEMORANDUM TO WEBSTER HUBBELL

Acting Associate Attorney General

Re: Constitutionality of the Qui Tam Provisions of the False Claims Act

As part of a larger review by the Department, you have asked us to look again at the arguments for and against our position that the qui tam provisions of the False Claims Act, 31 U.S.C. § 3729 et seq. (Act), are unconstitutional. See Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 249 (1989) (preliminary print) (Barr Memorandum) (attached). This memorandum represents an effort to reevaluate the arguments in the Barr Memorandum in light of recent developments. It sets out the original arguments of the Barr Memorandum, possible objections to those arguments, and tentative conclusions about the relative merits of the two positions. It concludes with a discussion of the implications of a reversal of the Barr Memorandum for other areas of the Office's jurisprudence.

Reconsideration of the arguments presented in the Barr Memorandum is appropriate for three reasons. First, both the Attorney General and the current Congress have expressed strong interest in the qui tam provisions of the Act. Indeed, during her recent confirmation hearings, the Attorney General indicated that she was inclined to believe both that the statute was constitutional and that its policy goals were sound. Second, the Barr Memorandum was written in a deliberately argumentative manner: it was designed to defend as forcefully as possible one viewpoint in an internal Departmental dispute among the Civil Division, the Solicitor General's Office, and this Office over the constitutionality of the qui tam provisions. Nevertheless, defendants in qui tam cases have tried to portray the memorandum as expressing the conclusion of the Department. Third, significant developments in qui tam jurisprudence have occurred during the last four years, including judicial decisions, scholarly commentary, and the growing familiarity of the Civil Division with *qui tam* litigation. Most importantly, no court -- including the only court of appeals yet to have reached the constitutional questions -- has accepted any of the arguments set out in the Barr Memorandum.[1]

Our tentative conclusion is that the arguments set out in the Barr Memorandum are wrong. We believe that the *qui tam* provisions are constitutional on their face, although certain applications of them may raise constitutional difficulties.

I. The Statute.

The False Claims Act provides that anyone who presents a false money claim to the federal government shall be liable for double or treble damages and civil penalties of up to $10,000 per false claim. 31 U.S.C. § 3729. Under the *qui tam* provisions a person who "has direct and independent knowledge of" the alleged false claim may bring a civil action "for the person and the United States Government" to recover damages and penalties. *Id.* §§ 3730(b)(1), (e)(4). The *qui tam* action, although initiated by a private plaintiff, or "relator," is "brought in the name of the Government." *Id.* § 3730(b)(1).

When a person brings a *qui tam* action, he or she must serve the government with the complaint and a written disclosure of the information he or she possesses. 31 U.S.C. § 3730(b)(2). The Attorney General may intervene within sixty days. *Id.* If the Attorney General does not intervene, the relator "shall have the right to conduct the action." *Id.* § 3730(b)(4)(B).

The relator has control over the lawsuit, subject to several exceptions: the action may be dismissed only if the Attorney General and the court give written consent, 31 U.S.C. § 3730(b)(1); the government may obtain stays of discovery by showing that such discovery interferes with ongoing civil or

---

1 *See United States ex rel. Kreindler & Kreindler* v. *United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993); *United States ex rel. Burch* v. *Piqua Engineering, Inc.*, 803 F. Supp. 115 (S.D. Ohio 1992); *United States ex rel. Givler* v. *Smith*, 775 F. Supp. 172 (E.D. Pa. 1991); *United States ex rel. Truong* v. *Northrop Corp.*, 728 F. Supp. 615 (C.D. Cal. 1989); *United States ex rel. Newsham* v. *Lockheed Missiles & Space Co.*, 722 F. Supp. 607 (N.D. Cal. 1989); *United States ex rel. Stillwell* v. *Hughes Helicopters, Inc.*, 714 F. Supp. 1084 (C.D. Cal. 1989). *See also* Evan Caminker, The Constitutionality of *Qui Tam* Actions, 99 Yale L.J. 341 (1989) (concluding that the *qui tam* statute is constitutional).

suggests that the framers did not understand the Appointments Clause to restrict Congress's power to grant executive governmental functions to private citizens, *see supra* note 5, and suggests that the framers did not understand Article III to forbid actions for bounties. And it suggests that the framers did not understand the principle of separation of powers to forbid delegation of executive litigating functions to private citizens. In sum, it suggests that the framers did not understand *qui tam* statutes to violate any provision of the Constitution.

The Barr Memorandum objects that "the entire historical inquiry is essentially pointless, since the version of *qui tam* [contained in 31 U.S.C. § 3730, the False Claims Act] differs essentially from *qui tam* as it existed in history." Barr Memorandum at 29. However, section 3730 is actually *less* of an interference with the executive branch than the earlier versions, which did not provide for government intervention once the suit was brought. If those versions were constitutional, then *a fortiori* so is section 3730.

3. Conclusion.

In light of the long historical acceptance of *qui tam* actions, it is unlikely that they would be found invalid on any constitutional ground. Importantly, to the extent that courts uphold the provisions on the basis of their historical pedigree, such holdings could be distinguished in cases involving more novel attempts by Congress to transfer executive power to privat citizens.

III. Consequences for OLC Jurisprudence.

The conclusion that the *qui tam* provisions are generally constitutional on their face could necessitate revision in several areas of this Office's jurisprudence. Our current position is that *Buckley* forbids certain forms of contracting out of governmental functions, the use of certain forms of alternative dispute resolution involving federal agencies, and possibly certain statutory arrangements for citizens' suits and for private peer review of federal grant-making. We also read *Buckley* to prohibit even discrete and temporary delegations of governmental power to state, local, or tribal officials. Reversal of the Barr Memorandum would necessitate reconsideration, and perhaps repudiation, of some of these views. We emphasize, however, that reversal of the Barr Memorandum would *not* necessitate rejection of the view that *Buckley* forbids continuous, employment-like delegations of governmental power. The tests for such a relationship would be those laid down in *Auffmordt*.

We examine below the possible effects of overruling the Barr memorandum on each of the categories identified above. Of course, to the extent we rely on the long historical practice regarding qui tam, we would not necessarily have to reexamine all of these issues.

Contracting Out. This Office has taken the position that the Department of Justice may not contract out causes of action to private individuals who act as independent contractors not under executive branch discipline and control. This position is based on the broad reading of Buckley that only officers of the United States may conduct litigation on behalf of the government.[17] Because contracting out generally involves the transfer of a single case to a private individual, it probably does not violate the Appointments Clause under the narrow reading of Buckley.

Alternative Dispute Resolution. This Office has opposed alternative dispute resolution mechanisms that involve delegation of adjudicative authority to private persons. As the Assistant Attorney General for this Office, William Barr testified before Congress that the United States cannot enter into binding arbitration conducted by private persons. The Alternative Dispute Resolution Act of 1989: Hearings on S. 971 Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 101st Cong., 1st Sess. 86 (1989) (statement of William P. Barr, Assistant Attorney General, Office of Legal Counsel). As a result of this testimony, the Administrative Disputes Resolution Act, 5 U.S.C. §§ 581-593 (Supp. II 1990), as eventually enacted, provides that when the United States enters into arbitration in administrative disputes, the arbitral award may be overturned by the head of the agency involved. Id. § 590(c).[18] However, to the extent that individual cases, rather than classes of cases, are delegated to private adjudicators, such a delegation would probably not violate the Appointments Clause under the narrow reading of Buckley.

---

17 See, e.g., Constitutional Limitations on "Contracting Out" Department of Justice Functions Under OMB Circular A-76, 14 Op. O.L.C. 106 (1990) (preliminary print).

18 See also Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, re: Administrative Conference Recommendations on Federal Agencies' Use of Alternative Dispute Resolution Techniques (Apr. 24, 1986); U.S. Dep't of Justice (Civil Division), Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts (1992) 4 & n.9.

Citizens' Suits. This Office has generally viewed citizens' suits with suspicion and has insisted on a variety of restrictions in order to obviate Appointments Clause problems, including the right of the executive to intervene in a citizens' suit and substitute its representative for the plaintiff.[19] Citizens' suits, like qui tam actions, probably do not violate the Appointments Clause under the narrow reading of Buckley, because they are brought pursuant to authority to initiate individual cases.

Private Peer Review and Other Expert Groups. This Office has objected to bills that require agencies to cooperate with private peer review groups in such a way that forces the agencies to share their funding or enforcement power.[20] To the extent that members of these groups do not, by participating in them, occupy an employment relationship with the United States, the creation of such groups probably does not violate the Appointments Clause under the narrow reading of Buckley.

Delegation of Federal Government Power to States. This Office has strongly resisted attempts by Congress to authorize states to enforce federal laws, and the President has issued signing statements in reliance on those views. We have argued that state and local officials may not exercise federal authority because Buckley forbids such delegations.[21]

---

19 See, e.g., Memorandum from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, to Anne H. Shields, Chief, Policy, Legislation and Special Litigation Section, Land & Natural Resources Division, re: S. 1630 - Clean Air Restoration and Standards Attainment Act (Jan. 19, 1990).

20 See, e.g., Memorandum from David G. Leitch, Deputy Assistant Attorney General, Office of Legal Counsel, to W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, re: Enrolled Bill H.R. 2130, the NOAA Authorization Act of 1992 (Oct. 21, 1992) (objecting to bill requiring various federal agencies to cooperate with academic and other private groups in developing environmental research programs); Memorandum from David G. Leitch, Deputy Assistant Attorney General, Office of Legal Counsel, to Paul J. McNulty, Principal Deputy Director, Office of Policy Development, re: S. 1523, NIH Reauthorization Act of 1991; S. 1092, Research Freedom Act of 1991 (Feb. 4, 1992) (objecting to bills that vest in inferior executive officials the authority to appoint members of boards that have the power to review and disapprove funding of certain research programs).

21 See Statement on Signing the Medical Waste Tracking Act of 1988, II Pub. Papers of Ronald Reagan 1430 (Nov. 2, 1988)
(continued...)

If the Barr Memorandum is overruled, the Office's position would have to be modified to oppose only broad delegation of federal governmental powers to states; the Office would not be able to object to delegations of authority that involved only the discharge of limited federal functions, as distinct from the installation of state officers into federal offices. The position this Office should take with respect to the intermediate case of authorizations to state officials to prosecute a narrow class of cases would be a subject for further consideration.

Delegation of Federal Government Power to Indian Tribes. This Office has taken the position that the Appointments Clause prohibits Congress from delegating governmental authority to Indian tribes. Because representatives of Indian tribes, like representative of states, are not appointed by the President, heads of departments, or courts, we have said that they may not exercise governmental power under this Office's interpretation of Buckley.[22] If the Barr Memorandum is overruled, the Office's position would have to be modified to oppose only broad delegation of federal governmental powers to tribes; the Office would not be able to object to delegations of authority that did

---

21(...continued) (objecting to provision of Medical Waste Tracking Act of 1988 authorizing states to take enforcement actions). See also Letter from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, to Dennis Daugherty, Office of the Solicitor, Department of the Interior (Aug. 19, 1991) (stating Office's position that state officials may not exercise significant federal authority and citing letters objecting to bills delegating to states federal powers relating to police training and to enforcement of federal consumer protection laws); Letter from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, to Anne H. Shields, Chief, Policy, Legislation, and Special Litigation Section, Land & Natural Resources Division, re: S. 1630 - Clean Air Restoration and Standards Attainment Act (Jan. 19, 1990) (objecting to provisions of the Clean Air Restoration and Standards Attainment Act that give states the authority to grant exceptions to and enforce federal regulations).

22 See, e.g., Memorandum from David G. Leitch, Deputy Assistant Attorney General, Office of Legal Counsel, to W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs re: S. 684, National Historic Preservation Act Amendments of 1991 (Aug. 19, 1992) (enclosing proposed letter to Congress objecting to bill that vests authority in tribal, as well as state and local, authorities, to enforce certain national historic preservation laws).

not involve the creation of federal offices or the installation of tribal officials in them.

Daniel L. Koffsky
Acting Assistant Attorney General
Office of Legal Counsel

CC: William S. Bryson
Acting Solicitor General
Office of the Solicitor General

Stuart E. Schiffer
Acting Assistant Attorney General
Civil Division

Attachment

15

x x x Act.

What are your views on the False Claims Act? And have you looked at the amendments proposed by Senator Grassley to the False Claims Act? Do you have an opinion on those?

MR. HUBBELL: Yes. We have been looking at the False Claims Act and trying to work with Senator Grassley with his amendments, and I think the Civil Division under Frank Hunger has been giving comment on what we perceive to be the good or -- and troubling provisions of the act. I couldn't give you the specifics because I know Frank has been working on it. We are not hostile to the False Claims Act. We need to work with people on the False Claims Act to seek out fraud. We have been working, as you know, on the constitutionality of it. I think the prior administration had questioned its constitutionality. I think we're of a little different mind, although we haven't finally come to grips on that. But the Ninth Circuit, as I understand, has ruled this constitutional.

We're going to seek out fraud, and we need the help of private citizens, and we're not going to be hostile to those citizens.

Q One of the provisions of the Grassley proposal that has come under attack by some whistle blowers is that it creates a number of -- (inaudible) -- government employees to bring false claims actions against those who defraud government, against individuals -- I mean, government employees as individuals -- (inaudible) -- cases. Do you feel that government employees should be allowed to bring false claims actions against those who defraud the government and get (a bounty ?) -- (inaudible)?

MR. HUBBELL: You know, that's a very difficult question, and I would only be speaking for myself and not the administration. I think you've got a balancing; that oftentimes a government employee might know of something and try to bring it to the attention of his or her superiors and not get anywhere, and I think then if there's fraud, they should have the ability to mete it out. On the other hand, I wouldn't want a government employee on purpose finding fraud and withholding it so that they could then go and personally gain from it. I think people would find that abhorrent. So I think there's a balancing there. I don't know how you find that balance, but I think everybody will try to look for it.

Q Mr. Hubbell, could I return for a moment to the New Jersey -- (inaudible)?

.ETX

Reno Confirm Hearing

QUI TAM

Senator Grassley. Well, in the case of these two instances, I think it is appropriate that Congress not have any show of impropriety as well, and I think that is one way to make it clear to the public.

If I could go on to qui tam, please. Now, of course, as I told you and I have told this committee so many times, the Justice Department--it doesn't matter whether it is Republican. It has been Republican since this law has been applied, and it doesn't matter whether it is political appointees or, I believe as well, I am convinced--well, people at the professional level have never really been big fans of this 1986 amendment to the False Claims Act, which, of course, revised the provisions allowing individuals who know of fraud to come forth and prosecute that fraud on behalf of the Government, and there is a percentage of the award that can be given to the person bringing the suit as an incentive to do it.

Now, it seems to me that we have courageous whistleblowers that are going out here to let the public know about this waste of taxpayers' money, and we have collected close to a half a billion dollars, recovered close to a half a billion dollars. And as recently as December of 1992, we had a single recovery that was $110 million, and this was achieved in what I believe is the next frontier of these sorts of fraud recoveries, most of them heretofore being the Defense Department, now will be the health care industry.

But, of course, as I indicated, there is an attitude within the Department of Justice, one of hostility towards whistleblowers and towards false claims, seeking to get them dismissed from the lawsuit or arguing to cut them out of award as the law provides. And last fall, Attorney General Barr told a group of corporate counsels that these whistleblower suits "constitute a burden, and a severe burden, we believe, on the contractors who are defending them."

I hope you are prepared to change the attitude from top to bottom within the Department of Justice and direct the Department to support these cases and end the hostile attitude towards whistleblowers.

Ms. Reno. I would like to work with the relators in every way possible in these cases. I think it has saved the Government money. I think it has been a great device for detecting fraud.

I would like to utilize the resources of the Department of Justice in working with private litigants so that we use the resources of both sides in the most effective manner possible.

AGCONFIRM

Senator Grassley. Could I direct your attention specifically to the question that has been raised within the Department of Justice? And there are all sorts of big corporations out there, particularly in the defense industry, that are just looking for the Department of Justice to do more in this area, questioning the constitutionality of the False Claims Act. Now, the Solicitor General's office has recommended that the Department advocate for the constitutionality of this.

Ms. Reno. I have not carefully researched the issue. My reaction is that it is constitutional, and we will do everything we can to support the law.

Senator Grassley. Well, thank you, and I appreciate your presumption of constitutionality.

Let me say that there is an immediacy on this, not that you answer any further than you have already said right now, but on April the 7th, there is a very important oral argument that is going to take place in the Ninth Circuit on this very question. Some defendants, particularly General Dynamics and Litton, will be using previous positions of the Justice Department--for example, Barr's speech that I have referred to and an old legal opinion of the Office of Legal Counsel that Barr wrote--to argue that the False Claims Act is unconstitutional.

Now, I think the Government could lose millions of dollars, not only in this court case, but in a lot of others, if this act is declared unconstitutional. And I think that there is enough evidence already that this is very useful to the Government and that you can't expect--I mean you or any other Attorney General--all of the U.S. attorneys to do all the prosecuting that needs to be done and that this is a very useful tool to get this information out, first of all, and maybe even to supplement some of the weaknesses in the Department on personnel.

Ms. Reno. Senator, since you are talking about a specific case, I am going to research the law carefully and do what is right based on the evidence in the law.

Senator Grassley. It seems to me like I am not asking you to comment on a specific case in regard to that. It seems to me that is one of those policy decisions that you said you were very willing to talk to us about. I am not asking your opinion on a specific case. It is a policy decision within this Department that is somewhat in jeopardy by both Republican political appointees--I don't know that it has been by--there aren't any

Democrat political appointees yet.

Senator Grassley. Anyway, but within the professional service of Justice that are raising some of these points, and to me it is anti-taxpayer, the positions that are being taken against the constitutionality of this act.

Ms. Reno. Again, Senator, I am going to do it based on a thorough review of the law.

Freeh

even to the point of asking me if I knew who they were.

The Chairman. There you go being practical again, Senator.

Senator Grassley. Thank you.

One other point that probably now doesn't deal with your work as an FBI Director, and I only bring it up because you had in your questionnaire some references to your work as a prosecutor or as a deputy U.S. prosecutor to work that you did supervising a number of cases that involved false claims and procurement cases. And I asked you about false claims because I was involved with improving that legislation, and we recovered a half a billion dollars now, even last December $110 million from some fraudulent Medicare cases.

Do you find that false-claim cases, you know, are initially brought by the private citizens, did the existence of these cases require that civil or criminal resources of the U.S. Attorney's Office be burdened by handling non-productive cases?

Judge Freeh. That was not my experience. My experience was that the qui tam cases, although at some cost to resources, informational resources, by either the civil or criminal assistance, was really outweighed greatly by the benefits which were achieved in cases where millions of dollars were recovered on the basis of a small investment of informational resources by the Government.

Senator Grassley. Did you find that relators or their counsels excessively interfered with the U.S. attorney's discretion to conduct the litigation of the Government's fraud claims?

Judge Freeh. It was not my experience in the Southern District of New York, no.

Senator Grassley. I yield the floor. I wish you well.

Judge Freeh. Thank you, Senator.

3 [The prepared statement of Senator Grassley follows:]

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: **2**

A-12 STEALTH FIGHTER LITIGATION

1. ISSUE STATEMENT

In McDonnell-Douglas Corporation and General Dynamics Corporation v. United States -- the largest Government contract claim ever filed -- plaintiffs have filed suit in the United States Court of Federal Claims challenging the Navy's default termination of their contract to design and produce the A-12 "stealth" aircraft.

- Plaintiffs seek over $2.9 billion, including $1.3 billion for equitable adjustments and termination for convenience costs, and to overturn the Navy's demand for the return of $1.4 billion in unliquidated progress payments.

- The suit challenges virtually every aspect of the A-12 contract. It includes allegations that the contract was awarded in violation of the 1988 Defense Appropriations Act, that the funding of the contract violated the Anti-Deficiency Act and that the contract was unlawfully terminated by the Secretary of Defense.

- Discovery encompasses no less than 63 million pages of documents, most of which are classified "special access" and require special security precautions. The contractors also sought discovery of other "stealth" programs to support their allegations that the Government was obligated by law to share "stealth" technology with them. Already the Government has twice successfully petitioned the Court of Appeals for the Federal Circuit to overturn the trial judge's rulings on discovery related to classified information.

- In addition to the enormous amount at stake, the case raises the important issue of whether DOD can control its contractors. After spending $2 billion and failing to produce a single airplane, the contractors notified DOD that they would not continue to perform unless this fixed price contract was reformed to a cost plus fixed fee contract. Even if this were done, the contractors could not tell DOD when it would receive an airplane, what it would look like or what it would cost. This case involves the question whether, under these circumstances, DOD can justifiably terminate the contract for default.

2. STATUS

Discovery is continuing; a second trial on another section of the case is scheduled to begin in June 1994; and preliminary settlement discussions have begun.

- A two-week trial on one count of the 20-count complaint, Count 17, relating to termination of the contract for default, ended in October 1993. The trial on Count 1, which is scheduled to begin on June 6, 1994, and is expected to last 1-2 weeks, relates to a challenge to the propriety of using a fixed price contract for development of the aircraft.

- Count 9 of the complaint alleges that the government improperly withheld its superior knowledge regarding stealth technology contained in other classified, special access programs. Notwithstanding the Air Force's assertion of the state secrets privilege over certain relevant information, an assertion which has been sustained by the court of appeals, the court issued an order, on April 28, 1994, permitting the contractors to engage in further discovery on the superior knowledge allegation.

- The court heard oral argument on March 16, 1994, regarding the proper interpretation of the contract's H-7 clause, which involves the incremental funding of this contract, as challenged in Counts 4 and 5 of the complaint.

- No ruling has been issued on the Count 17 or incremental funding issues. Instead, the court has deferred ruling on those matters until at least July 21, 1994, pending the result of settlement negotiations between the Government, represented by the Assistant Attorney General for the Civil Division and the General Counsel of the Navy, and the top officials of both companies and their attorneys.

3. DEPARTMENT POSITION

We plan to continue to attempt to find the resources necessary to litigate this case while at the same time exploring the possibility of an acceptable settlement.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

As far as we are aware and even with some publicity, no member of the committee has expressed a special interest in this litigation.

5. REFERENCE MATERIALS

Aside from the briefs, which are extremely voluminous, we are not aware of other documents which would be of use in this briefing.

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: 3

RURAL ELECTRIFICATION ADMINISTRATION

1. ISSUE STATEMENT

Rural Electrification Administration (REA) Litigation. In the last nine years, electric cooperatives have defaulted on over $9 billion in REA loans to finance construction of power generation plants. In seven instances defaults representing close to $6 billion have been the subject of intense negotiations resulting in debt restructuring agreements. Others are in bankruptcy or other stages of litigation.

2. STATUS

Cajun Electric, a Louisiana cooperative, owes REA more than $4 billion. Much of that is attributable to loans used to finance Cajun's 30% share of the River Bend nuclear facility. We restructured Cajun's debt to REA several years ago so that about 70% of the debt was repayable on a fixed schedule, and 30% was repayable only contingently. At present, about $2.5 billion is non-contingent and about $1.5 billion is contingent. Cajun probably cannot repay the non-contingent debt from rate revenues. Cajun sued Gulf States Utilities (now merged with Entergy, Inc.) for rescission, fraud, and other theories regarding the construction of River Bend. Any recovery is to be paid to REA pursuant to the debt restructure. This lawsuit is Cajun's major asset, other than rates, to which we have looked for recovery. Cajun seems relatively indifferent to the amount for which it settles if, as part of the settlement, REA forgives any remaining debt over about $1 billion so that it can stabilize or lower its rates. Settlement discussions have broken off, but there are overtures to restart them. Trial is ongoing. Whether Cajun wins or loses, another debt restructure is likely.

Big Rivers Electric Corporation, a Kentucky cooperative, owes REA more than $1 billion. Much of that was loaned to finance the Wilson plant, a source of excess power. Two aluminum companies consume about 70% of Big Rivers' domestic load. They have long balked at paying for Wilson. We restructured Big Rivers' debt in 1987, and the state regulatory body then tied the price of power for the aluminum companies to the price of aluminum. These companies fought the pricing but acquiesced in it in 1990, as part of a settlement. The recent depression of aluminum prices has reinvigorated the aluminum companies' demands for rate concessions, and the relationship between the aluminum companies and Big Rivers is acrimonious. In addition, there have been criminal convictions relating to Big Rivers' fuel procurement policies. We have told Big Rivers we will consider fine tuning the 1987 restructure or, if economics require it, approach the problem anew.

Vermont Electric represents two jointly run borrowers that together owe REA about $90 million. Vermont's problems arose primarily due to its participation in the Seabrook nuclear plant.

We agreed on a debt restructure last year, but the state regulatory commission denied the coops permission to consummate it. Negotiations are ongoing.

3. DEPARTMENT POSITION

We work very closely with REA in litigation, debt restructive negotiations, and related matters.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Most of these matters have provoked the interest of elected officials, both on the Hill and in the local jurisdictions. Senator Leahy's staff has been very interested in the Vermont Electric situation, pressing for a resolution that benefits local interests at the expense of the federal taxpayer and has applied pressure at REA and DOJ.

Consummated transactions affecting cooperatives in other members' states include:

* Illinois (Simon and Moseley-Braun):

  - Western Illinois Power Cooperative ($364 million), after suffering financial distress, merged with Soyland Electric Cooperative ($1 billion). Soyland has approached REA, seeking additional relief.

  - Illinois Valley Electric Cooperative ($22 million), which had some of the highest rates in country and still could not pay its REA loans, first restructured its debt and then paid REA roughly the discounted present value of its low-interest loans with funds borrowed privately.

* Colorado (Brown)

  - Colorado-Ute ($400 million) suffered from severe management deficiencies. It filed for bankruptcy and its chapter 11 plan, now consummated, liquidated the company, resulting in full payment to REA.

* Maine (Cohen)

  - Eastern Maine Electric Cooperative ($11 million) filed a chapter 11 bankruptcy petition due to Seabrook related financial difficulties. Its recently approved reorganization plan provides for full payment to REA.

* Utah (Hatch)

- Deseret Generation and Transmission Cooperative's debt ($450 million) was restructured several years ago. It forecasts renewed financial difficulty in several more years and has, therefore, approached REA and another cooperative about a possible merger.

In none of these instances have the named senators become actively involved.

5. REFERENCE MATERIALS

None

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: **4**

TIMBER HARVESTING CASES

1. ISSUE STATEMENT

In the late 1970's and early 1980's, timber companies in the Northwest concluded contracts with the Forest Service under which they agreed to harvest timber at prices which they subsequently determined were too high. A large number of companies failed to harvest the timber in accordance with their contracts. While many paid the United States damages arising from their defaults, others chose to litigate the contracts -- in the United States Court of Federal Claims, the United District Court for the District of Oregon, or both. In response, the Commercial Litigation Branch formed a team of about a dozen attorneys to handle some 50 cases in which timber companies seek to avoid damages arising from their defaults. All told, the cases involve over 60 individual contracts in which the United States seeks damages in excess of $68 million.

For approximately seven years -- from 1984 to 1991 -- discovery in all cases was stayed by the Court of Federal Claims while the timber companies challenged the constitutionality of the Contract Disputes Act. That challenge was finally resolved in the Government's favor in the summer of 1991. Since that time, we have completed extensive discovery and settled 2 cases, successfully moved to dismiss some 20 cases under 28 U.S.C. §1500, and moved for summary judgment in another 28 cases.

Currently, the two principal issues are: (1) whether the United States is entitled to summary judgment in the 28 cases now pending in Court of Federal Claims; and (2) whether the United States can enforce in district court, without trial, the 20 cases which were dismissed under 28 U.S.C. §1500.

2. STATUS AND DEPARTMENT POSITION

Court of Federal Claims: On May 17 and 18, 1994, the Court of Federal Claims heard oral argument on motions for summary judgment in four representative cases. At the close of argument, the court rejected the plaintiffs' contentions that their performance was excused under the force majeure clause of the contracts or the doctrines of frustration of purpose and impossibility of performance, and granted the United States summary judgment on these issues. The court also held that the sale in one of the cases was not illegal even though a subsequent resale had been invalidated for environmental reasons and granted the Government summary judgment on this issue as well. The judge said that he was also inclined to reject the plaintiffs' contention that performance was excused under the doctrine of commercial impracticability but reserved final judgment on that issue. Finally, the plaintiffs contended that the terms of the resale contracts differed substantially from those of the original sales and that, therefore, under the Supreme Court's decision in Axman v. United States, the Government was not entitled to collect damages. We maintained that the changes were covered by the sovereign acts doctrine and, in any event, affected only the terms of payment for the timber which was to be harvested and not the scope of performance and, therefore, that Axman did not apply. The Court took this issue under advisement, indicating that if it did not grant summary judgment for the United States, a trial would be necessary to determine the materiality of the changes at issue.

District Court: The Contract Disputes Act ("CDA") provides that, unless a contractor appeals a contracting officer's decision to the Court of Federal Claims or an agency's Board of Contract Appeals, that decision becomes "final and conclusive and not subject to review by any forum." Several contractors filed suit in the Court of Federal Claims challenging decisions by Forest Service contracting officers that they had breached their contracts by failing to perform after having first filed actions in the United States District Court for the District Court of Oregon seeking declaratory and injunctive relief. The Court of Federal Claims, however, does not have jurisdiction when a plaintiff has already brought an action in district court involving the same operative facts. 28 U.S.C. §1500. We moved to dismiss some 20 Claims Court actions on these grounds. After prolonged delay, during which the import of 28 U.S.C. §1500 was being resolved by the Court of Appeals for the Federal Circuit, those motions were granted in 1992. In 1993, we moved the district court in Oregon to enforce the contracting officers' decisions, without trial, on the ground that they were "final and conclusive" because they had not been successfully appealed as provided for in the CDA. The court denied that motion, holding that the United States should have asseted its claims as a compulsory counterclaim in the district court action which was pending at the time the contractors filed in the Claims Court. We believe this holding is wrong for a number of reasons, the principal ones being that (a) the CDA deprived district courts of jurisdiction to hear government contract claims and (b) adhereance to the district court's decision would allow contractors to avoid trial in the specialized tribunals established by Congress expressly for that purpose. The case is now on appeal to the Ninth Circuit -- briefing was completed in April.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

As far as we are aware, no member of the committee has expressed a special interest in this litigation.

5. REFERENCE MATERIALS

Aside from the briefs, which are extremely voluminous, we are not aware of any public documents which would be of use in this briefing.

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: 5

HUGHES AIRCRAFT COMPANY V. UNITED STATES

1. ISSUE STATEMENT

- o The amount of compensation due Hughes Aircraft for the use of patented attitude control systems in spacecraft.

- o This patent suit was brought in the U. S. Court of Federal Claims pursuant to 28 U.S.C. § 1498. The Court of Appeals for the Federal Circuit has affirmed that the United States is liable for the use of the patented invention. At issue are 81 spacecraft used by the Air Force, National Aeronautics and Space Administration and Navy, having a total value of approximately $3.5 billion.

- o Hughes Aircraft Company claims that it is entitled to a royalty of 15% of the total cost of these spacecraft and delay compensation computed on the basis of its historic return on equity, making the total award approximately $4 billion.

2. STATUS

Judge Turner has advised that he will issue a decision in May which will determine the royalty rate and delay compensation issues. (There are two components of total compensation: (1) royalty compensation, which is normally calculated by multiplying the compensation base by the royalty rate, and (2) delay compensation, which is normally measured as interest from the time royalty compensation would have been due up to the date of payment.) Civil Division will then attempt to agree on a calculation for the total award which will be entered subsequently by Judge Turner as the final judgment of the Court of Federal Claims.

3. DEPARTMENT POSITION

We contend that the royalty should be no more than 1% of the total cost of the spacecraft and that delay compensation should be computed using historic interest rates for 52-week Treasury bills adjusted for any income taxes for a total award of approximately $50 million.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Unknown.

5. REFERENCE MATERIALS

None.

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: **6**

HUMAN RADIATION EXPERIMENTS--INTERAGENCY WORKING GROUP

1. ISSUE STATEMENT

' **Summary:** Whether and to what extent the federal government should compensate persons who were intentionally exposed to ionizing radiation in experiments conducted by or on behalf of the government.

' **Background:** On December 7, 1993, Energy Secretary Hazel O'Leary acknowledged, as had been reported in a 1986 congressional report, that individuals had been subjected to injections of plutonium as part of an experiment sponsored by the Atomic Energy Commission in the 1940's, possibly without having been fully informed of the purpose or risks of the experiment. Secretary O'Leary's announcement set in motion an effort, which was expanded by the White House in January 1994, to investigate the nature and extent of human experiments involving intentional exposure to ionizing radiation conducted or sponsored by the government since the Cold War era.

' **Areas of controversy/Sensitivity:** Because many of the human radiation experiments occurred decades ago, conventional tort cases may be time-barred, and proof of injury from such experiments may be elusive or non-existent; also, the cases may be barred by the United States' sovereign immunity. The prospect of "victims" of government-sponsored experimentation being denied a tort remedy on the bases of the statute of limitations or sovereign immunity is publicly unpopular and unpalatable to many members of congress. Also, test subjects have pursued and can be expected to pursue private relief bills, requiring time and attention by the members. Thus, some members have recommended a global legislative response, potentially providing compensation through an administrative scheme similar to the more limited Radiation Exposure Compensation Act administered by the Attorney General. The potential budgetary impact of such legislation is unknown but likely very substantial, since the RECA program cost more than $122-million in payments and administration during its first two years. Moreover, compensation of as yet undefined eligibility populations may raise questions of parity relative to other populations and could result in windfall payments to uninjured parties.

Some members of Congress want the inquiry expanded into government-conducted or sponsored human experiments of any nature, including experiments involving mustard gas and LSD, which have been the subjects of private relief bills. Expansion of the current inquiry beyond its present bounds threatens the capacity of the Executive Branch to conduct a meaningful investigation, and further expansion of any legislative compensation plan would have added fiscal burdens.

2. STATUS

The Civil Division, along with personnel from other Department components, is participating in the Clinton Administration's government-wide initiative to collect and analyze the facts surrounding the experiments, to make the information public, and to determine whether the experiments met ethical and scientific standards. The information that will be derived from this investigation will enable the Administration to make informed decisions concerning the most appropriate response to our citizens, including informing subjects and their families of potential health risks and the need for medical follow-up; formal apologies; and on-going research, education and information programs, as well as monetary compensation or other forms of redress for test subjects.

Operating through five principal subcommittees during its first three months, and assisted by an independent Advisory Committee of experts in science, medicine, ethics, and law, appointed by the President, the Working Group has made great progress in setting the framework and goals of the investigation, defining the scope of the investigation, and in beginning the process of identifying, locating, and collecting records of the experiments. Document collections are anticipated to be massive and dispersed throughout the country. Retrieval and organization of the records will require substantial investments of personnel and automation resources from participating agencies. However, since DOJ has discovered no such records in its own collections, our participation will continue to focus on the legal issues involved in the investigation and on potential compensation legislation. The investigation timetable provides for an Interim Report by the Advisory Committee within six months of the date of its first meeting, which was held April 21-21, 1994, with a goal of a final report one year after its first meeting. In congressional testimony, we expressed the hope of being able to provide information to the Congress between the six-month and one-year period.

The intense publicity surrounding the human radiation experiments has also resulted in several new federal tort claims and related tort litigation filed by test subjects -- with more expected as additional details are made public. In addition to participating in the Working Group's activities since it was established on January 3, 1994, the Civil Division is responsible for defense of the tort claims filed by radiation test subjects. Litigation liability exposure is unknown (first three individual pending tort claims seek $10,000,000 for each subject). The first tort claims will become ripe for litigation in late July or early August 1994. In addition, the Torts Branch is defending a personal liability suit brought against Dr. Glenn Seaborg, former Chairman of the Atomic Energy Commission.

3. DEPARTMENT POSITION

With respect to the tort claims, the Department intends to fulfil its fiduciary responsibility to the taxpayers and will raise all applicable defenses and challenges to jurisdiction under existing law. With respect to changes in the law, the Department urges the Congress to await the results of the investigation before rushing into potentially improvident legislative proposals. At this time, we simply do not have sufficient information with regard to the subjects of human radiation experiments to make any specific proposals. As Assistant Attorney General Frank W. Hunger testified before the House Subcommittee on Administrative Law and Governmental Affairs on February 2, 1994, "The Department of Justice shares a commitment to a full public accounting of the government's human radiation experiments. [We are] charged with developing a broad range of possible responses to individuals affected by human radiation experiments. The [Working Group and Advisory Committee] are dedicated to developing a record so that the Administration and this Congress, should it choose, can craft an informed and appropriate response to a problem too long ignored."

4. JUDICIARY COMMITTEE MEMBERS' INTERESTS/POSITIONS

Early in 1994, we received indications that Senator Kennedy might co-sponsor compensation legislation with Rep. Markey, who was a leader in exposing radiation experiments back in 1986. If the legislation is drafted as Congressman Markey has described it, it will be far better than bills previously introduced on this topic. Howver, no Senate-sponsored legislation has been proposed to date; and the only House bill on which we have commented is that discussed in the previous paragraph. Senator Hatch was a principal sponsor of the Radiation Exposure Compensation Act, providing compensation for certain "downwinders," uranium miners, and on-site participants at atmospheric tests. He may have a continuing interest in the progress of RECA, as well as the recently disclosed radiation experiments.

5. REFERENCE MATERIALS

\ March 15, 1994, Briefing Book for the Attorney General and Justice Department Senior Staff

Cooperating Components: The Office of the Associate Attorney General, Office of Legislative Affairs, Office of Legal Counsel, Office of Information and Privacy, and the Office of Policy Development.

Members of the Working Group: DOE, DOD, HHS, DVA, DOJ, NASA, CIA and OMB.

Component Contact: J. Patrick Glynn (501-7040)

HUMAN RADIATION EXPERIMENTS--HUMAN RADIATION INTERAGENCY WORKING GROUP: BRIEFING BOOK

TABLE OF CONTENTS

DOJ PARTICIPANTS IN INTERAGENCY WORKING GROUP

<u>Eva Plaza</u>
Deputy Assistant Attorney General
Office of Deputy Assistant Attorney General
Civil Division
Room 3135 - MAIN
PHONE: 514-3309
FAX : 514-8071

<u>J. Patrick Glynn</u>
Director
Torts Branch, Civil Division
Room 8454 - PHB
PHONE: 501-7040
FAX : 208-0976

<u>Nancy McFadden</u>
Deputy Associate Attorney General
Office of Associate Attorney General
Room 5215 - MAIN
PHONE: 514-9700
FAX : 514-0238

<u>Paul Friedman</u>
Deputy Associate Attorney General
Office of the Associate Attorney General
Room 5134 - MAIN
PHONE: 514-1721
FAX : 514-1724

<u>Katherine Gruenheck</u>
Trial Attorney
Appellate Staff, Civil Division
Room 3343 - MAIN
PHONE: 514-3159
FAX : 514-8151

<u>Kirsten Levingston</u>
Special Assistant to Assistant
Attorney General
Civil Division
Room 3608 - MAIN
PHONE: 514-5373
FAX : 514-8071

Dan Metcalfe
Co-Director
Office of Information and Privacy
Room 7238 - MAIN
PHONE: 514-3642
FAX : 514-1009

Rosemary Hart
Senior Counsel
Office of Legal Counsel
Room 5234 - MAIN
PHONE: 514-2027
FAX : 514-0563

Shelia Anthony
Assistant Attorney General
Office of Legislative Affairs
Room 1145 - MAIN
PHONE: 514-2141
FAX : 514-4482

Faith Burton
Senior Counsel
Office of Legislative Affairs
Room 1139 - MAIN
PHONE: 514-1653
FAX : 514-9149

Julie Anbender
Deputy Director
Office of Public Affairs
Room 1228 - MAIN
PHONE: 514-2007
FAX : 514-5331

Peter C. Erichsen
Deputy Assistant Attorney General
Office of Policy Development
Room 4224 - MAIN
PHONE: 616-2004
FAX : 514-2424

HUMAN RADIATION EXPERIMENTS--HUMAN RADIATION INTERAGENCY WORKING GROUP

Background

- December 7, 1993, Energy Secretary Hazel O'Leary press conference
  - previous tests and plutonium stockpile
  - per 1986 congressional report, plutonium injection experiment sponsored by the Atomic Energy Commission in the 1940's
  - subjects possibly not fully informed of the purpose or risks
- DOE commits to investigate nature and extent of human experiments
- January 3, 1994, effort expanded by the White House
  - Human Radiation Interagency Working Group to coordinate government-wide investigation
  - scope: intentional exposure to ionizing radiation, conducted or sponsored by the government since the Cold War era.
  - Members: DOE, DOD, HHS, DVA, DOJ, NASA, CIA, and OMB
Treasury, NARA, White House, and others participate
- DOJ Personnel, Civil Division
  - Primary activity next several months: develop the Administration's response, prepare comments/counterproposals monetary compensation legislation
- Purpose of the investigation:
collect and analyze the facts
make the information public
determine whether the experiments met ethical and scientific standards
make informed decisions concerning most appropriate response
- Administration position on options:
inform subjects and their families of potential health risks/need for medical follow-up;
formal apologies;
on-going research, education and information programs;
monetary compensation or other forms of redress for test subjects.

Activities to Date

Interagency Working Group -- Overview:

- o Five subcommittee operation for first two months
  - Ethics & Science; Communications; Record Retrieval; Congressional; Legal Issues
  - framework and goals of the investigation set
  - scope of the investigation defined
  - begin process of identifying, locating, and collecting records Document collections massive and dispersed -
  - Retrieval and organization require substantial personnel and automation resources

- o DOJ role:
  - Draft Executive Order for Advisory Committee
  - Review/screening Advisory committee Members
  - Draft/comment on Record Retrieval Order
  - Draft Internal DOJ Record Search Directive
  - Privacy/FOIA
  - Compensation
  - Draft/comment on Legislative Testimony
  - Record Production Compliance Advice

- o March 1994 streamlined operating structure
  - Subcommittees on Legislative Affairs and Compensation Issues continue
  - All other functions coordinated through Operations Subcommittee, DOE, DOD, HHS, and DVA.

Advisory Committee Established:

- o January 18, 1994, President signed Executive Order forming an Advisory Committee on Human Radiation Experiments

  - Advisory Committee Membership:

  Outside-government experts in ethics, medicine, science, law (Members listed at end of this memo)

  - Mission: Provide advice/recommendations to the Human Radiation Interagency Working Group determine applicable ethical and scientific standards and criteria evaluate extent to which the experiments were consistent with applicable standards

  If required to protect health, may recommend that particular subjects or their descendants, be notified of any potential health risk or the need for medical follow-up

  May recommend further policies, as needed, to ensure compliance with recommended ethical and scientific standards for human radiation experiments

- DOJ directive for search by its components. To date, no records found to indicate that any DOJ component conducted or sponsored experiments

Communications and Outreach Results:

- Early January, Radiation Experiment Helpline, utilizing "800" numbers
  - Approximately twenty thousand calls received and information collected for further study
  - Information received from a number of those calls referred to the DOJ for consideration (Principally, these involve calls from or on behalf of a person who may be eligible for consideration for compensation under the Radiation Exposure Compensation Act program administered by the Civil Division. Eligible candidates include certain geographically defined "downwinders," uranium miners, and on-site participants in atmospheric testing programs

Legal Issues Subcommittee Initiative:

- Initial activities:
  - appropriate constitution of the Advisory Committee/FACA/Conflicts
  - establishment of the record retention and inventory process
  - Privacy/FOIA
- Current activities:
  - developing models for compensation,
  - responding to congressional legislative initiatives
  - establish broad compensation models

Administration Strategy:
- consider a broad range of responses, including, but not limited to, monetary compensation.
- conduct comprehensive study of existing compensation schemes (list of compensation plans under review, together with a summary of the potential characteristics of a federal response)

Administration position on new legislation:
- await full development of the facts and the recommendations of the independent Advisory Committee

Administration Position Statement on Compensation, Attached as Item 5

Congressional Affairs Activities:

- Intense public interest in radiation experiments has triggered substantial congressional interest
  - introduction of proposed legislation to provide monetary compensation to experiment subjects, including program to be administered by the Attorney General
  - calls to expand the investigation beyond radiation experiments to include such experiments as those involving mustard gas and hallucinogenic drugs such as LSD

- February 2, 1994, Hearing
  - House Subcommittee on Administrative Law and Governmental Affairs, of the House Judiciary Committee
  - Witnesses:

  Members of Congress (Mann, Byrne, Goss, Frost, Markey), former experiment subjects, including subjects of radiation, LSD, and mustard gas experiments, commentators on the topic of human experimentation, representatives of each of the agencies involved in the Interagency Working Group. (Assistant Attorney General Frank W. Hunger testified for DOJ.)

- Funding for a new compensation scheme reasonably projected to cost more than a hundred million dollars annually.
  - RECA cash payments to a relatively small population of eligible recipients
  - paid $122 million in benefits during the first two years of the program
  - budgeted for $2.7-million in administrative costs during the current fiscal year.

POTENTIAL ELEMENTS OF A FEDERAL RESPONSE

Compensation Options

1. Individual monetary compensation

   a. Lump sum

      -- Amount(s)

      -- Variation by claimant circumstances

   b. Periodic

      -- Amount(s)

      -- Variation by claimant circumstances

   c. Duration

      -- Survivors' benefits

   d. Program(s) under which benefits administered

      -- Existing program(s)

      -- New program

2. In-kind Services

   a. Medical monitoring

   b. Health care services (physical, mental)

      -- Eligibility for select programs (e.g., VA)

      -- Special program

   c. Other social services (e.g., housing, transportation, education, life insurance)

   d. Follow up study(s) of individuals and groups to determine health and other effects

e. Administering agency(s)

f. Duration

- Survivors' benefits

3. Disclosure of personal information

   a. For subjects and their families

   b. Full disclosure of government's information on circumstances of each individual case

4. Recognition

   a. Formal apology

      - By whom (responsible agency(s), President, Congress, Government, Nation?)

      - To whom (individual participants, families, groups?)

      - Form (letter, public announcement, legislation?)

   b. Appreciation for contribution to the National interest

   c. Memorial

      - Plaque/monument/memorial building

5. "Living" program to help others

   a. Research program/endowment

   b. Information archives and periodic reports to the Nation

   c. Education programs

Legislation/ Compensation Program	# People Affected/# of Claims	Monetary Compensation	Health Care Monitoring or Other Services	Apology/ Recognition	Information Disclosure/ Research Programs	Program Cost (estimate)	Terms or Conditions for Compensation
Veterans Dioxin and Radiation Compensation Standards Act (1984; amended 1988) (Benefits are one component of a broad veterans' compensation program)	Need this information from VA.	Tax-free benefit of $85 to $4,943 per month, based on disability. Surviving spouses/children eligible for indemnity compensation. Death benefits paid at $9,228 to $19,632 per year. Mandated presumption of service-connected disability if claimant has one of thirteen specified cancers.	Yes. Priority medical care at VA hospitals available for veterans exposed to herbicides during Vietnam War or exposed to radiation.	No.	Yes. Epidemiological studies of health effects of veterans exposed to radiation and herbicide mandated in legislation.	Need this information from VA.	Legislation covers Vietnam War veterans or veterans exposed to radiation during atomic weapons tests or the post World War II occupation of Hiroshima or Nagasaki. Veterans also eligible if disabilities or death result from negligent VA treatment.
DOE Health Monitoring Program for Workers Exposed to Occupational Hazards	Need this information from DOE.	No.	DOE provides lifetime health monitoring to workers occupationally exposed to radioactive or hazardous substances.	No.	Need this information from DOE.	Need this information from DOE.	All employees subject to significant health risks are monitored.

Legislation/ Compensation Program	# People Affected/# of Claims	Monetary Compensation	Health Care/ Monitoring or Other Services	Apology/ Recognition	Information Disclosure/ Research Programs	Program Cost (estimate)	Terms of Conditions for Compensation
Japanese Internment Reparation Program (administered by DOJ Civil Rights Division)	120,000 people interned. 78,000 claims expected through end of program in FY 1994.	$20,000 to each interned individual or to internee's family, if deceased.	No.	Yes.	No.	$1.5 billion paid through FY 93. FY 94 $100 million will complete program at $1.6 billion.	Acceptance of claim constitutes full satisfaction of claims against U.S. Government.
National Vaccine Injury Compensation Program	1,700 cases resolved since 10/88; 500 paid. Several thousand cases still pending.	Yes. Justice-appointed "special masters" determine awards for successful claimants.	No.	No.	Need this information from HHS or DOJ.	$400 million (through FY 93)?	Compensates people with vaccine-related injuries from childhood.
Tuskegee Syphilis Study Subjects Compensation Program (HEW, HHS predecessor)	Approximately 450 persons affected.	No.	Yes. Full lifetime medical benefits paid for all subjects involved, including health monitoring for subjects and their families, if affected.	Yes.	Yes. Full access to information.	Several tens of millions of dollars.	Monitoring and assistance provided to any family member, (including grandchildren) affected by the disease.

ADMINISTRATION POSITION ON COMPENSATION
RELATED TO HUMAN RADIATION EXPERIMENTS

The Administration's actions regarding compensation and other responses to individuals affected by the human radiation experiments include the following:

1. Taking immediate action to provide information to subjects and their families;

2. Acting, when required to protect the health of individuals, or their descendants, who were subjects of a human radiation experiment, to notify a particular subject, or his or her descendants, of any potential health risk or the need for medical follow-up;

3. Examining various models for appropriate federal responses, including those incorporated into other federal programs such as those for downwinders, Veterans exposed to radiation, and the Japanese interns during World War II. The range of federal responses under consideration include potential monetary compensation, medical follow-up, disclosure of detailed information, formal apologies or other recognition, and on-going research, education and information programs; and

4. Developing specific recommendations for legislative and other action that may be appropriate once the Working Group and Advisory Committee have at least completed their first phase of work. This will be in six months, when the Advisory Committee's interim report is issued to the Administration's Human Radiation Interagency Working Group.

Throughout all of this activity, the Administration will continue active consultations with the Congress.

-/14/94 tjg

LITIGATION UPDATE

The intense publicity surrounding the human radiation experiments has also resulted in several new administrative claims under the Federal Tort Claims Act, 28 U.S.C. § 2675, and related tort litigation filed by test subjects, with more expected as additional details are made public. In addition to participating in the Working Group's activities since it was established on January 3, 1994, the Civil Division is responsible for defense of the tort claims filed by radiation test subjects.

o *Administrative Claims:*

Three claims related to radiation testing filed with DOE as successor AEC.

- Vanderbilt University:

1945-1949 Experiment: Two claims re study using radioactive iron isotope to measure the rate of iron absorption in 819 pregnant women at the Vanderbilt University Hospital 1945-1949.

1969 Follow-up study: Children of participants, plus 831 untreated patients at clinic at time of experiment, studied to determine if prenatal exposure to iron caused an increase in cancer or congenital birth defects. Informed consent issue disputed.

Claimants' Theory: AEC control of Oak Ridge, Tennessee, facility where iron isotope was manufactured; AEC support of 1969 follow-up study (which was also funded, in part, by United States Public Health Service grants).

Damages Sought: Helen Hutchison and daughter Barbara - $10 million, each, whether or not Helen Hutchison actually received the iron isotope. Emma Craft - $30 million ($10 million for her own alleged injuries and emotional distress and $20 million for the wrongful death of her daughter, cancer death at age eleven).

Timetable: July 25, 1994, earliest date suit vs. U.S. can be filed (six-month ad. claim period).

Anticipated defenses: Statute of limitations, 28 U.S.C. § 2401(b); Discretionary function exception, 28 U.S.C. § 2680(a); Independent contractor exception, 28 U.S.C. § 2671; No strict liability vs. U.S., Laird v. Nelms, 406 U.S. 797 (1972).

- University of California at San Francisco Hospital:

One Claim, Richard A. Reece, filed with DOE January 11, 1994.

Claimed between 1945 and 1947 ingested or was injected with radioactive materials, at age ten to twelve years old and, allegedly, mentally retarded.

Also alleges that, in 1958, he was drafted into the Army, where he received no treatment for the conditions that the prior experiment may have caused or, alternatively, he may have been subject to additional radiation-related experiments.

MEMBERS OF THE ADVISORY COMMITTEE ON HUMAN RADIATION EXPERIMENTS

Ethicists

Ruth R. Faden, Ph.D., M.P.H. -- Dr. Faden, Chair of the Advisory Committee, is Professor of Health Policy and Management and Director, Program in Law, Ethics, and Health, Department of Health Policy and Management, Johns Hopkins University, Baltimore, MD; and is Senior Research Scholar, Kennedy Institute of Ethics, Georgetown University, Washington, DC.

Ruth Macklin, Ph.D. -- Dr. Macklin is Head of the Division of philosophy and History of Medicine, Professor of Bioethics, Shoshanah Trachtenberg Frackman Faculty Scholar in Biomedical Ethics, Department of Epidemiology and Social Medicine, Albert Einstein College of Medicine, Bronx, NY.

Patricia J. King, J.D. -- Professor King is Professor of Law at Georgetown University Law Center; and Adjunct Professor, Dept. of Health Policy and Management, School of Hygiene and public Health, John Hopkins University; Professor King is also former Deputy Assistant Attorney General, Civil Division, 1980-81.

Jay Katz, M.D . -- Dr. Katz is Elizabeth K. Dollard Professor Emeritus of Law, Medicine and Psychiatry and Harvey L. Karp Professorial Lecturer in Law and psychoanalysis, Yale University, New Haven, CT.

Historian

Susan E. Lederer, Ph.D. -- Dr. Lederer is Associate Professor, Department of Humanities, The Milton S. Hershey Medical Center, Pennsylvania State University, Hershey, PA.

Lawyer

Kenneth R. Feinberg, J.D. -- Mr. Feinberg maintains his own firm in Washington, DC, and is adjunct professor of law, Georgetown University Law Center, and a former member of the Presidential Commission on Catastrophic Nuclear Accidents, 1989-90.

Mr. Feinberg is a well-known expert mediator and arbitrator, who has served numerous appointments as special settlement master in such diverse areas as "Agent Orange," asbestos, DES, Dalkon Shield, among others.

Epidemiologist

Duncan Thomas, Ph.D. -- Dr. Thomas is Professor, Preventive Medicine, University of Southern California School of Medicine,Los Angeles, CA.

Clinicians - **Radiation Therapy/Nuclear Medicine**

Eli J. Glatstein, M.D. -- Dr. Glatstein is Professor, and Chairman, Department of Radiation Oncology, Simmons Cancer Center, Southwestern Medical Center, University of Texas, Dallas, TX.

Henry D. Royal, M.D. -- Dr. Royal is Associate Professor, Division of Nuclear Medicine, Mallinckrodt Institute of Radiology and Professor of Radiology Washington University School of Medicine, St. Louis, MO.

Mary Ann Stevenson, M.D. -- Dr. Stevenson is Assistant Professor in Radiation Therapy, Joint Center for Radiation Therapy and Deputy chief, Department of Radiation Oncology, New England Deaconess Hospital, Harvard Medical School, Boston, MA.

<u>Clinician</u> - **Nonradiation, Public Health**

Reed Tuckson, M.D. -- Dr. Tuckson is President, Charles R. Drew University of Medicine and Science Medical Center, Los Angeles, CA.

<u>Military Medicine</u>

Philip K. Russell, M.D. -- Dr. Russell is Professor of International Health, School of Hygiene and Public Health, Johns Hopkins University, Baltimore, MD.

<u>Radiation Biologist</u>

Nancy L. Oleinick, Ph.D. -- Dr. Oleinick is Professor of Radiation Biology and Biochemistry, Health Science and Oncology, School of Medicine, and Director, Division of Biochemistry and Oncology, Department of Radiology, Case Western Reserve University, OH.

<u>General Scientist</u>

Frank Press, Ph.D. -- Dr. Press is a Fellow, Cecil and Ida Green Fellowship, Carnegie Institution of Washington, Washington, DC; and former president National Academy of Scientists.

<u>Community Representative</u>

Lois L. Norris -- Ms. Norris, retired second vice president, Omaha National Bank and Omaha National Corporation, is a member of the Institutional Review Board, University of Nebraska, Omaha, Nebraska.

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: 7

BRANCH DAVIDIANS CIVIL LITIGATION

1. **ISSUE STATEMENT**

A. Government liability matters:

Branch Davidians and their estates, hospitals that provided medical care to Branch Davidians, persons who own nearby property and others have filed tort claims seeking damages under the Federal Tort Claims Act (FTCA). Parkland Memorial Hospital has asserted that the United States is liable for all medical care it provided to Branch Davidians.

B. Constitutional Tort matters:

Survivors of Branch Davidians, on behalf of themselves and the estates of the decedents, have filed Bivens actions. Plaintiffs allege that the Attorney General, FBI officials and ATF officials violated the First, Fourth, Fifth and Eighth Amendments.

A reporter for a "fringe" newspaper, the publisher of the newspaper and the newspaper have filed a Bivens action alleging that FBI and ATF officials violated the First Amendment by denying the reporter access to future press conferences.

2. **STATUS**

A. Government liability matters:

We have denied tort claims presented on behalf of hospitals, as well as on behalf of the City of Waco for funds it expended during the Branch Davidian operation. The hospital and city claims, however, have led to subsequent negotiations.

Personal injury and wrongful death claims have been presented at various dates seeking damages for injuries to Branch Davidians or deaths; adjacent property owners have also presented claims. We are seeking to resolve the property owners' claims and are preparing to defend the anticipated wrongful death and personal injury litigation.

B. Constitutional Tort matters:

1. An order partially granting our motion to dismiss one of the Bivens actions filed thus far was issued on April 25, 1994, in Oliver Gyarfas, et al. v. United States, et al., W.D.Texas, a case brought against 20 federal officials for alleged violations of the Constitution. Plaintiffs are Oliver and Elizabeth Gyarfas, the parents of Aisha Gyarfas Summers and the grandparents of Startle Summers, both of whom are alleged to have perished in the fire at the Branch Davidian compound on April 19, 1993.
United States District Judge Walter S. Smith determined that plaintiffs' complaint failed to state a claim against the individual defendants under the First, Fourth and Fifth Amendments with respect to the BATF's initial investigation and the planning and execution of the search warrant at the Branch Davidian Compound. Judge Smith also determined that plaintiffs' complaint failed to state a claim under the Fourth and Fifth Amendments with respect of the standoff that occurred immediately following the execution of the warrant. However, Judge Smith determined that plaintiffs' complaint did state a claim against the individuals with respect to the FBI's plan and the actions taken to end the standoff.

2. Isabel Andrade, et al. v. Philip J. Chojnacki, et al. No. H-94-0923 S.D. Texas, Houston Division, is a Bivens action brought on behalf of 11 decedents and members of their immediate families. The complaint was filed March 21, 1994. A motion to dismiss or in the alternative, to transfer venue, will be filed on Monday, May 23, 1994. The motion to dismiss will be based on plaintiffs' failure to state a claim upon which relief can be granted and raises the defense of qualified immunity.

3. Paul Hall, The Jubilee and Louis Ray Beam, Jr. v. United States et al., W.D. Texas, No. W93-CA120, is a Bivens action arising from the arrest of Louis Ray Beam for criminal trespass at a press conference at the Waco Convention Center. Beam is the former grand dragon of the Texas Knights of the Ku Klux Klan, and was hired as

a reporter by The Jubilee, a publication of the Christian far right. Plaintiff Paul Hall is the publisher of The Jubilee. The Court has denied the individual defendants' Motion to Dismiss. This action is currently in discovery, with a trial date scheduled for August 8, 1994. Summary judgment motions are due to be filed on June 6, 1994.

3. **DEPARTMENT POSITION**

A. Government liability matters:

The Department denies liability for any of the injuries suffered by Branch Davidians. As to claims of innocent parties (such as the City of Waco and nearby property owners), we are in the process of determining whether the claims can be resolved by monetary payments under authorities other than the Federal Tort Claims Act. As to medical bills, the law enforcement agencies have caused payments to be made on behalf of persons treated while the persons were in custody. Parkland Memorial Hospital has filed suit in the Court of Federal Claims seeking recovery of medical expenses. While the custodial status of the individuals is not completely clear, we have made settlement overtures and expect to resolve the suit out-of-court.

B. Constitutional Tort matters:

The Department asserts that in the Andrade and Gyarfas cases, the individual federal defendants are entitled to qualified immunity in respect to all of plaintiffs' claims arising out of the incident at the Branch Davidian compound. Settlement of the claims against the individual defendants is unlikely.

With respect to the Hall case, the Department will assert that defendants are entitled to summary judgment because discovery has revealed that they were not involved in the arrest of Beam, nor did they direct the Waco Police to arrest or question him.

4. **JUDICIARY COMMITTEE MEMBERS' INTERESTS/POSITIONS**

Not known.

5. REFERENCE MATERIALS

The Branch Davidian incident is thoroughly explored in "Report to the Deputy Attorney General on the Events At Waco, Texas" (February 28 to April 19, 1993) submitted on October 8, 1993 and in Edward Dennis, Jr.'s report "Evaluation of the Handling of the Branch Davidian Stand-off In Waco, Texas," also submitted on October 8, 1993. Two additional documents, "Recommendations of Experts For Improvements in Federal Law Enforcement After Waco" and "Lessons of Waco: Proposed Changes in Federal Law Enforcement," both submitted by Former DAG Heymann, relate generally to the aftermath of the Branch Davidian activities.

Clinton Presidential Records
Digital Records Marker

Divider Title: 8

COURT PROCEEDINGS AGAINST FEDERAL PROSECUTORS FOR MISCONDUCT

1. ISSUE STATEMENT

Federal judges occasionally conduct hearings to determine whether federal attorneys should be sanctioned for misconduct before the court. In rare cases, federal courts may also appoint investigators to determine whether federal attorneys were guilty of ethical misconduct in the course of federal litigation. The Civil Division generally represents federal attorneys in such disciplinary investigations or proceedings arising from their handling of federal litigation. There are two important cases of this type presently pending respectively in the Middle Districts of Tennessee and Florida.

The investigation in the Middle District of Tennessee, which is captioned In the Matter of: Janice Bossing and the United States Attorney's Office for the Middle District of Tennessee While Under the Administration of Ernest W. Williams, No. 94-9007 (6th Cir.), arose from a federal fraud prosecution in Nashville, Tennessee. In the course of the prosecution, the district court suppressed a deposition of one of the criminal defendants taken by AUSA Janice Bossing in a related civil proceeding. The district court concluded that AUSA Bossing had intentionally misled the criminal defendant to conclude that a federal criminal prosecution would not be initiated against him in order to obtain his agreement to testify in the civil proceeding. The district court characterized AUSA Bossing's conduct as "lying and cheating" in an effort to improperly construct a criminal case against the criminal defendant. The Sixth Circuit subsequently overturned the district court's suppression of the deposition. However, Chief Judge Merritt of the Sixth Circuit, at the request of the criminal defendant, assigned a special master to investigate AUSA Bossing's conduct.

The investigation in the Middle District of Florida, which is captioned In re Petition to Appoint Grievance Committee, 94-58-MISC-J (M.D. Fla.), arose from a federal prosecution of a state judge for ordering obscene videotapes by mail. The state judge committed suicide soon after he was indicted. It was subsequently discovered that the husband of an attorney employed by the United States Attorney's Office had ordered some of the same material that gave rise to the state judge's indictment, but that no federal prosecution was initiated against him. This discovery prompted the district court to appoint a panel of local attorneys as a grievance committee to determine whether the state judge was the subject of a discriminatory prosecution. The investigation will likely focus upon AUSA Stephen Kunz, the federal prosecutor who handled the case against the state judge, and AUSA Michelle Heldmyer, the wife of the individual who was not prosecuted.

There is a significant institutional interest in both of these investigations. Although both investigations may focus on the conduct of individual federal attorneys, it is anticipated that the investigations will extend to the broader and more sensitive issue of the proper exercise of prosecutorial discretion by the Justice Department.

2. STATUS

In the Matter: of Bossing, et al., is being handle directly by the Civil Division, which recently filed separate answers to the complaint on behalf of Bossing and the United States Attorney's Office.

In In re Petition, private counsel was obtained to represent AUSAs Kunz and Heldmyer at federal expense under 28 C.F.R. § 50.16 because they have conflicting legal positions in the case that makes joint representation by federal counsel inappropriate. Separate private counsel will soon file a response for each of them. The Justice Department's Office of Professional Responsibility recently issued a report concerning AUSA Kunz and Heldmyer's actions, which was submitted to the district court and grievance committee. The content of the report is confidential from the public.

3. DEPARTMENT POSITION

In the Matter: of Bossing, et al., the Civil Division contends that AUSA Bossing properly advised the criminal defendant of the potential of a future criminal prosecution against the criminal defendant. The district court's determination that AUSA Bossing intentionally deceived the criminal defendant is erroneous. There was no attempt by AUSA Bossing or anyone in the United States Attorney's Office to improperly utilize civil process to construct a criminal case against the defendant.

In In re Petition, the Civil Division contends that the decision to prosecute the state judge and not AUSA Heldmyer's husband was a proper exercise of prosecutorial discretion that was justified by the different circumstances involved in each case, including the available evidence. No preferential treatment was provided to AUSA Heldmyer's husband based upon their relationship or her position of authority in the United States Attorney's Office.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Not known.

5. REFERENCE MATERIALS

The key documents are the complaints and the court orders authorizing the investigations.

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: 9

PRESCOTT & FEDERAL TORT CLAIMS ACT (RADIATION ISSUES)

1. ISSUE STATEMENT

The issue presented in Prescott v. United States (D. Nev.), a Federal Tort Claims Act damage suit seeking more than $1 billion, is whether the United States is liable under the Federal Tort Claims Act (FTCA) for personal injuries to individuals claiming to have suffered radiation injuries arising out of nuclear tests conducted between 1951 and 1981. The plaintiffs were all workers at the government's Nevada Test Site.
The suit was filed by approximately 220 persons; there are thousands of potential similarly-situated plaintiffs. In defense of the litigation, the government is relying, inter alia, on the discretionary function exception to bar liability.

The litigation is exceptionally visible and controversial. Plaintiffs' counsel, Stewart Udall, has offered to settle this suit for $15 million; that offer has been rejected.

2. STATUS

Trial was conducted from December 13, 1993 to February 1, 1994. Post-trial briefing has been completed.

3. DEPARTMENT POSITION

The Department rejected settlement offers because the United States should prevail on the basis of the discretionary function exception and other defenses available to the United States under the Federal Tort Claims Act.

4. JUDICIARY COMMITTEE MEMBERS' INTEREST/POSITIONS

Senator Hatch has been an active supporter of persons claiming to be victims of fallout from nuclear tests.

5. REFERENCE MATERIALS

The key documents are papers filed with the courts in the course of the litigation.

Clinton Presidential Records
Digital Records Marker

This is not a presidential record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

This marker identifies the place of a tabbed divider. Given our digitization capabilities, we are sometimes unable to adequately scan such dividers. The title from the original document is indicated below.

Divider Title: **10**

Feres DOCTRINE LEGISLATION

1. ISSUE STATEMENT

The _Feres_ Doctrine bars claims by military personnel for injuries incident to their military service. During each Congress, legislation has been pressed, mainly in the House of Representatives, to modify the _Feres_ Doctrine to permit suits at least when medical malpractice claims arise from medical care provided at military medical facilities. Heretofore, the Department has opposed each of the bills.

2. STATUS

To the best of our knowledge, no legislative proposal is pending before the Senate. H.R. 1730, which would override _Feres_ for noncombatant medical and dental care, is pending in the House.

3. DEPARTMENT POSITION

The Department has not taken a position on the _Feres_ Doctrine during the 103rd Congress. However, the Department has strongly opposed any modification of the _Feres_ Doctrine during prior Congresses. Our opposition has been predicated upon the generous, broad military compensation regime and upon the disruptive effect litigation would have on the military.

4. JUDICIARY COMMITTEE MEMBERS' INTEREST/POSITIONS

Not known. This legislation has passed the House of Representatives during prior Congresses but has always died in the Committee on Armed Services in the Senate.

5. REFERENCE MATERIALS

The attached Statement of Former Civil Division Assistant Attorney General Stuart M. Gerson before the House Judiciary Committee, Subcommittee on Administrative Law and Governmental Relations concerning H.R. 3407 on October 2, 1991 sets forth the Department's position during the 101st Congress, opposing any modification in the _Feres_ Doctrine.

Department of Justice

STATEMENT

OF

STUART M. GERSON

ASSISTANT ATTORNEY GENERAL

CIVIL DIVISION

U.S. DEPARTMENT OF JUSTICE

BEFORE

THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW

AND GOVERNMENTAL RELATIONS

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 3407

OCTOBER 2, 1991

I am pleased to appear before the Subcommittee today to present the views of the Department of Justice on H.R. 3407, a bill that would allow active duty members of the Armed Forces to sue the United States for damages for certain injuries caused by improper medical care.

H.R. 3407 would permit claims against the United States under the Federal Tort Claims Act for the personal injury or death of a member of the Armed Forces serving on active duty when the claim arises out of medical or dental care furnished in medical facilities operated by the United States. If enacted, this proposal would essentially overrule a sound, long-standing, and viable rule of law known as the Feres doctrine for certain military medical malpractice claims. The Department of Justice is strongly opposed to this legislation and we would be compelled to recommend Executive disapproval if it were presented to the President.

Before I address the Feres doctrine and H.R. 3407, I want to comment about the impressive action the Department of Defense has initiated to improve the quality of care to our soldiers. Beginning in the late 1980's, all military hospitals have screened the medical records of all patients to determine if the treatment should be more closely reviewed to identify instances of poor medical care. The screening is performed on a criteria-based monitoring of patient care. For example, a patient who is readmitted to the hospital within 48 hours of discharge would cause the medical record to be flagged and a senior physician would closely review the record to determine if the first discharge was premature. This occurrence screening system is used for all patients including all service members. Each military hospital also has a quality assurance committee charged with conducting a complete audit of at least 5% of medical records of patients discharged each month. The records are reviewed pursuant to checklists designed to determine if the medical decisions made in the care of patients were correct.

In 1987, DOD hired a civilian contractor, Forensic Medical Advisory Service, to review the quality of medical care in military hospitals during a two year period. During the study, the contractor found that the percentage of cases where the medical care was substandard was less than 2% and there was no statistical difference between the care provided to service members and all other patients.

At present, DOD is conducting a study of the medical records of service members recommended for discharge by their commanders due to medical disabilities. The study is intended to determine if service members suffered disabling injuries as a result of negligent medical care.

The Department of Defense is also a participant in the Joint Commission on Hospital Accreditation's Agenda for Change. A major component of the Joint Commission's Agenda for Change involves creating a data-based performance monitoring mechanism for accredited healthcare organizations. Through this process hospitals will routinely collect a limited set of important clinical and organizational process and outcome data, send them to the Joint Commission, and receive back aggregate, comparative data. Several DOD medical facilities were asked by the Joint Commission to participate in developing the parameters for the monitoring system.

The Feres Doctrine

Since H.R. 3406 would so directly impact upon the Feres doctrine, a brief explanation of the doctrine and its underpinnings is in order. The doctrine derives its name from the case of Feres v. United States, 340 U.S. 135, which was decided by the Supreme Court in 1950. In Feres and its progeny, the Court has held that members of the uniformed services cannot sue the federal government, other service members, or civilian government employees in tort for injuries which arise out of, or are incurred in the course of, activity incident to military service. The Court relied upon three principal reasons in coming to its decision:

(1) The existence and availability of a separate, uniform, comprehensive, no-fault compensation scheme for injured military personnel;

(2) The effect upon military order, discipline, and effectiveness if service members were permitted to sue the government or each other; and,

(3) The distinctly federal relationship between the government and members of its armed

services, and the corresponding unfairness of permitting service-connected claims to be determined by nonuniform local law.

It is important to understand where the Feres doctrine fits into the body of law that governs tort suits involving the United States. To start with, the United States, as sovereign, is immune from suit unless it has consented to be sued, United States v. Sherwood, 312 U.S. 584 (1941). Further, the United States may define the terms and conditions upon which it may be sued. Soriano v. United States, 352 U.S. 270 (1957). The Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671, et seq.), constitutes a waiver of sovereign immunity, with certain specific limitations. United States v. Sherwood, supra; Carr v. Veterans Administration, 522 F.2d 1355 (5th Cir. 1975); Childers v. United States, 442 F.2d 1299 (5th Cir.), cert. denied, 404 U.S. 857 (1971); Simon v. United States, 244 F.2d 703 (5th Cir. 1957).

With Feres and its two companion cases, Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949), and Griggs v. United States, 178 F.2d 1 (10th Cir. 1949), the Supreme Court was called upon to determine whether the Federal Tort Claims Act was intended to waive that aspect of sovereign immunity which concerned the relationship between soldiers and their government. The common fact underlying each case was that the injured person was a service member on active duty, who sustained injury due to the action or inaction of others in the Armed Forces. I specifically note that two of the cases concerned allegations of medical malpractice. Reflecting upon the body of law from which the Federal Tort Claims Act carved a limited exception, the Supreme Court stated:

> We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving.

340 U.S. at 141. It concluded that, "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146.

The holding of Feres has been broadly and persuasively applied by the courts and has now stood for 41 years without either legislative or judicial alteration. It is even stronger today as a result of the reaffirmation of its rationale by the Supreme Court in United States v. Johnson, 481 U.S. 681 (1987), and the Court's decisions in United States v. Stanley, 483 U.S. 669 (1987); United States v. Shearer, 473 U.S. 52 (1985); Chappell v. Wallace, 462 U.S. 296 (1983); and Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, reh'g denied, 434 U.S. 882 (1977). These cases recognize that the policy underpinnings of the Feres doctrine are as valid today as they were in 1950.

The first of the three reasons or policy factors underlying the Feres doctrine is the availability of a viable alternative to damage suits in the form of a comprehensive statutory compensatory scheme. In Feres, the Supreme Court stressed that the Federal Tort Claims Act "should be construed to fit . . .

into the entire statutory system of remedies against the government [and thereby create] a workable, consistent and equitable whole," 340 U.S. at 139, and that it was thus highly relevant that Congress had already provided, "systems of simple, certain, and uniform compensation for the injuries or death of those in the Armed Services." 340 U.S. at 144.

The present statutory compensation scheme has three discrete components. First, members of the uniformed services serving on active duty receive free medical care when injured or ill. See, e.g., 10 U.S.C. §§ 3721, 6201, and 8721. They also receive unlimited sick leave with full pay and allowances until well or released from active duty. Survivors of service members are entitled to death gratuity benefits (10 U.S.C. §§ 1475-1482, P. L. 102-25), as well as partially subsidized life insurance. 10 U.S.C. §§ 1447, et seq.; 38 U.S.C. §§ 765, et seq..

Second, Congress has established a comprehensive disability retirement system for service members permanently injured in the line of duty. See 10 U.S.C. §§ 1201 and 1401. Moreover, should a service member leave the service without seeking disability retirement, he may later request it. For example, § 1552 of Title 10, United States Code, provides that the Secretary of the Army, acting through the Army Board for the Correction of Military Records (ABCMR), may correct any military record when he considers it necessary to correct an error or remove an injustice. This authority has often been used to provide former service members who demonstrate that they suffer from a permanent disability as a result of a service-related injury, with a retroactive, permanent disability retirement annuity and even back pay. See 32 C.F.R. § 581.3(b)(2) (1987); Sec. 4, A.R. 15-185.

Third, the Veterans Benefits Act provides yet another system of medical care, disability and death benefits for the service-disabled veteran and his family.[1] (A veteran eligible for both veterans disability benefits and military disability retirement benefits must choose which he will receive.)

The Stencel case emphasized the quid pro quo of this workers compensation-like remedy:

> A compensation scheme such as the Veterans' Benefits Act serves a dual purpose: it not only provides a swift, efficient remedy for the injured serviceman, but it also clothes the Government in the "protective mantle of the Act's limitation-of-liability provisions." [Citation omitted.] Given the broad exposure of the Government, and the great variability in the potentially applicable tort law, see Feres, 340 U.S. at 142-143, the military compensation scheme provides an upper limit of liability for the Government as to service-connected injuries.

---

[1] 38 U.S.C. §§ 301-362: Compensation for Service-Connected Disability or Death.

38 U.S.C. §§ 501-562: Pension for Non-Service Connected Disability or Death or for Service.

38 U.S.C. §§ 401-423: Dependency and Indemnity Compensation for Service-Connected Deaths.

38 U.S.C. §§ 601-654: Hospital, Nursing Home, or Domiciliary Care and Medical Treatment.

38 U.S.C. §§ 701-788: National Service Life Insurance.

431 U.S. at 673. The military service does not leave those permanently injured in the line of duty uncompensated. Congress has attended to such things in a reasonably adequate way. Bailey v. Van Buskirk, 345 F.2d 298 (9th Cir. 1965), cert. denied, 383 U.S. 948 (1966).[2]

The second consideration that has led to the broad application of the Feres doctrine by the courts through the years can be understood as an aspect of the traditional reluctance of American courts to intervene in military affairs, and the reluctance of the Congress to force such intervention. In United States v. Brown, 348 U.S. 110, 112 (1954), the Court said:

> The peculiar and special relationship of the soldier to his superiors, the effects of maintenance of such suits on discipline and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court [in Feres] to read the Act as excluding claims of that character. [Citation omitted.]

---

[2] In addition to compensation for personal injury, it is worthy to note that the American service member has a plethora of other remedies available to seek equitable and criminal relief for grievances. For example, see:

10 U.S.C. § 938: Complaints of Wrongs;

10 U.S.C. §§ 801, et seq.: Uniform Code of Military Justice;

United States Navy Regulations, ¶ 1107, Interview with Commanding Officer (Request Mast);

United States Navy Regulations, ¶ 1106, Redress of Wrong Committed by a Superior.

Simply put, Feres' prohibition of intramilitary tort litigation derives from society's most elemental instinct: self-preservation through a strong military.

This consideration comes into play even where the issue is not military discipline in the strict sense. United States v. Lee, supra. The Feres doctrine serves to avoid the general judicial intrusion into the area of military performance. See Mattos v. United States, 412 F.2d 793 (9th Cir. 1969); Callaway v. Garber, 289 F.2d 171 (9th Cir.), cert. denied, 368 U.S. 874 (1961). In Henninger v. United States, 473 F.2d 814 (9th Cir.), cert. denied, 414 U.S. 819 (1973), a medical malpractice case, the plaintiff had elective surgery prior to being released from the service. He argued that since the operation was performed after he had been processed for discharge, permitting him to sue for injuries incurred during its course could not have the undesirable consequences feared by the Supreme Court. The appeals court rejected this argument, stating:

> To determine the effect that a particular type of suit would have upon military discipline would be an exceedingly complex task, as Henninger concedes. The proximity of the injury to discharge would be only one factor. Whether it resulted from an allegedly negligent order would be another. Whether it was caused by totally unrelated military personnel would be yet a third. In short, nearly every case would have to be litigated and it is the suit, not the recovery, that wold be disruptive of discipline and the orderly conduct of military affairs . . . . This is a classic situation where the drawing of a clear line is more important than being able to justify, in every conceivable case, the exact point at which it is drawn. This is especially so

> because servicemen injured incident to their service are entitled to Veterans' benefits.

Id. at 815-816 (citations and footnotes omitted) [emphasis added].

H.R. 3407 would substantially blur the "clear line" that currently exists under the law. The disparity in treatment that this proposal would create between service members injured by malpractice in stateside medical facilities, and those injured by the negligence of their fellow service members anywhere else in the world, would lead to a plethora of special bills seeking additional exceptions to the doctrine.

In the last year, our military forces had tremendous success in the liberation of Kuwait. Unfortunately, that military success had a tragic, although fortunately very limited, human cost. In addition to the 98 service members who were killed in action, 354 were wounded in action. A substantially larger number of service members suffered other medical problems. The medical care provided to these people was outstanding. In all, 10,314 service members were evacuated for medical reasons from Desert Storm/Desert Shield to military medical facilities in Germany. Of these, 5,674 were evacuated from Germany to the United States. The mortality rate for all evacuees was less than .05%. These statistics alone demonstrate the high quality of military medicine despite unique and adverse conditions. Under the proposed bill, those service-members who were evacuated to the United States could bring malpractice suits; those who were treated only in Germany could not. This disparity in treatment cannot be justified.

The third policy consideration, the federal nature of the relationship and the absence of analogous private liability, led the Supreme Court in Feres to conclude that a service member's suit failed to state a claim under the Federal Tort Claims Act language which provides, "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674. On this point, the Supreme Court, in Feres stated:

> Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

340 U.S. at 146.

An analogy to various state workers' compensation statutes which preclude suit by covered workers injured in the course of employment also comes to mind. United States v. Lee, 400 F.2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969). The Supreme court in Feres recognized the relationship existing between the United States and its military personnel as one "distinctively federal in character," and that application of local law to that relationship by virtue of the Federal Tort Claims Act would be inappropriate. 340 U.S. at 143. 28 U.S.C. § 1346(b). See Atkinson v. United States, 825 F.2d 202 (9th Cir.

1987) (availability of alternative compensation scheme and the distinctly federal nature of the relationship between U.S. and members of its Armed Forces supports application of doctrine to this case). The fact that the geographic location of the injury should determine the law to be applied "makes no sense and is unfair to the soldier who has no choice as to his location, particularly because of wide variances in local law." United States v. United Services Automobile Association, 238 F.2d 364, 366 (8th Cir. 1956).

While it sometimes is argued that the Feres doctrine is unfair to service members who are the victims of medical malpractice, as we have seen, the Feres doctrine is an adjunct to a military disability compensation package available to service members which, on the whole, is far more generous, even-handed, and fair than compensation available to private citizens under analogous state workers' compensation schemes. This is because service members, unlike their civilian counterparts who suffer serious adverse consequences from medical care, generally are eligible for compensation whether or not those consequences are, or can be proven to be, the result of substandard medical care. While, in certain cases, the compensation may be somewhat less than what might be available to a successful plaintiff who endures a medical malpractice lawsuit (just as workers' compensation systems generally provide lower benefits for work-related injuries than what may be available through tort litigation), the fact is that all of these service members are eligible for such compensation rather than only a small handful who can show a causal link between their condition and substandard medical care. The arbitrariness and uncertainty associated with tort litigation is eliminated. Accordingly, from the perspective of <u>all</u> service members who suffer adverse consequences from medical care, the existing system of compensation is in many ways superior to what they would receive if they were private citizens.

The Department believes that the policy considerations outlined above are as valid today as when first articulated. Indeed, with suits against the government and individual federal officers increasing in numbers every year, the rationale for the <u>Feres</u> doctrine is even more compelling today.

<u>Negative Impact of the Proposed Legislation</u>

Accordingly, when H.R. 3407 is examined in light of the three policy considerations upon which the <u>Feres</u> doctrine is based, the shortcomings, as well as the problems which it will create, come disturbingly into focus.

<u>Disruption of Military Units</u>

One of the chief morale benefits of the existing statutory compensation scheme is that comparable injuries are treated uniformly. The principle is as basic as it is essential: in a military organization, uniformity, consistency, and fairness within the group are vital to the preservation of discipline, order, and cohesiveness. H.R. 3407 threatens this principle and seeks to replace it with special compensation based upon the circumstances and situs of injury.

As I understand the bill, it would apply only to those malpractice claims that occur in federal medical treatment facilities located in the United States: suits for injuries that occur outside those facilities would not be allowed. Inevitably, disparities will arise. One sailor would be able to sue for injuries received at a naval hospital; another, similarly injured a few miles away aboard an aircraft carrier, would not. A soldier injured by medical malpractice at the Walter Reed Army Medical Center could sue, whereas another similarly injured in Europe, or on board a medical evacuation flight landing at Andrews Air Force Base, could not. Because the FTCA predicates liability on state law, a Marine in California might recover; but another, treated in the same fashion by the same doctor in North Carolina, might not. Both Marines, however, would have one thing in common: their geographic duty stations are the result of military orders -- not their personal choice. Selective special compensation dependent upon the fortuity of location falls far short of the even-handed fairness required to preserve military morale.

Of even greater concern is the fact that only claims based on malpractice will have access to this new remedy. Thus, under H.R. 3407, a soldier who loses a leg on field maneuvers or on base in a driving accident will be treated differently than one who loses a leg in a military hospital at the hands of a surgeon, although all three suffered the same injury as a result of someone else's negligence. More importantly, the bill could be read to significantly demean all injuries sustained in combat by providing the soldier injured on the battlefield with administrative compensation, while the soldier injured in a military hospital could seek a million-dollar damage award in federal court.

The Administration is opposed to creating a special class of service members who may file tort suits against the United States. Service members injured as a result of medical malpractice should not have greater rights than service members injured during field training exercises, motor vehicle accidents, or any other activity.

Disruptive Impact of Litigation

Military morale and discipline are also affected by the special relationship of a soldier to his superiors and his comrades-in-arms. American courts have acknowledged the unique nature of this relationship in their reluctance to intervene in military affairs. Permitting one soldier to sue another for the negligent performance of his duty is anathema to the teamwork, mutual trust, and discipline upon which our military system operates. Superimposing the adversarial process of civil litigation onto the Armed Forces, even in the limited area of medical malpractice, will have a disruptive influence on military operations. The litigative process itself assures this result: military plaintiffs and witnesses will be summoned to attend depositions and trials, and they will have to take time from their regularly assigned duties to confer with counsel and investigators. They may have to be recalled from distant posts. Such disruptions are opposite to the interest of our national defense, which demands that soldiers, sailors, airmen, and Marines be ready to perform their duties at all times.

Decisions involving medical care involve not only health care practitioners, but also commanders and other members of the chain-of-command who must make decisions on whether service members are fit for duty or require medical care. If service members are allowed to file suit for alleged negligent medical care, military physicians and commanders could conceivably engage in fingerpointing to explain a service member's poor medical outcome.

The impact of litigation on the "specialized community" of our fighting forces will have another invidious effect. It will undermine trust not only among individual service members, but also between soldiers and their organization. To allow soldiers to sue their government for damages, even if limited to medical malpractice, implies that the military has failed its own and that only by taking the "boss" to court can justice be attained. Fostering that attitude within a community which demands uncompromising trust and teamwork has dire implications for our national defense.

Negative Influence on General Military Activities

The implications of retrenching on the Feres doctrine go far beyond providing tort remedies for injuries. Military health care practitioners often make determinations upon which commanders rely. The resulting decisions of the commanders frequently are contrary to the personal desires of the member and may have an adverse economic impact on him, e.g., the physical disqualification of a pilot from flying status. To allow disgruntled service members to challenge their superiors by attacking the medical bases of those decisions would surely "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." United States v. Shearer, 473 U.S. 52, 59 (1985).

The Services already have procedures in place by which erroneous medical judgments can be challenged, examined, and corrected. Allowing malpractice suits by military personnel would exact an intolerable price for the use of medical information in making personnel decisions. Such litigation would create an environment in which a commander could not act without looking over his shoulder for the process server.

The Office of Management and Budget advises that H.R. 3407 would increase direct spending. Therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990.

Conclusion

It is the view of the Department of Justice that the *Feres* doctrine continues to be a sound and necessary limit on the FTCA's waiver of sovereign immunity, essential to the accomplishment of the military's mission.