Mr. THURMOND. Mr. President, I think we are ready to vote.

The PRESIDING OFFICER. Is there objection? If there be no further debate, the question is on agreeing to the amendment.

The amendment No. 3731 was agreed to.

Mr. THURMOND. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. METZENBAUM. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The bill is before the Senate and open to further amendment. If there be no further amendment to be offered, the question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed, and the bill to be read a third time.

The bill was read a third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass?

So the bill (H.R. 5043), as amended was passed.

Mr. BYRD Mr. President, I move to reconsider the vote by which the bill, as amended, was passed and move to lay that motion on the table.

The motion to lay on the table was agreed to.

INCREASED PENALTIES FOR MAJOR FRAUD AGAINST THE UNITED STATES

Mr. BYRD. Mr. President, in accordance with the order that was entered into by the Senate on October 14, and having consulted with the distinguished Republican leader, I ask the Chair lay before the Senate H.R. 3911.

The PRESIDING OFFICER. The Clerk will report.

The assistant legislative clerk read as follows:

A bill (H.R. 3911) to amend title 18, United States Code, to provide increased penalties for certain major fraud against the United States.

The PRESIDING OFFICER. Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on the Judiciary with an amendment to strike all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Major Fraud Act of 1988".

SEC. 2. CHAPTER 47 AMENDMENT.

(a) IN GENERAL.—Chapter 47 of title 18, United States Code, is amended by adding at the end the following:

"§ 1031. Major fraud against the United States.

"(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—

"(1) to defraud the United States; or

"(2) to obtain money or property from the United States by means of false or fraudulent pretenses, representations, or promises, in any procurement of property or services for the Government, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more than $1,000,000, or imprisoned not more than 10 years, or both.

"(b) The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and

(1) the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or

(2) the offense involves a conscious or reckless risk of serious personal injury.

"(c) The maximum fine imposed upon a defendant for a prosecution including a prosecution with multiple counts under this section shall not exceed $10 million.

"(d) Nothing in this section shall preclude a court from imposing any other sentences available under this title, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. section 3571(d).

"(e) The amount of any fine imposed under this section shall be proportional to the offense. In determining the amount of the fine, the court shall take into account—

"(A) the egregiousness of the conduct proven at trial;

"(B) the amount of the loss or gain resulting therefrom;

"(C) any past convictions or judgments for fraudulent or other illegal acts against the United States entered against the defendant; and

"(D) any other factors deemed by the court to be relevant to determining the amount of the fine to be imposed.

"(f) A prosecution of an offense under this section may be commenced any time not later than 7 years after the offense is committed, plus any additional time allowed under 18 U.S.C. section 3292.

"(g)(1) Upon application by the Attorney General, the court may order a payment from a criminal fine under this section to an individual who furnished information leading to the conviction under this section. The amount of such payment shall not exceed the lesser of $250,000 or 10 percent of the criminal fine imposed under this section.

"(2) An individual is not eligible for such a payment if—

"(A) that individual is an officer or employee of a government who furnishes information or renders service in the performance of official duties;

"(B) that individual failed to furnish the information to the individual's employer prior to furnishing it to law enforcement authorities, unless the court determines the individual has justifiable reasons for that failure;

"(C) the funished information is based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit or investigation, or from the news media unless the person is the original source of the information. For the purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government; or

"(D) that individual participated in the violation of this section with respect to which such payment would be made.

"(h) Any individual who—

"(1) is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution), and

"(2) was not a participant in the unlawful activity that is the subject of said prosecution, may, in a civil action, obtain all relief necessary to make such individual whole. Such relief shall include reinstatement with the same seniority status such individual would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.".

(b) SENTENCING GUIDELINES.—Pursuant to its authority under section 994(p) of title 28, United States Code and section 21 of the Sentencing Act of 1987, the United States Sentencing Commission shall promulgate guidelines, or shall amend existing guidelines, to provide for appropriate penalty enhancements, including an additional incarceration of two years in cases under this section, where conscious or reckless risk of serious personal injury resulting from the fraud has occurred.

(c) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 47 of title 18, United States Code, is amended by adding at the end the following new item:

"1031. Major fraud against the United States.".

SEC. 3. LIMITATION ON ALLOWABILITY OF COSTS OF CONTRACTORS INCURRED IN CERTAIN PROCEEDINGS.

(a) IN GENERAL.—Chapter 15 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 293. Limitation on Government contract costs

"(a) Any proceeding costs incurred in connection with any proceeding brought by the United States or a State government that relates to a violation of, or failure to comply with, any Federal or State law or regulation on the part of the Contractor are not allowable costs in a covered contract if the proceeding results in any of the following:

"(1) an indictment by a Federal grand jury, or a conviction (including a conviction pursuant to a plea of nolo contendre) by reason of such violation or failure to comply;

"(2) the assessment of a monetary penalty by reason of a civil or administrative finding of such violation or failure to comply;

"(3) a civil judgment containing a finding of liability, or an administrative finding of liability, by reason of such violation or failure to comply, if the charges which are the subject of the proceeding involve fraud or similar offenses;

"(4) a decision to debar or suspend the contractor or rescind, void, or terminate a contract for default, by reason of such violation or failure to comply; or

"(5) the resolution of the proceeding by consent or compromise, where the penalty or relief sought by the government included the actions described in paragraphs (1) through (5).

"(b) In any proceeding brought by the United States or a State government that does not result in any of the actions de-

scribed in paragraphs (1) through (5) of subsection (a), costs for legal services incurred by a contractor in connection with such proceeding shall not be allowed in excess of the rate specified in the Equal Access to Justice Act (28 U.S.C. 2412(d)(2)(A); 5 U.S.C. 504(a)) unless the responsible contracting officer finds that a special factor (such as the limited availability of qualified attorneys or agents) justifies an award of higher rates.

"(c) For purposes of this section—

"(1) the term 'covered contract' means a contract for an amount more than $100,000 entered into by a department or agency of the United States other than a fixed-price contract without cost incentives;

"(2) the term 'proceeding' means a civil, criminal, or an administrative investigation, prosecution, or proceeding; and

"(3) the term 'proceeding costs' means all costs relating to a proceeding incurred before, during, or after the commencement of the proceeding, and such term includes—

"(A) administrative and clerical expenses;

"(B) the cost of legal services (whether performed by an employee of the contractor or otherwise);

"(C) the cost of the services of accountants and consultants retained by a contractor; and

"(D) the salaries and wages of employees, including officers and directors.".

(b) AMENDMENT TO CHAPTER ANALYSIS.—The chapter analysis for chapter 15 of title 18, United States Code, by adding at the end thereof the following:

"293. Limitation on Government contract costs.".

(c) APPLICABILITY.—The amendments made by this section shall apply to contracts entered into after the date of the enactment of this Act.

SEC. 4. ESTABLISHMENT OF ADDITIONAL ASSISTANT UNITED STATES ATTORNEY AND SUPPORT PROVISIONS.

(a) ESTABLISHMENT OF POSITIONS.—Subject to the funding authorization limitations in section (a), there are hereby established within the Department of Justice additional Assistant United States Attorney positions and additional support staff positions for prosecuting cases under both the criminal and civil statutes.

(b) FUNCTION OF PERSONNEL.—The primary function of individuals selected for the positions specified in subsection (a) shall be dedicated to the investigation and prosecution of fraud against the Government.

(c) LOCATIONS.—The Attorney General shall determine the locations for assignment of such personnel. In making such determination the Attorney General shall consider concentrations of government programs and procurements and concentrations of pending Government fraud investigations and allegations.

SEC. 5. AUTHORIZATION OF APPROPRIATIONS.

(a) AUTHORIZATION.—Subject to the provisions of subsection (b), for the purpose of carrying out the purposes of this Act there are authorized to be appropriated $8,000,000 for fiscal year 1989, and such sums as may be necessary for each of the four succeeding fiscal years, to be available until expended.

(b) LIMITATION.—Before expending funds appropriated pursuant to subsection (a) to carry out the purposes of this section, the Attorney General shall utilize available existing resources within the Department of Justice for such purposes.

SEC. 6. CONGRESSIONAL OVERSIGHT.

Commencing with the first year after the date of enactment of this section, the Attorney General shall annually report to the Congress with respect to—

(1) the number of referrals of fraud cases by the Department of Defense of defense contractors (with specific statistics with respect to the one hundred largest contractors), the number of open investigation of such contractors, and a breakdown of to which United States Attorney's Office or other component of the Department of Justice each such case was referred;

(2) the number of referrals of fraud cases from other agencies or sources;

(3) the number of attorneys and support staff assigned pursuant to this Act;

(4) the number of investigative agents assigned to each investigation and the period of time each investigation has been opened;

(5) the number of convictions and acquittals achieved by individuals assigned to positions established by the Act; and

(6) the sentences, recoveries, and penalties achieved by individuals assigned to positions established by this Act.

Mr. DOLE. Mr. President, will the majority leader yield? I wonder if we might take up the Cranston amendment first and have a voice vote on that. I know Senator THURMOND wants a voice vote on that. I think the rest of the amendments have been agreed to.

Mr. BYRD. I think that is a good suggestion.

I yield the floor.

The PRESIDING OFFICER. The Senator from California.

AMENDMENT NO. 3732

(Purpose: For the relief of Paulette Mendes-Silva)

Mr. CRANSTON. Mr. President, I send an amendment to the desk and ask it be reported.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from California [Mr. CRANSTON] proposes an amendment numbered 3732.

Mr. CRANSTON. Mr. President, I ask that further reading of the amendment be dispensed with.

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

The amendment is as follows:

At the end of the bill insert: That (a) notwithstanding section 2675 of title 28, United States Code, and section 2401(b) of such title, or any other limitation on actions at law or in equity, the United States District Court for the District of Columbia shall have jurisdiction to hear, determine, and render judgment on any claim of Paulette Mendes-Silva against the United States for personal injuries which she allegedly incurred after an innoculation on March 12, 1963, by an employee of the Public Health Service of the United States Department of Health, Education, and Welfare. Any such claim of Paulette Mendes-Silva shall be brought within six months after the date of the enactment of this Act. The court shall apply the laws of the District of Columbia in such case.

(b) Nothing in this Act shall be construed as an inference of liability on the part of the United States.

Mr. CRANSTON. Mr. President, I would like to make a few brief remarks in support of this amendment that will add to the defense procurement fraud bill the text of private legislation (S. 1456) which I introduced on behalf of Ms. Paulette Mendes-Silva. The amendment waives the statute of limitations to allow Ms. Mendes-Silva to have her day in court to seek damages for the alleged negligence of an employee of the U.S. Public Health Service in administering an inoculation back in 1963. The facts of Ms. Mendes-Silva's case present particularly compelling reasons for waving the statute of limitations and allowing her to litigate her claim.

Ms. Mendes-Silva, a french citizen, first came to the United States in 1951 as a Fulbright scholar. After completing her tenure under the Fulbright Program, Ms. Mendes-Silva—who is fluent in five languages—worked under contract as an interpreter for the U.S. Department of State and the Agency for International Development, as well as a free lance intepreter.

Her claim is based on an inoculation she received in 1963 which was administered by the Public Health Service of the U.S. Department of Health, Education, and Welfare, in preparation for a private interpreting assignment in India. Ms. Mendes-Silva asserts that the public health nurse who administered the inoculation failed to ask if she had recently received any other inoculation and, as a result, Ms. Mendes-Silva developed post vaccinal encephalitis—causing total paralysis—from having two live virus inoculations—smallpox and yellow fever—in 1 day.

When her family subsequently inquired about the possibility of suing the U.S. Government for damages, they were discouraged from bringing a lawsuit. In a letter dated May 31, 1963, former Secretary of State Dean Rusk explained that since Ms. Mendes-Silva received the inoculations in preparation for a trip to interpret for a private organization and she was not then under contract with the U.S. Government, the Government was not responsible for her medical expenses.

After Ms. Mendes-Silva's health improved somewhat, she sought the help of an attorney but by then the 2-year statute of limitations had run. Because of her limited financial means, no lawyer would take her case.

Mr. President, Ms. Mendes-Silva should have her day in court. That's all my bill will do for her by waiving the statute of limitations. The burden of proof will be on her—not the Government—to prove that the 1963 inoculation was administered negligently by the Public Health Service nurse, and that that particular inoculation was the cause of her subsequent paralysis. The burden will not be on the Government to prove its innocence. Rather, the burden will be on Ms. Mendes-Silva to prove the Government's neglience. In fact, Mr. President, the bill explicity states: Nothing in this act shall be construed as an inference of liability on the part of the United States."

Furthermore, the waiving of the statute of limitations is warranted in

this case given the timely efforts which were made to determine if a suit could be brought against the U.S. Government. The May 1963, misleading statement by former Secretary of State Dean Rusk—that the U.S. Government could not be responsible for Ms. Mendes-Silva's medical expenses—was the basis for not pursuing her legal remedies. Also Ms. Mendes-Silva was seriously ill during the time when the statute of limitations was running, she was residing outside of the United States, and she was generally unfamiliar with her rights under the American legal system.

All of these factors argue in favor of passing this amendment today. Ms. Mendes-Silva deserves her day in court. I urge my colleagues to vote in favor of the amendment.

The PRESIDING OFFICER. Is there further debate?

Mr. THURMOND addressed the Chair.

The PRESIDING OFFICER. The Senator from South Carolina.

Mr. THURMOND. Mr. President, I rise in opposition today to an amendment by Senator CRANSTON in reference to the relief of Paulette Mendes-Silva.

Briefly, I would like to highlight the facts of this case. On March 12, 1963, she received an inoculation against smallpox at a health clinic in Arlington, VA. Later on the same day, Ms. Mendes-Silva was inoculated against yellow fever at a clinic of the U.S. Public Health Service. It is asserted that when the yellow fever inoculation was administered, the attending Public Health Service nurse failed to inquire as to whether Ms. Mendes-Silva had received any other recent inoculations.

This amendment would allow Ms. Mendes-Silva to sue the United States for injuries that allegedly were caused by an inoculation which was administered by U.S. Public Health Service on March 12, 1963, more than 25 years ago. This is despite the fact that Ms. Mendes-Silva did not file an administrative claim or filed suit in a timely manner, as required by the Federal Tort Claims Act.

Mr. President, I recognize the legitimate use of private relief legislation to address unique cases where special circumstances and inequitable situations deserve special relief. I feel sympathetic to Ms. Mendes-Silva. However, I am unaware of any strong evidence that justifies why she was unable to file a timely claim against the Government. In fact, Ms. Mendes-Silva's own lawyers have acknowledged that she tried to pursue her claim from 1963 to 1968. It is undisputed that those lawyers with whom she consulted advised her that a lawsuit, based on her claim against the United States, would probably be unsuccessful. It is apparent that there was a lack of evidence that the Government was actually responsible for her disability. There is no evidence to show that the Government was responsible.

As well, I am greatly concerned with the precedent that enactment of this legislation would set for litigation against the Federal Government. There must be some reasonable limit to the time during which the Government must remain prepared to defend itself against specific claims. Twenty-five years since the date of injury is simply too long to allow to be brought in this case.

Finally, both the Departments of Justice and Health and Human Services oppose this legislation. In a letter from the Department of Justice dated November 23, 1987, Assistant Attorney John Bolton stated, "the bill * * * waives the requirement that a claim for personal injuries be filed within the applicable statute of limitations or be forever barred. [Additionally] the bill waives the requirement that an administrative claim first be presented to the appropriate Federal agency for investigation and administrative adjudication." The letter goes on further to state that the Department of Justice is "unaware of any extraordinary circumstances that support enactment of the bill."

In closing, the most important fact may be that the President vetoed a similar bill in the 99th Congress. His opposition was based on Ms. Mendes-Silva's failure to file an administrative claim or law suit in a timely fashion and the adverse precedent this legislation would set.

For the above reasons, I will vote against this amendment.

Mr. President, I just want to say a word in closing.

Mr. President, there is no evidence to show that the Government is responsible for this. It is questionable that the two inoculations caused the illness. There is no evidence to show it. So what is the claim based upon?

The fact is she did not file an administrative claim, which she could have done, so that it could have been investigated by the Government. After all, we represent the taxpayers and it is our duty to do what is right by the taxpayers as well as an individual.

She did not file a suit. She could have filed a suit. She talked to some lawyers and the lawyers discouraged her and evidently told her there was no merit in the case.

It happened over 25 years ago, I want to remind you, Mr. President. I think it would set an adverse precedent if we approve this claim.

Why could not people come in with claims 30 years old, 40 years old, and 50 years old, if you can come in with a claim almost 26 years old? Why not come in with one for 30 or 40 years? Then how would the Government protect itself?

As I said, the President vetoed a similar bill in the 99th Congress.

I am sure the agency she had worked for would have been sympathetic to her if they felt she deserved it.

The Health and Human Services Department opposes this claim and so does the Department of Justice oppose this claim.

After all, Mr. President, we are dealing with the taxpayers' money. How could anyone go for a claim of this kind?

I have the most consideration and most compassion for people in need or who have a valid claim, but there is no valid claim here. It is not in law; it is not in fact.

How we can approve this claim, in my judgment, is not understandable. If you went back home and talked to some of your people and asked them, should the Government approve a claim like this after 25 years, what would be their answer? What would be the answer of the people in Wisconsin, in West Virginia, or in any other State? You know what the answer would be. The answer would be no. Ask the people of Florida. The answer would be no. How can the Government protect itself in a claim of this kind?

I say to you that, in my judgment, this claim should not be approved.

The PRESIDING OFFICER. Is there further debate? Who yields time? The Senator from South Carolina controls 9 minutes and the Senator from California 11 minutes.

Mr. CRANSTON. Mr. Presdient, I would like to point out that all the concerns regarding the previous Presidential veto were addressed in committee, and that both the House and Senate Judiciary Committees reported the private relief bill out favorably inspite of the previous veto. Moreover, the grounds for the previous Presidential veto are not persuasive.

First, there is basis for relief for Ms. Mendes-Silva's case. By passing this amendment we are not saying that Ms. Mendes-Silva's serious illness is the result of the Government-administered inoculation. We are merely saying that that inoculation could be the cause of her illness, and she should have her day in court to prove that in fact it was the cause. Medical literature states that "two live virus vaccines should not be given together or on the same day." This opinion is endorsed by the World Health Organization. As I pointed out before, the burden of proof will be on Ms. Mendes-Silva to establish that her illness in fact was due to the Government-administered inoculation.

Second, because Ms. Mendes-Silva and her family made timely efforts to determine if they could bring a lawsuit to recover damages for her illness, we would not be disregarding the importance of the statute of limitations. The 1963 letter from former Secretary of State Dean Rusk establishes that efforts were made on Ms. Mendes-Silva's behalf within months of the onset of her illness. That letter also establishes that Ms. Mendes-Silva was given misleading information indicating that the U.S. Government was not

responsible for her medical expenses. given that Ms. Mendes-Silva was also seriously ill during the time when the statute of limitations was running, she was residing outside of the United States, and she was generally unfamiliar with her rights under the American legal system, I do not believe that we would be setting a precedent for others to disregard the statute of limitations.

For these reasons I believe that the previous Presidential veto should not deter us from adopting this amendment today.

Furthermore, Mr. President, as I have stated before, this private relief bill will not prejudice the Government. The bill explicity states that: "Nothing in this act shall be construed as an inference of liability on the part of the United States."

Moreover, the burden of proof will be on Ms. Mendes-Silva, not on the Government, to show that her illness is the result of the Government-administered inoculation. Obviously, this will be no easy task for Ms. Mendes-Silva. However, that is a separate issue from the issue of whether she should have the opportunity to prove her claim. That's all my bill will do, give Ms. Mendes-Silva the opportunity to prove her claim.

Finally, let me point out that when this bill was reported out of the Judiciary Committee in the 99th Congress—when Senator THURMOND chaired that committee—the committee report stated:

> The committee determines that the grievous circumstances following the vaccinations prevented Ms. Mendes-Silva from pursuing her claim in a timely manner. The burden of proof rests upon the claimant to show that the Government employee was negligent in administering the vaccine.

As indicated by this statement in the Judiciary Committee's report, all of the concerns which are now being raised have been addressed before, and the bill has passed muster in both the House and Senate Judiciary Committee in the 99th Congress, and in the 100th Congress. I therefore urge my colleagues to support the amendment.

I yield such time as he may need to Senator HEFLIN.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. HEFLIN. Mr. President, I served as the chairman of the Subcommittee on Courts and Administrative Procedure of the Committee of the Judiciary. This bill came before that committee and in my judgment it is a meritorious claim. Ms Mendes-Silva was injured some 25 years ago, receiving a smallpox and yellow fever inoculation at the U.S. Public Helath Service. There was standards procedure at that time that no two such inoculations should be given out the same day and this lady was not warned about it. She did not know what the consequences would be. This in effect waives the statute of limitations.

The lady stayed in a coma for approximately 2 years. After she came out of the coma and it was determined what caused her problems, she attempted to bring it to her superiors and it even was brought to the attention of then the Secretary of State. I think she has fulfilled her adminstrative requirements in regards to it, and in my judgment it is a bill that has merit. I think we ought to waive the statute of limitations in this instance.

Mr. CRANSTON. Mr. President, I thank my friend from Alabama very much for that very constructive and very fair and very wise statement, typical of his view on so many matter that come before the Judiciary Committee. I am prepared to yield back all time on this side.

Mr. THURMOND. Mr. President, I just want to say in closing there is little evidence to show that the Government is responsible. If Ms Mendes-Silva, after she was vaccinated, had told the nurse about the yellow fever shot, she probably would not have given it to her. In other words, why should the Government be held reponsible in a case of this kind? There is little evidence to show that the two inoculations is the cause. Why could she not have filed a claim within the time required by statute? Why could she not brought a suit? I am sorry for Ms. Mendes-Silva, but under the law the Government is not responsible and under the facts there is little evidence that the Government should be held responsible.

Mr. CRANSTON. Mr. President, I yield back all time on this side.

Mr. THURMOND. Mr. President, unless somebody else wants to speak, I yield back the time on this side.

The PRESIDING OFFICER. All time having been yielded back, the question is on agreeing to the amendment offered by the Senator from California.

The amendment (No. 3732) was agreed to.

Mr. CRANSTON. I move to reconsider the vote by which the amendment was agreed to.

Mr. PELL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. Who yields time on the bill?

AMENDMENT NO. 3733

Mr. METZENBAUM addressed the Chair.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. METZENBAUM. Mr. President, on behalf of Senator GRASSLEY and myself, I send an amendment to the desk on behalf of Senator BUMBPERS and ask unanimous consent it may be considered at this time.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report

The assistant legislative clerk read as follows:

> The Senator from Ohio [Mr. METZENBAUM] for Mr. BUMPERS, proposes an amendment numbered 3733:
> On page 6, delete lines 11 through 24.
> On page 7, delete lines 1 through 16.

Mr. METZENBAUM. Mr. President, my colleague from Iowa and I are offering this amendment to H.R. 3911 on behalf of our colleague from Arkansas, Senator BUMPERS. The amendment deletes one of the bill's provisions about which our colleague from Arkansas is concerned. The provision as reported by the Judiciary Committee would permit a court, upon application of the Attorney General, to pay up to $250,000 to a qualified individual who has disclosed the existence of fraud against the Government. This provision may only be invoked when the information led to a criminal conviction and the individual receiving the award did not participate in the criminal violation. We believe this is an important provision because it will encourage individuals with knowledge of criminal conduct to step forward.

Unfortunately, however, it does not appear that H.R. 3911 will be permitted to come to a vote as long as this provision remains in the bill. Therefore, while we do not support deleting this provision, we have agreed to offer this amendment on behalf of our colleague from Arkansas so that the other important provisions contained in H.R. 3911 may be voted on.

We expect that passage of H.R. 3911 will play a significant role in punishing and deterring major fraud schemes targeted at the Federal Government.

Mr. GRASSLEY. Mr. President, I associate myself with the remarks of the Senator from Ohio, both as to my feelings on the substance of the amendment as well as the sole purpose of expediting consideration of this bill and passage of this bill at this time. I urge the Senate to accept the amendment offered by the Senator from Ohio on the part of the Senator from Arkansas.

The PRESIDING OFFICER. Is there further debate? If not, the question is on agreeing to the amendment offered by the Senator from Ohio.

The amendment (No. 3733) was agreed to.

AMENDMENT NO. 3734

Mr. METZENBAUM. Mr. President, I send a technical amendment to the desk in behalf of myself and Senator GRASSLEY and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

> The Senator from Ohio [Mr. METZENBAUM], for himself and Mr. GRASSLEY, proposes an amendment numbered 3734.

Mr. METZENBAUM. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 4, lines 19-20, delete "from the United States".

On page 4, lines 22-23, delete "for the Government" and insert in lieu thereof the following:

"as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States.

On page 6 lines 9-10, delete "allowed under 18 U.S.C. section 3292" and insert in lieu thereof, "otherwise allowed by law."

On page 8, lines 16-17, delete the following: ", including an additional incarceration of two years in cases under this section,".

On page 8, line 19, insert the following after "occurred."

"The Commission shall consider the appropriateness of assigning to such a defendant an offense level under Chapter Two of the sentencing guidelines that is at least two levels greater than the level that would have been assigned had conscious or reckless risk of serious personal injury not resulted from the fraud."

Delete line 19 on page 5 through line 6 on page 6 and insert in lieu thereof the following:

"(e) In determining the amount of the fine, the court shall consider the factors set forth in 18 U.S.C. sections 3553 and 3572, and the factors set forth in the guidelines and policy statement of the United States Sentencing Commission, including—

"(A) the need to reflect the seriousness of the offense including the harm or loss to the victim and the gain to the defendant.

"(B) whether the defendant previously has been fined for a similar offense; and

"(C) any other pertinent equitable considerations."

Mr. METZENBAUM. Mr. President, my colleague and I are offering a technical amendment in response to concerns raised by the Department of Justice and the U.S. Sentencing Commission.

Briefly, the amendment addresses four points.

First, the Justice Department is concerned that currently, the bill may be interpreted to require proof of additional, unprecedented intent standard—knowledge that it was the United States that was being defrauded.

The committee did not intend this result.

I am offering this technical amendment to clarify this point.

Second, the bill currently permits a court to consider a prior Federal conviction in setting the amount of a fine.

The Justice Department would like the court to be able to consider a prior conviction by a State or local government as well.

My technical amendment clarifies this point.

Third, the current language concerning the statute of limitations may not be clear.

The Justice Department would like it to be clarified so that any existing extra limitations period still applies to a major fraud case brought under this act.

I am offering a technical amendment addressing this concern.

Fourth, the U.S. Sentencing Commission raised several technical points concerning the bill's overlap with the sentencing guidelines.

My amendment includes technical changes to address their concerns.

I urge my colleagues to support this amendment which will help strengthen this important bill.

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from Ohio.

The amendment (No. 3734) was ageed to.

AMENDMENT NO. 3735

(Purpose: To amend the Federal Property and Administrative Services Act of 1949 and title 10, United States Code, to limit the allowability of costs incurred by Federal Government contractors in connection with certain criminal, civil, and administrative proceedings)

Mr. GRASSLEY. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Iowa [Mr. GRASSLEY], for himself, Mr. LEVIN, and Mr. BINGAMAN proposes an amendment numbered 3735.

Mr. GRASSLEY. Mr. President, I ask unanimous consent the reading of the amendment be dispensed with.

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

The amendment is as follows:

On page 14, below line 3, insert the following:

SEC. 7. LIMITATIONS ON ALLOWABILITY OF COSTS INCURRED BY FEDERAL GOVERNMENT CONTRACTORS IN CERTAIN PROCEEDINGS.

(a) AMENDMENT TO THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949.—(1) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended by inserting after section 305 the following new section 306:

"LIMITATIONS ON ALLOWABILITY OF COSTS INCURRED BY CONTRACTORS IN CERTAIN PROCEEDINGS

"SEC. 306. (a) Except as otherwise provided in this section, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the proceeding (1) relates to a violation of, or a failure to comply with, a Federal or State statute or regulation, and (2) results in a disposition described in subsection (b).

"(b) A disposition referred to in subsection (a)(2) is any of the following:

"(1) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in subsection (a).

"(2) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in subsection (a).

"(3) In the case of any civil or administrative proceeding, the imposition of a monetary penalty by reason of the violation or failure referred to in subsection (a).

"(4) A final decision by an appropriate official of an executive agency—

"(A) to debar or suspend the contractor;

"(B) to rescind or void the contract; or

"(C) to terminate the contract for default, by reason of the violation or failure referred to in subsection (a).

"(5) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in paragraph (1), (2), (3), or (4).

"(c) In the case of a proceeding referred to in subsection (a) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor and the United States, the costs incurred by the contractor in connection with such proceeding that are otherwise not allowable as reimbursable costs under such subsection may be allowed to the extent specifically provided in such agreement.

"(d) In the case of a proceeding referred to in subsection (a) that is commenced by a State, the head of the executive agency that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the agency head determines, under regulations prescribed by such agency head, that the costs were incurred as a result of (1) a specific term or condition of the contract, or (2) specific written instructions of the agency.

"(e)(1) Except as provided in paragraph (3), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under subsection (a), but only to the extent provided in paragraph (2).

"(2)(A) The amount of the costs allowable under paragraph (1) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the single Government-wide procurement regulation issued pursuant to section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)).

"(B) Regulations issued for the purpose of subparagraph (A) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

"(3) In the case of a proceeding referred to in paragraph (1), contractor costs otherwise allowable as reimbursable costs under this subsection are not allowable if (A) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (B) the costs of such other proceeding are not allowable under subsection (a).

"(f) As used in this section:

"(1) The term 'covered contract' means a contract for an amount more than $100,000 entered into by an executive agency other than a fixed-price contract without cost incentives.

"(2) The term 'proceeding' includes an investigation.

"(3) The term 'costs', with respect to a proceeding—

"(A) means all costs incurred by a contractor, whether before or after the commencement of such proceeding; and

"(B) includes—

"(i) administrative and clerical expenses;

"(ii) the cost of legal services, including legal services performed by an employee of the contractor;

"(iii) the cost of the services of accountants and consultants retained by the contractor; and

"(iv) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers, and employees to such proceeding.

"(4) The term 'penalty' does not include restitution, reimbursement, or compensatory damages.".

(2) The table of contents in the first section of such Act is amended by inserting after the item relating to section 305 the following new item:

"306. Limitation on allowability of costs incurred by contractors in certain proceedings.".

(b) AMENDMENTS TO TITLE 10.—Section 2324 of title 10, United States Code, is amended—

(1) in subsection (e)—

(A) by striking out subparagraph (N) and inserting in lieu thereof the following:

"(N) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in subsection (k).";

(B) by striking out paragraph (2); and

(C) by redesignating paragraph (3) as paragraph (2); and

(2) by striking out subsection (k) and inserting in lieu thereof the following:

"(k)(1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or State statute or regulation, and (B) results in a disposition described in paragraph (2).

"(2) A disposition referred to in paragraph (1)(B) is any of the following:

"(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).

"(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).

"(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty by reason of the violation or failure referred to in paragraph (1).

"(D) A final decision by the Department of Defense—

"(i) to debar or suspend the contractor;

"(ii) to rescind or void the contract; or

"(iii) to terminate the contract for default, by reason of the violation or failure referred to in paragraph (1).

"(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).

"(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor and the United States, the costs incurred by the contractor in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.

"(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the head of the agency that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the agency head determines, under regulations prescribed by such agency head, that the costs were incurred as a result of (A) a specific term or condition of the contract, or (B) specific written instructions of the agency.

"(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).

"(B)(i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the single Government-wide procurement regulation issued pursuant to section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)).

"(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.

"(C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).

"(l)(1) In this section, the term 'covered contract' means a contract for an amount more than $100,000 entered into by the Department of Defense other than a fixed-price contract without cost incentives.

"(2) In subsection (k):

"(A) The term 'proceeding' includes an investigation.

"(B) The term 'costs', with respect to a proceeding—

"(i) means all costs incurred by a contractor, whether before or after the commencement of any such proceeding; and

"(ii) includes—

"(I) administrative and clerical expenses;

"(II) the cost of legal services, including legal services performed by an employee of the contractor;

"(III) the cost of the services of accountants and consultants retained by the contractor; and

"(IV) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers, and employees to such proceeding.

"(C) The term 'penalty' does not include restitution, reimbursement, or compensatory damages.".

(c) TECHNICAL AMENDMENT.—Section 832(b) of the National Defense Authorization Act, Fiscal Year 1989 is repealed.

(d) REGULATIONS.—The regulations necessary for the implementation of section 306(e) of the Federal Property and Administrative Services Act of 1949 (as added by subsection (a)) and section 2324(k)(5) of title 10, United States Code (as added by subsection (b))—

(1) shall be prescribed not later than 120 days after the date of the enactment of this Act; and

(2) shall apply to contracts entered into more than 30 days after the date on which such regulations are issued.

(e) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall take effect with respect to contracts awarded after the date of the enactment of this Act.

Mr. GRASSLEY. Mr. President, I thank Senators LEVIN and BINGAMAN for their assistance in reaching this point. I especially commend the staffs on all sides for the hours devoted to this final, product. I also want to thank Senator METZENBAUM, the manager of H.R. 3911, for his patience while this language was being worked out.

The amendment is to the section of the committee bill dealing with the allowable legal costs that can be charged off to the taxpayers in fraud cases and other Government prosecutions.

As I have explained in the past on this issue, under current law, contractors are permitted to bill the Government for the full cost of expenses incurred in fraud and other legal proceedings as an element of contract cost, unless there is a conviction, civil judgment, or a decision to suspend or debar the contractor. The anomolous result is that the same Government that prosecutes the fraud case pays the cost of the defense. We as taxpayers pay twice—we fund the prosecution by D.O.J. and D.O.D. through the Agency's budgets; then we subsidize the contractor and their high-priced lawyers.

Such an arrangement, by the way, is wholly unprecedented in more than 200 years of American jurisprudence. In no other case—whether it be a white collar, or other economic crime, or a street crime case—is a criminal defendant permitted to recover the cost of his legal defense from the Government. I might add that the guilt or innocence of the defendant is irrelevant to this general prohibition on recovery of legal fees. Criminal defendants who are acquitted have never been entitled to recover legal expenses incurred in their defense.

In civil cases, private parties that prevail over the Government can recover legal expenses only by specific statutory authorization, such as the Equal Access to Justice Act, which applies to all other businesses and individuals, and generally limits legal fee recovery to $75 per hour.

Rest assured, Mr. President, defense contractors and their high-priced lawyers who currently bill the Government for their legal bills charge far, far more than $75 per hour. Indeed, hourly rates of $250 per hour and up are not uncommon. Just because well-heeled private clients dole out huge sums doesn't mean that the Government should be equally generous.

However, there were public reports that General Dynamics Corp. billed the Government for some $20 million for attorneys fees after a criminal fraud investigation last year.

In a recent fraud case against the Bell Helicopter Division of Textron, settled by the Government 6 months

ago, attorney expenses of about $3.5 million could have been billed to the Government as an element of allowable cost.

The Wall Street Journal reported in April that Rockwell billed NASA for over $800,000 in legal expenses in a fraud case where the contractor agreed to repay $500,000 in mischarges to the Government.

In another case, it was reported that the Government had potentially millions of dollars of legal fees exposure after the Justice Department decided not to indict the Pratt & Whitney group for allegedly overcharging the Government by $22 million on contracts.

It is argued by my friends at the American Bar Association and others that to charge off these legal expenses to the Government, and the taxpayer, is simply a legitimate, regular cost of doing business, much like other overhead charges such as utility bills and the like. But these are most assuredly not "utility bills"—no utility charges the Government $200 per hour for electricity.

I would concede that legal expenses are a cost of doing business in today's overly litigious society. But free market competition normally limits any business' ability to pass on legal costs to its customers. As we know all too well, there's far too little free market competition in public contracts, particularly defense contracts. The Government has few alternatives; there's little incentive for contractors to be competitive.

I'd concede further that the current allowability of the "prevailing" big-firm wage as a cost of doing business holds a kind of superficial appeal. But on closer inspection, it reveals a giant rip-off. Just as public works cost too much in part because the Davis-Bacon Act requires union-scale wages, and just as medical costs soar in part because doctors have dominated service and price decisions, so it is with contractors' legal fees. Lawyers—even "good" ones—need at least as much wage restraint as other contractors and subcontractors when it comes to billing the taxpayers.

Defense contractors shouldn't use their superior leverage to gouge the U.S. taxpayers on their legal bills. Like all other businesses, they should be made to find the lowest cost "subcontractor," even when it is a law firm to represent them in litigation with the Government.

Under current practices, there's no incentive for contractors to keep an eye on costs or keep a careful eye on what lawyers bill them in Government fraud cases. After this amendment, there will be.

After this amendment, they will have a stake in seeking out low cost services—rather than blindly passing on costs.

We need to dispose of another argument against reform of the current taxpayer rip-off: That the current law shouldn't be characterized as permitting recovery of attorneys fees because the Government doesn't pay over a lump sum to the contractors. Instead, it's a matter of allowable costs spread out over other contracts.

But if it looks like a duck, walks like a duck, and quacks like a duck, it's a duck.

Simply calling it allowable costs doesn't change the fact that the Government is subsidizing private attorneys for the benefit of the very party they are suing—the same Government that prosecutes the fraud pays for legal defense.

Mr. President, this amendment is designed to end this abusive subsidy and, for the first time, place some reasonable limitation on the costs that can be routinely passed on to the Government, and thus, to the taxpayers.

Mr. President, the amendment is a compromise between members of the Judiciary Committee and others who raised concerns about the scope of the committee-passed language. While this amendment is not as I would draft it, were the decision mine alone, I believe it fairly accommodates the concern of my colleagues.

In summary, the amendment provides that legal proceeding costs are unallowable in any criminal, civil or administrative proceeding brought by the Federal or State Government that results in a conviction, civil liability, the imposition of a fine or other monetary penalty, a suspension or debarment, or other similar result evidencing a violation or failure to comply on the part of the contractor.

In the case of proceedings alleging law violations or a failure to comply that are resolved by consent or compromise, costs will be generally disallowed, unless the contractor and the Government agree otherwise. The parties can agree to allow all or part of the proceeding costs pursuant to that consent or compromise agreement.

In a proceeding brought by a State where the legal costs were incurred as the result of the contractor's compliance with a specific term or condition of the contract or specific written instruction of the Federal Agency, costs will continue to be allowable.

Significantly, the compromise language adopted here alters the committee-passed provision that would have imposed a bar on allowable costs in cases where there is an indictment by a Federal grand jury or an information, but no conviction.

I agreed to change the committee language to accommodate a concern that this provision was inconsistent with the presumption of innocence in criminal cases.

However, the compromise language offered here provides that in such situations, a disposition favorable to the Government in a parallel, subsequent, or other, criminal, civil or administrative proceeding involving the same contractor conduct will make all proceeding costs unallowable—both the civil or administrative proceeding and the criminal proceeding, notwithstanding that the result in the criminal proceeding was other than a conviction. Contractor costs otherwise allowable as reimbursable costs will therefore not be allowable where such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil or administrative proceeding.

In no case may a contractor recover, as a matter of allowable cost, more than 80 percent of the costs incurred and determined to be otherwise reasonable and allowable under Governmentwide regulations, which are to be promulgated pursuant to the Office of Federal Procurement Policy Act no later than 120 days after enactment of this bill. These regulations are to consider a number of factors bearing on the reasonableness of the amount and type of legal expenses, such as the principles governing the award of legal fees in civil actions involving the United States as a party.

This 80-percent provision represents another significant departure from the committee-passed language, which would have generally limited the allowability of legal proceeding costs to the hourly rates found in the Equal Access to Justice Act.

For now, I accept this substitute language, Mr. President, as a further accommodation to those with concerns over the committee-passed provision. I appreciate that legal fees bear some relation to the ability to attract competent counsel, but the purpose of the cost principle most assuredly should not be to subsidize the legal profession.

Therefore, it is my hope and expectation that the regulations will be promulgated with an eye toward creating a disincentive to increased legal expenses and on reducing what is now an open-ended, and ever-increasing cost to the Government.

The regulations are intended to guide Agency decisions on the reasonableness of contractor requests to pass on legal proceeding costs as part of overhead. As currently stated in the Federal acquisition regulations, no presumption of reasonableness shall be attached to the incurrence of costs by a contractor, either in the type of cost or the amount of cost. The contractor will be required to clearly break out the costs associated with covered proceedings, and will continue to have the burden of proof to establish that any cost is reasonable. Contracting officers and other responsible Agency officials will be required to scrutinize costs sought to be recovered for legal time that is excessive, redundant or otherwise unnecessary. Attention should be paid to ensure that outside attorneys, in particular, exercise appropriate "billing judgment," since hours not properly billed to one's client are not properly billed to one's adversary, especially where the tax-

payers are ultimately called on to pay the bill.

Determinations as to reasonableness will continue to be made on a proceeding-by-proceeding, and a case-by-case, basis. What is reasonable, of course, will depend on the facts and circumstances. Only after all these factors are considered will the 80-percent standard be applied.

Mr. President, should this 80-percent solution and these regulatory efforts prove unavailing to retard the upward-ratcheting of legal costs passed on to the Government, I will continue to offer amendments and language to unambiguously limit what can be passed on to the taxpayers.

Mr. BINGAMAN. Mr. President, I am pleased to join Senator GRASSLEY and Senator LEVIN in sponsoring an amendment to establish government-wide restrictions on allowability of legal fees incurred by government contractors. This amendment builds on the work that we initiated in the National Defense Authorization Act this year, and provides new cost control procedures that will improve the government's ability to preclude excessive payment of overhead expenses to government contractors.

The amendment limits the ability of a contractor to include the cost of certain proceedings in the overhead component of charges submitted for reimbursement under a government contract. Under the amendment, when a proceeding is brought against a contractor for violating a Federal or State law or regulation, the contractor may not include the cost of the proceeding in the contractor's overhead charges if the proceeding results in: First, a criminal conviction; second, a determination of civil or administrative liability on the basis of fraud or similar misconduct; third, imposition of a monetary penalty; and fourth, a decision to debar or suspend the contractor, to rescind or void the contractor, or to terminate the contract by reason of default.

The amendment also prohibits recovery when the proceeding is resolved by consent or compromise to the extent that a limitation on costs is set forth in the agreement. The amendment also recognizes that under our Constitution, the interests of National Government are paramount. It provides a limited exception from the general rule disallowing costs of State proceedings when action inconsistent with a State rule has been undertaken because of a specific term or condition in the contract, or because of specific written instructions of the Federal agency.

Finally, the amendment regulates the costs of all other proceedings commenced by the Federal Government or a State against a contractor. The amendment requires issuance of regulations governing the reasonableness of legal fees, taking into account the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions against the United States, and other appropriate factors. In order to provide a strong incentive to hold down legal costs, the amendment limits allowability to 80 percent of the costs actually incurred. Thus, in order to be allowable, the costs must be both reasonable under the regulations, and may not exceed 80 percent of actual costs.

I appreciate the work that Senators GRASSLEY and LEVIN have done in support of this amendment. It reflects a cooperative effort by members of the Armed Services, Governmental Affairs, and Judiciary Committees, and represents an important contribution to reform of the procurement process.

Mr. METZENBAUM. Mr. President, the amendment is agreeable to sponsors of the legislation.

The PRESIDING OFFICER. If all time is yielded back, the question is on agreeing to the amendment offered by the Senator from Iowa.

The amendment (No. 3735) was agreed to.

Mr. GRASSLEY. I move to reconsider the vote by which the amendment was agreed to.

Mr. METZENBAUM. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 3736

Mr. GRASSLEY. Mr. President, I send another amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from Iowa [Mr. GRASSLEY] proposes an amendment numbered 3736.

Mr. GRASSLEY. I ask unanimous consent that further reading of the amendment be dispensed with.

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

The amendment is as follows:

At the appropriate place in the bill, insert the following:

SEC. . QUI TAM ACTIONS.

(a) AWARDS OF DAMAGES.—Section 3730(d) of title 31, United States Code, is amended—

(1) by redesignating paragraph (3) as paragraph (4); and

(2) by inserting after paragraph (2) the following new paragraph:

"(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.".

(b) TECHNICAL AMENDMENTS.—Section 3730 of title 28, United States Code, is amended—

(1) in subsection (c)(4) by inserting "the" after "Government proceeds with"; and

(2) in subsection (d)(4), as redesignated by subsection (a)(1) of this section, by striking out "actions" and inserting in lieu thereof "action".

Mr. President, in the 99th Congress, I was the principal sponsor of legislation which was intended to strengthen and revitalize the ability of both the Government and private individuals to combat fraud. That legislation, the False Claims Act Amendment of 1986, became law on October 27, 1986. A key provision of that law allows private citizens knowing of fraud—"whistleblowers"—to bring a suit on behalf of the Government and if successful, share in a portion of the recovery.

This part of the False Claims Act, the qui tam provision, is an acknowledgment that the Department of Justice and the various agency investigators need assistance protecting our huge volume of Government spending from fraudulent abuses. Often private individuals know of fraudulent practices, disapprove of them, but fear that only negative consequences would result from disclosing the practices. Unfortunately, history shows those fears are well-founded. Our 1986 amendments were intended to create incentives for private citizens to bring information forward without fear of reprisal. Specifically, the amended act's qui tam provision awards whistleblowers up to 30 percent of the action's proceeds and grants legal protection from retaliation.

Even though the 1986 legislation is not yet 2 years old, we have already seen positive results with as least 80 pending cases brought by private individuals disclosing evidence and allegations of fraud. These cases involve hundreds of millions of taxpayer dollars which may be rightfully returned to the Federal Treasury as a result of these individuals coming forward.

We were mindful in drafting the 1986 amendments that in some cases, only persons who participated in the false claims practice will have knowledge of the actions. It has long been recognized in both criminal and civil enforcement circles that granting a participant some benefit is often a necessary evil in order to achieve a successful prosecution. The same is true under the False Claims Act. However, the amendment I offer today is a clarification that Congress did not intend that the qui tam amendments would encourage individuals to first be a party to a false claims practice or fraud and later bring a qui tam action against other participants or their employer with the expectation of receiving a substantial share of the suit's recovery.

My amendment simply clarifies that in an extreme case where the qui tam

plaintiff was a principal architect of a scheme to defraud the Government, that plaintiff would not be entitled to any minimum guaranteed share of the proceeds of the action. And in any case where a qui tam plaintiff is convicted of criminal misconduct for his or her role in the false claims practice, the qui tam plaintiff must be dismissed from the action and is entitled to zero recovery.

I do not believe there is any disagreement on this point among my colleagues. Further, it is our intent that this amendment apply retroactively just as it was our intent that the 1986 amendment apply retroactively. Clearly, in 1986 we desired to bring about immediate improvements in disclosure and prosecution of Government fraud. That effort would be significantly frustrated if our amendment applied only to suits involving actions which occurred prior to October 1986. Similarly, the amendment I offer today, is intended to apply retroactively to both previous false claims practices and pending false claims suits.

This amendment is intended to apply narrowly to principal wrongdoers, such as those convicted of criminal misconduct, and not to those qui tam plaintiffs who may have had some more minor role in the false claims conduct.

Mr. DECONCINI. Mr. President, in the 99th Congress I joined Senator GRASSLEY as the Democratic cosponsor of amendments to the False Claims Act. I believe that those amendments, signed into law in 1986, have provided the Government and the private citizenry with a powerful and effective tool against fraud. I agree with Senator GRASSLEY that while it is too early to render a complete assessment of the effect of the 1986 amendments, the actions so far appear to strike a blow in the taxpayers' favor.

The rather minor amendment which we are acting upon today is actually a clarification of our intent when legislating the 1986 amendments. In those amendments we made clear that successful private plaintiffs are guaranteed a minimum amount of recovery with the specific amount to be determined in light of the private plaintiff's participation and contribution to the litigation. However, that guarantee was not meant to be an incentive for individuals who are the main force behind a false claims scheme. The amendment offered today provides that in an extreme case where the private plaintiff was a principal architect of a scheme to defraud the Government, that plaintiff would not be entitled to any minimum guaranteed share of the proceeds of the action. Also, in any case where a private plaintiff is convicted of criminal misconduct for his or her role in the false claims practice, the private plaintiff will be dismissed from the action and not entitled to any recovery.

This amendment is in keeping with our intent to provide a strong weapon against fraud, but at the same time protect the use of that weapon from possible abuse. I am confident that the vast majority of private plaintiffs in false claims actions will not be affected by this amendment because they are not the driving force behind the false claims activities disclosed in their lawsuits. But those who do seek to abuse the statute in this manner, or have already done so, will take that action at their own risk and expense.

Our clarification today is intended to apply retroactively to pending suits so that any potential abuse is prevented. Similarly, our 1986 amendments to the False Claims Act were also intended to apply retroactively so that improvements we legislated would have an immediate effect. I am hopeful that through enacting all of these amendments we have helped to ensure that our critically needed tax dollars are spent properly.

Mr. METZENBAUM. Mr. President, I think we are ready to act on the amendment. The amendment is agreeable.

The PRESIDING OFFICER. All time having been yielded back, the question is on agreeing to the amendment.

The amendment (No. 3736) was agreed to.

Mr. GRASSLEY. I move to reconsider the vote by which the amendment was agreed to.

Mr. METZENBAUM. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. GRASSLEY. Mr. President, I enthusiastically support passage of the major fraud act.

Last December, I testified in support of this legislation before the House Judiciary Subcommittee on Crime. As I stated then, it has been estimated that perhaps ten percent of the Federal budget is being lost each year due to fraud against the taxpayers.

That comes to about $100 billion of fraud.

How much is $100 billion, Mr. President?

On hundred billion dollars would fund all the weapons in this year's defense budget; it would fund our military research and development programs; it would also fund our entire agriculture budget, our transportation budget, plus our budgets for education, housing and food stamps—with billion to spare.

And as the size of our Federal Government grows, the opportunities for fraud also grow. The American taxpayer has a right to know that his Government will use every arrow in its quiver to detect and prosecute fraud.

Events of recent weeks and months only serve to underscore the need to "up the ante" for those firms that betray the American people. Just last Thurday, for example, the Justice Department announced a $115 million settlement as part of a guilty plea by Sundstrand Corp.—the largest single fraud settlement in history.

Sundstrand, and Illinois defense contractor, overbilled the Pentagon for millions of dollars in cost overruns, over a 4-year period. They were also charged with spending more than $100,000 in a crude attempt to win the favor of Pentagon personnel through gifts and gratuties.

I commend U.S. Attorney Tony Valukas for his efforts in this case. But I think even the Justice Department realzies that the increased penalties provided in this bill—without more—won't do the job we need to do. Because increasing the penalties presumes that the perpetrator of the government fraud has been caught.

We can't expect law enforcement authorities to find fraud unless we give them the resources to do it. That's why I'm pleased that this bill includes my amendment to authorize an additional $8 million per year to the Justice Department for government fraud investigation and prosection.

This amendment was first introduced by Senator Proxmire and myself last December. It was modified with the assistance of U.S. attorneys like Tony Valukas, whom I've already mentioned. It's wholeheartedly supported by the Justice Department.

In my view, it sends an unambiguous message—that we've serious about finding fraudulent acts, and then prosecuting them to the fullest extent of the law.

I urge my colleagues to support the committee substitute bill.

Mr. DECONCINI. Mr. President, I rise today to support H.R. 3911, the Major Procurement Fraud Act of 1988. As we are all well aware, the topic of procurement fraud has been highlighted recently due to the activities of many defense contractors and their dealings with the Department of Defense.

Earlier this year a Government Accounting Office report estimated the loss due to procurement fraud to be $387 million in only 148 open cases reported to the Secretary of Defense from April 1, 1985, to March 31, 1986. In 1985 Deputy Attorney General Toensing testified before the Subcommittee on Administrative Practice and Procedure that 45 of the top 100 Department of Defense contractors were under criminal investigation. Apparently, not much has changed; in the last few months it has been reported that 39 of the 46 defense contractors who had agreed to police their own compliance with procurement rules have come under investigation for fraud. As a result of recent investigation, the Justice Department has issued 278 subpoenas and 42 search warrants and it is likely more will follow. Earlier this year the Senate Armed Services Committee, the Senate Government Affairs Committee, and the House Armed Services

Committee held hearings on the procurement process.

We now have before the Senate a piece of legislation that attempts to address problems associated with Federal procurement fraud. The bill amends title 18 of the United States Code to provide increased penalties for certain major fraud against the United States. Specifically, the bill provides jail terms, fines and a whistleblower provision in the event of procurement fraud.

I would like to commend the work of my distinguished colleague from Ohio, Senator METZENBAUM. Without his efforts this bill would not be before the Senate at this time.

I urge my colleagues to join me in supporting the passage of the Major Fraud Act of 1988.

Mr. THURMOND. Mr. President, I rise today to support H.R. 3911, the Major Fraud Act of 1988. Generally, this bill establishes criminal penalties for those who defraud the Government in the procurement process. Over the last few years, Government probes of major contractors, particularly in the defense area, have exposed massive fraud. Such waste of money is inexcusable. While the Government suffers the immediate loss, the real loser in such cases is the American taxpayer.

In the last Congress, we passed the False Claims Amendments Act and the Program Civil Remedies Fraud Act which are aimed at attacking fraud against the Government. This bill would add another weapon to the prosecutor's arsenal by establishing a specific offense for major procurement fraud. I recognize that some contractors have realized the importance of stopping fraud and have set up self-policing programs. I commend those companies who have developed and are diligently enforcing such programs. However, the fact remains that fraud is still widespread in this industry.

Additionally, when the Judiciary Committee considered this bill, an amendment was adopted to provide additional resources in the Department of Justice to be primarily dedicated to the investigation and prosecution of Government fraud.

This bill is an important step toward the prosecution of major fraud. I strongly urge my colleagues to support this measure.

Mr. BUMPERS. Mr. President, I rise in strong support of H.R. 3911, the Major Fraud Act of 1988, and I want to commend Senators METZENBAUM and GRASSLEY for their work on this bill.

I especially want to thank Senator METZENBAUM for agreeing to strike the monetary reward provision of this bill. When I first read this provision, I simply had a visceral reaction against it, although I fully supported the other provisions of the bill. I informed the Senate leadership last week that I wished to offer an amendment to strike, but through inadvertence my amendment was left out of the time agreement that was reached on October 14. Even though Senator METZENBAUM strongly disagreed with my position on the monetary reward provision, he has graciously agreed to accommodate my concern.

I want the record to be clear, however. I made no threat to hold up this bill, and in fact have advocated an early passage. I support the bill; I simply wanted 30 minutes on an amendment to strike the provision I objected to. Senator METZENBAUM agreed to offer the amendment to strike on my behalf in order to avoid the problems associated with vitiating the time agreement, and I thank him for that. This is an important bill, and it is my fervent hope that it will be signed into law this year. It is long overdue.

Mr. METZENBAUM. Mr. President, fraud against the Government continues to grow. It robs taxpayers of the honest use of their hard-earned dollars. For example, the cost of building roads is increased, and the everyday cost of running the Government has increased.

It contributes to burdensome budget deficits. But even more serious: Fraud can cost lives—lives of our military personnel.

For example: Fraud may cause defective military equipment to be supplied to the Government. This may harm, or even cause the loss of the life of our soldiers. It may jeopardize our national security.

The Department of Defense estimates that procurement fraud alone cost $99.1 million for fiscal years 1986 and 1987. We need stronger laws to punish criminal fraud and to deter future fraud. H.R. 3911 is part of the answer.

It is a bipartisan bill. It increases the penalties for major fraud against the Government to a $1-million fine and/or 10 years in jail.

It permits up to a $5-million fine if the fraud involved more than $500,000 or the fraudulent conduct involved all conscious or reckless risk of serious personal injury.

It authorizes up to a $10-million fine per prosecution for major fraud.

It encourages whistleblowers to come forward with information about major fraud—and authorizes payment of up to $250,000 to them.

It protects whistleblowers from being discharged, harassed, or discriminated against for coming forward with information about major fraud.

It extends the time the Government has to investigate major frauds and to bring suit. The Judiciary Committee unanimously voted for this bill. I urge my colleagues to support this important measure.

Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. If there are no further amendments to be proposed, the question is on agreeing to the committee substitute, as amended.

The committee substitute, as amended, was agreed to.

Mr. GRASSLEY. Mr. President, I move to reconsider the vote by which the amendment, as amended, was agreed to.

Mr. METZENBAUM. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The question is on the engrossment of the amendments and the third reading of the bill.

The amendments were ordered to be engrossed and the bill to be read a third time.

The bill was read the third time and passed.

Mr. BYRD. Mr. President, I move to reconsider the vote by which the bill, as amended, was passed.

Mr. METZENBAUM. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. METZENBAUM. Mr. President, I express my appreciation to the majority leader and the minority leader for their cooperation.

SENATE SCHEDULE

Mr. BYRD addressed the Chair.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. DOLE. Mr. President, will the majority leader yield?

Mr. BYRD. I yield.

Mr. DOLE. Mr. President, the majority leader indicated earlier that we had hoped this evening to take action on the Montana wilderness bill, and we did, and the Washington wilderness bill, the veterans' COLA, the defense fraud bill, and the lobbying bill. Except for the House message that Senator PROXMIRE is going to move on, we have completed that.

I understood that if we would complete action on those, any other matter we would deal with would be by unanimous consent.

I think we have had a good day, disposed of a lot of legislation. I am not certain what will happen in the next 2 or 3 hours on the next item.

Is it safe to indicate to my colleagues that there will be no votes tonight or tomorrow?

Mr. BYRD. Mr. President, I did assure Senators, as the distinguished Republican leader has stated, that it was my intention not to have any rollcall votes tomorrow, and I think we ought to come in at 11 o'clock or noon.

There are some important measures that can be disposed of by unanimous consent. Staffs on both sides of the aisle have been working diligently and effectively to prepare a number of bills for such passage.

I understand that good progress is being made on the drug bill at this point, and I would expect that