**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

May 1, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R.1667, the "War Profiteering Prevention Act of 2009," a bill "[t]o prohibit profiteering and fraud relating to military action, relief, and reconstruction efforts, and for other purposes." Combating fraud committed by military contractors is a priority for the Department and we welcome new enforcement tools in this area. However, as we explain below, we are concerned that H. R. 1667 would have a negative impact upon existing criminal statutes. We would welcome the opportunity to work with Committee staff to address our concerns.

## I. Background

H.R. 1667 would amend the Federal criminal code by adding a new provision to prohibit profiteering and fraud involving a contract or the provision of goods or services in connection with a mission of the United States overseas (including making materially false statements or false representations, or materially overvaluing any good or service). The bill would establish penalties for violating its provisions, including imprisonment for up to 20 years, and a fine of the greater of $1 million, or twice the gross profits or other proceeds.

H. R. 1667 is unnecessary in light of existing fraud provisions in title 18 of the United States Code. Further, it may have the unintended effect of eroding the applicability of current general fraud statutes. Provisions of the bill are vague and unduly difficult to interpret or implement. On the other hand, if Congress were to amend the existing general fraud statutes to include certain provisions of H. R. 1667, it both could remove barriers to applying these statutes in cases of fraud relating to war profiteering and it could impose higher penalties.

## II. Constitutional Concerns

H.R. 1667 would establish the new criminal offense of "war profiteering and fraud." In any "matter involving a contract with, or the provision of goods or services to, the United States . . . in connection with a mission of the United States Government overseas," the new statutory offense would prohibit, *inter alia*, executing a scheme or artifice to defraud the United States; materially overvaluing any good or service with the intent to so defraud; falsifying, concealing,

or covering up a material fact in connection with the Federal contract or provision of goods or services; and making any materially false or fraudulent statements or representations. New 18 U.S.C. § 1041(c)(3) would permit prosecution of offenses committed under this provision to proceed *either* under the general venue chapter (chapter 211) of title 18, *or* in any district where any action in furtherance of the offense took place, *or* "in any district where any party to the contract or provider of goods or services is located." The third of these options would raise a constitutional problem as applied to some cases under the new law.

The drafters apparently envision that the new offense might be committed overseas, as new subsection 1041(b) would establish "extraterritorial Federal jurisdiction over an offense under this section." To the extent that such "war profiteering and fraud " offenses are committed outside the United States, the venue provision permitting prosecution to be brought "in any district where any party to the contract or provider of goods or services is located" would comport with constitutional limits on venue. When a crime is "not committed within any State," Article III, § 2, cl. 3 of the Constitution directs that it shall be tried "at such Place or Places as the Congress may by Law have directed." Thus, Congress may vest venue for the prosecution of extraterritorial offenses in any district, provided it does so "by Law." *See, e.g.*, 18 U.S.C. § 3238 (general venue provision for overseas crimes).

However, where a war profiteering or fraud offense is committed in the United States, it would be unconstitutional to prosecute the crime "in [a] district where any party to the contract or provider of goods or services is located" (unless part of the crime was committed in that district). Article III, § 2, cl. 3 of the Constitution provides that the "Trial of all Crimes . . . shall be held in the State where the Crimes shall have been committed" (except when such crimes are "not committed within any State"). Similarly, the Sixth Amendment to the Constitution provides to the accused a right to trial by a jury "of the State and district wherein the crime shall have been committed." Together, these provisions limit venue for criminal trials to the location where the crime was committed. *See, e.g., Travis v. United States*, 364 U.S. 631, 634 (1961). To be sure, where Congress has defined a crime as continuing, or as comprising distinct acts, venue may be located "where any part of the crime can be proved to have been done." *United States v. Lombardo*, 241 U.S. 73, 77 (1916); *accord United States v. Rodriguez-Moreno*, 526 U.S. 275, 281-82 (1999) (where not specified by Congress, the *locus delicti* of a crime "must be determined from the nature of the crime alleged and the location of the act or acts constituting it"). However, the focus of the venue inquiry remains the location where the crime was committed; the location or residence of the defendant (or other parties) may not serve as a proper basis for venue for crimes committed in the United States. *See Johnston v. United States*, 351 U.S. 215, 220-21 (1956); *United States v. Anderson*, 328 U.S. 699, 705 (1946). Therefore, to avoid the possibility of unconstitutional application, we recommend revising the provision of the bill that would be codified at 18 U.S.C. § 1041(c)(3) to permit venue "(3) in any district where any party to the contract or provider of goods or services is located, *if the offense was committed outside of the United States.*" Alternatively, subparagraph (3) could be stricken from the bill.

**III. Policy Concerns**

Currently, the Department of Justice uses a number of very effective profiteering and fraud statutes that are not limited to specific international undertakings by the United States. These statutes apply universally to all fraudulent schemes undertaken against the United States, including those schemes associated with war profiteering. We are concerned that legislation such as H.R. 1667 that is targeted toward fraud occurring during particular events may have the unintended consequence of eroding the application of time-tested general fraud statutes to specific events, establishing the precedent that fraud in each new situation requires its own new fraud statute before effective prosecution can be undertaken.

The Department has had great success in prosecuting contractor fraud under various statutes, including 41 U.S.C. § 51 *et seq.* (the Anti-Kickback Act); and 18 U.S.C. §§ 1031 (major fraud against the United States), 1001 (false statements made in any matter within the jurisdiction of the United States), 1956 and 1957 (money laundering (both sections)), 1341 (mail fraud), and 1343 (wire fraud). To the extent that problems have surfaced in applying these statutes or others to the types of criminal procurement fraud associated with war profiteering, we offer the following suggestions for amending the general fraud statutes in order to eliminate those obstacles:

- amending the general fraud statutes to provide for higher statutory maximum sentences if the illicit conduct occurred in connection with "a mission of the United States government overseas," assuming that these terms were defined adequately.

- amending 18 U.S.C. § 1956 (money laundering) to list certain general fraud statutes (*e.g.*, 18 U.S.C. § 1031 and 41 U.S.C. § 51) as "specified unlawful activity."

- amending the general fraud statutes to include an explicit provision for extraterritorial jurisdiction.

By amending our time-tested general statutes in these ways, Congress would improve these statutes significantly without creating a new fraud regime.

If, notwithstanding these concerns, the Congress were to proceed with legislation along the lines of H.R. 1667, we would welcome the opportunity to work with the staff to eliminate several technical problems with the language of the bill that might weaken our ability to use these provisions successfully. For example,

- in subsection 2(a) (proposed new 18 U.S.C. § 1041(a)), the phrases "a provisional authority" and "in connection with a mission of the United States Government

overseas" are unclear. A clearer definition of these phrases would deflect future legal challenges;

- subsection 2(a) (proposed new 18 U.S.C. § 1041(a)(l)(B)) does not indicate the means by which to determine whether a good or service is "materially overvalued";

- subsection 2(a) (proposed new 18 U.S.C. § 1041(a)(2)(A) would criminalize "to falsif[y], conceal[], or cover[] up by any trick, scheme, or device a material fact" "in connection with the contract or the provision" of covered goods or services. The provision is unnecessarily unclear. Specifically, it is unclear to what the material fact must be material. It may be that subparagraph (a)(2) could be read to limit this to a material fact "in any matter involving a contract or the provision of goods. . .," but this does not appear to resolve all of the vagueness problems associated with this provision;

- subsection 2(a) (proposed new 18 U.S.C. § 1041(b)) provides for "extraterritorial Federal jurisdiction." Although we do not oppose this provision, we are concerned that it might have the unintended consequence of undermining the Department's efforts to apply the general statutes extraterritorially because the general statutes do not contain such a provision. Circuit Courts have held the general statutes could be applied extraterritorially notwithstanding the absence of such a provision. *See United States v. Kim*, 246 F.3d 186 (2d Cir. 2001) (holding that the wire fraud statute could be applied extraterritorially).

Additionally, we would recommend that the Committee consider broadening proposed new 18 U.S.C. § 1041(a)(1)(A) (paragraph 2(a)(1) of the bill) to include conspiracies, by inserting ", conspires," after the word "executes." This would ensure that conspirators to violate its provisions were subject to proposed subsection 1041(a)'s penalty of imprisonment for not more than 20 years (as opposed to the five year penalty in 18 U.S.C. § 371, the provision of law generally establishing the penalties for conspiracies). We also would recommend that the Committee consider including in paragraph 2(a)(1) of the bill a provision for attempt in proposed new 18 U.S.C. § 1041(a)(2). Further, we would recommend amending 18 U.S.C. § 2516(c) (authorization for wire interception) to make H. R. 1667 a predicate statute for authorizing wire interception.

Finally, if the bill went forward, we would recommend deleting the money laundering language in subsection 2(c) of the bill. Currently, section 2 of the bill would list proposed new 18 U.S.C. § 1041 as both a money laundering predicate under section 18 U.S.C. § 1956(c)(7)(D) and as a RICO predicate under section 18 U.S.C. § 1961(1). While this language technically is correct, it also is redundant. The inclusion of proposed section 1041 as a RICO predicate renders it a money laundering predicate by incorporation, subjecting the proceeds of the prohibited activities to civil forfeiture under 18 U.S.C. § 981(a)(1)(C). This is because 18 U.S.C. §

1956(c)(7)(A) defines "specified unlawful activity" as "any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31."

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

M. Faith Burton

M. Faith Burton
Acting Assistant Attorney General

cc: The Honorable Lamar S. Smith
Ranking Minority Member