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

“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:

“293. Limitation on Government contract costs

“(a) Any proceeding costs incurred in connection with any proceeding brought by the United States, or a State or other person, pursuant to any Federal or State law or regulation 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 allowed in a conviction or 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 contendere) 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 such convictions are the subject of the proceeding involving fraud or similar offenses;

“(4) a decision to debar or suspend the contractor or reassign, void, or terminate a contract for default, or for violation of such violation or failure to comply;

“(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 (4).

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

October 20, 1988

S 16698

Mr. CRANSTON. Mr. President, I would like to make a few brief remarks about the amendment I introduced on behalf of Ms. Mendes-Silva.

I yield the floor.

Mr. BYRD. I think that is a good place to conclude this, and I ask that further reading of the amendment be made.

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 in 1963. The facts of Ms. Mendes-Silva's case present particularly compelling reasons for waiving 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 interpreter.

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. The purpose of the inoculation was 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 represented by 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 still be on 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 former Secretary of State Dean Rusk. Rather, the burden will be on Ms. Mendes-Silva to prove the Government's negligence. In fact, Mr. President, the bill expressly states: Nothing in this act shall be construed as an inference of liability on the part of the United States.
this case given the timely efforts which were made to determine if a suit could be brought against the U.S. Government.

Mr. President, I recognize the legitimate use of private relief legislation to address unique cases where special circumstances and inequitable situations deserved 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 Federal Government, 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.

Mr. President, I realize the legitimate use of private relief legislation to address unique cases where special circumstances and inequitable situations deserved 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 Government, 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 22, 1987, Assistant Attorney General John Bolton stated, "the bill waives the requirement that a claim for personal injuries be filed within the applicable statute of limitations or to show that the, administratively 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, adverse precedent this legislation would set.

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 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 deserved 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 Government, 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.

The Department of Justice 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 no compassion for people in need who have a valid claim, but there is no valid claim here. It is not in law; it is not in fact.

How can we approve this claim. In my judgment, it 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 approve a claim like this?

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

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

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 Defense 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
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 suicide, and it even was brought to the attention of the Secretary of State. I think she has fulfilled her administrative requirements in regards to it, and in my judgment it is a bill that has appeared before the Senate 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 matters 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 been given it to her. In other words, why should the Government be held responsible 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 have filed a claim within the time required by statute?

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

The PRESIDING OFFICER. Who yields time on the bill?

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

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

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 difficulties which are now being raised have been addressed before, and the bill has passed muster in both the House and Senate Judiciary Committees in the 99th Congress, and in the 100th Congress. I therefore urge my colleagues to support the amendment.

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

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

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

The PRESIDING OFFICER. All further debate? If not, the question is on agreeing to the amendment offered by the Senator from Ohio 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 provide that the computation 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 reads as follows:

The Senator from Ohio (Mr. METZENBAUM), for himself and Mr. GRASSLEY, proposes an amendment numbered 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 reads as follows:

The Senator from Ohio (Mr. METZENBAUM), for himself and Mr. GRASSLEY, proposes an amendment numbered 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 reads as follows:

The Senator from Ohio (Mr. METZENBAUM), for himself and Mr. GRASSLEY, proposes an amendment numbered 3734.
The amendment is as follows:

On page 4, lines 19-20, delete "from the
United States," 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 4, lines 8-10, delete "allowed
under 18 U.S.C. section 3292" and insert in
lieu thereof, "otherwise allowed by law."

On page 5, lines 16-17, delete the follow­
ing:

"The court may extend the limitations period
in this section, costs incurred by a con­
tractor in connection with any criminal,
civil, or administrative proceeding, by
reason of the violation or failure referred
to in subsection (a)."

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

"(c) The court may extend the limitations period
in this section, costs incurred by a con­
tractor in connection with any criminal,
civil, or administrative proceeding, by
reason of the violation or failure referred
to in subsection (a)."

The amendment is as follows:

On page 6, lines 9-10, delete "allowed
under paragraph (1), (2), (3), or (4).

The amendment is as follows:

On page 14, below line 3, Insert the follow­
ing:

"(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).

(6) 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 determines that the costs incurred
are appropriate.

(7) 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).

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

The amendment (No. 3734) was
agreed 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 Fed­
eral Government contractors in connec­
tion with certain criminal, civil, and
administrative proceedings.

Mr. GRASSLEY. Mr. President, I
send a motion 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 GOVERN­
MENT 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
303 of 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, by reason of the violation or failure referred to in
subsection (a).

(b) A disposition referred to in subsection
(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 viola­
tion or failure referred to in subsection
(a).

(3) In the case of an investigation 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 of­
ficial 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).

(6) 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 determines that the costs incurred
are appropriate.
(iv) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers, and employees to such proceeding.

(5) In the case of a proceeding commenced 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 (1), but only to the extent provided in subparagraph (B).

(B) In the case of a proceeding commenced 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 (1), but only to the extent provided in subparagraph (B).

(III) the cost of the services of accountants, consultants retained by the contractor, and such other factors as may be appropriate.

(II) the term 'costs' 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.

(1) The term 'proceeding' includes an investigation, a civil or administrative proceeding commenced by the United States or a State to the extent provided in subsection (1), but only to the extent provided in subparagraph (B).

(1) The term 'proceeding' includes an investigation, an administrative proceeding commenced by the United States or a State, to the extent provided in subsection (1).

(ii) the cost of legal services, including the cost of the services of accountants, consultants retained by the contractor, and the cost of the services of legal services performed by an employee of the contractor;

(a) the term 'penalty' does not include a fine, but includes a debarment or suspension of the contractor, and a decision to suspend or debar the contractor.

(b) shall apply to contracts entered into after the date of the enactment of this Act.

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

(d) Rates in paragraphs necessary for the implementation of section 306(e) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 404(4)(A)) are amended—

(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 after 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 entered into after the date of the enactment of this Act.
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 $550,000 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 to the Government $200 per hour for electricity.

I would concede that legal expenses are a cost of doing business in today's over-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 for 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 allowable 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 thus a significant cost to its customers, as we know all too well, there's far too little free market competition for 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 allowable 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 thus a significant cost to its customers, as we know all too well, there's far too little free market competition for public contracts, particularly defense contracts. The Government has few alternatives; there's little incentive for contractors to be competitive.

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 the Government is handing 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 paying 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 the taxpayer.

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 another 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 to allow all or part of the proceeding costs pursuant to that consent or compromise agreement.

In a proceeding brought by a State or other entity, the costs are 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 prior or subsequent, 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 be allowable.

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 Government-wide 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 nature of the legal expenses, and 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 allowable cost of legal proceeding costs to the hourly rates found in the Federal Acquisition 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 nature of the legal expenses, and the principles governing the award of legal fees in civil actions involving the United States as a party.

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.

Lawyers and other costs are 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.

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 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-
The amendment that I propose today is as follows:

**AMENDMENT NO. 3736**

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

The PRESIDING OFFICER. The amendment is now in possession of the Clerk.

Mr. GRASSLEY. 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 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; or third, imposition of a monetary penalty; and fourth, a decision to debar or suspend the contractor, to rescind or void the contract, 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 inconsistent with a State rule that 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 commencement 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 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 agreed 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 amendment is now in possession of the Clerk.

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 as follows:

The amendment 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:

**SUB. 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 rule of that person is advancing the case to litigation and any relevant considerations relating 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 is precluded 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 3720 of the United States Code is amended—

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

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

Mr. President, in the 98th Congress, I was the principal sponsor of legislation which was instituted them 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.

In 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 and abusive practices. 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 achieved results with as many 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 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 employers 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 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 18, 1988, the date we 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 the legislative history of 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, the 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 qui tam plaintiff must be dismissed from the action and is 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 to protect the use of that weapon from possible abuse. I am confident that the vast majority of private plaintiffs in false claims 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 who are already doing 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 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're ready to act on the amendment. The amendment is agreeable.

The PRESIDING OFFICER. The motion to lay on the table 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 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 billions 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 keep the ante up for those firms that bid the American people. Just last Thursday, 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. Therefore are also more than $100,000 in a crude attempt to win the favor of Pentagon personnel through gifts and gratuities.

I commend U.S. Attorney Tony Valukas for his efforts in this case. But I think even the Justice Department realizes that the increased penalties provided in this bill—without more—won't do the job we need to do. Because increasing the penalties presumably 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 an amendment to authorize an additional $8 million per year to the Justice Department for government fraud investigation and prosecution.

This amendment was first introduced by Senator Proxmire at my suggestion 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're serious about finding fraudulent acts, and then prosecuting them to the fullest extent of the law.

I urge my colleagues to support the 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 and 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 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 again been found to be engaged in fraud. As a result of recent investigations, the Justice Department has issued 278 subpoenas and 42 search warrants and it is likely more will follow. Earlier this year the Senate Government Affairs 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 plethora 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 procurement 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 is aimed at stopping fraud against the Government. The 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 investigation of major fraud. I strongly urge my colleagues to support this measure.

Mr. BUMPER. 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 bringing to the Senate 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 leaders 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 12. Even though Senator METZENBAUM strongly disagreed with my position on the monetary reward provision, he has graciously agreed to accommodate my concern.

I want disposed of 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 overall cost of running the Government has increased.

It contributes to burdensome budget deficits. But even more serious: Fraud can cost lives—lives 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 telling the Government 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. The motion to lay on the table was agreed to.

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, without amendment.

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 actions to 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 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 roll-call 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