REPORT BY THE

# Comptroller General

OF THE UNITED STATES



# Department Of Justice Should Coordinate Criminal And Civil Remedies To Effectively Pursue Fraud In Federal Programs

The Department of Justice is not making full use of civil remedies to combat fraud. Until a criminal case is complete, it gives little consideration, if any, to potential civil remedies. This failure to take timely action weakens the total prosecutive effort, making it less efficient and reducing the potential for recovering fraud losses.

Problems with settlement procedures and the management and enforcement of fraud collections have prevented Justice from maximizing civil recoveries and realizing the deterrent value of aggressively enforced remedies.

GAO recommends that civil remedies be made part of a coordinated strategy to combat fraud and that improvements be made in the settlement and collection of fraud debts. Justice agrees that coordination is beneficial but disagrees with some of GAO's recommendations to achieve it.

This review was requested by Representative Elizabeth Holtzman.



GGD-80-7

OCTOBER 25, 1979

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-171019

The Honorable Elizabeth Holtzman
House of Representatives

Dear Ms. Holtzman:

This report addresses the need for the Justice Department to develop and implement a coordinated strategy against fraud. A strategy promoting early consideration of both criminal and civil remedies is clearly warranted.

--Because civil aspects of fraud cases are not considered at the outset, the result has been inefficiency, duplication of effort, untimely civil action and reduced potential for recovery in some cases, and no civil consideration in other cases.

--Fraud cases are compromised or closed without adequately determining the defendants' present and future ability to pay.

This review was made pursuant to your April 11, 1978, request and subsequent agreements with your Office. As agreed, unless you publicly announce the contents earlier, we plan no further distribution of this report until 10 days from the date of the report. At that time, we will then send copies to interested parties and make copies available to others upon request.

We trust that this report will be useful to you and the Congress in your endeavors to deter fraud against the Government.

Sincerely yours,

Comptroller General
of the United States

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REPORT BY THE
COMPTROLLER GENERAL
OF THE UNITED STATES

# DEPARTMENT OF JUSTICE SHOULD COORDINATE CRIMINAL AND CIVIL REMEDIES TO EFFECTIVELY PURSUE FRAUD IN FEDERAL PROGRAMS

## D I G E S T


The Department of Justice, as the chief law enforcement agency, must use every means available to combat fraud and to maintain integrity in Federal programs. Both criminal and civil remedies are available to the Department of Justice in its efforts to combat fraud.

Criminal statutes provide for punishment, such as imprisonment and fines, to deter criminal activities. Civil actions can help the Government recover losses through monetary damages and forfeitures.

Although the fraud problem warrants enforcement of both criminal and civil sanctions, Justice is not making full use of civil remedies to insure that

- --civil sanctions are considered as part of a coordinated prosecutive strategy against fraud,
- --attorneys give adequate consideration to a defendant's present and future ability to pay before compromising and closing civil fraud cases, and
- --civil fraud debt collections are vigorously pursued.

Justice needs to make the most of its opportunities to recover losses of program funds due to fraudulent activity.


GGD-80-7

## COORDINATED PROSECUTIVE STRATEGY NEEDED

In many fraud cases, little consideration, if any, is given to potential civil remedies until after a criminal case is complete. Consequently, civil remedies often are not timely, making the total prosecutive effort less efficient and reducing the chance for recovering losses.

Early consideration of civil remedies would

- --permit more informed judgments on prosecutive options,
- --improve investigative efforts,
- --improve the timeliness of civil action, and
- --assure that all available sanctions against fraud are used to the best overall advantage of the Government.

Justice officials have recognized the benefits of coordinating criminal and civil actions and have developed policies advocating their coordination. However, GAO's review at nine judicial districts and at the Justice Department's Civil Division showed that little progress has been made in implementing these policies.

Justice's tradition of giving preeminence to criminal sanctions continues to be implemented in such a manner that the decision to proceed against a fraud is made without early consideration of available civil remedies. This must be overcome.

Justice has also not provided adequate guidance to address attorneys' concerns about legal barriers to early consideration of civil sanctions, nor developed an effective referral system which would help insure that fraud cases are reviewed for civil prosecution at an early stage. (See pp. 8 to 23.)

IMPROVEMENTS NEEDED IN THE SETTLEMENT AND COLLECTION OF FRAUD DEBTS

To combat fraud effectively, the Justice Department must improve settlement procedures and strengthen the management and enforcement of fraud collections. Justice's attorneys do not adequately consider defendants' financial status when compromising and settling fraud cases. Additionally, its efforts to oversee and monitor the collection of fraud debts have been unsatisfactory.

Civil attorneys compromise and settle cases without adequately determining defendants' present and future ability to pay. Failure to determine the defendant's financial position results in recovering less than the full amount lost or in declining civil action on potentially collectable cases. Justice must insure that attorneys adequately consider defendants' present and future ability to pay before compromising or closing a fraud case. (See pp. 32 to 35.)

Currently, Justice cannot effectively monitor collections because its management information system does not

provide accurate and comprehensive data on all fraud debts. To further complicate enforcement and collection, some State laws impede the collection of Federal fraud judgments. (See pp. 35 to 38.)

RECOMMENDATIONS

To effectively combat fraud in Federal programs the Attorney General should:

--Address, through better guidance and training, the concerns preventing coordination of criminal and civil cases.

--Develop an adequate referral system which will insure timely civil consideration of all fraud matters.

--Provide guidance and assistance to increase awareness of civil remedies and the benefits of coordinating criminal and civil remedies.

--Enforce Justice's policy of obtaining adequate financial information on a defendant before compromising or settling a case.

--Strengthen the management and enforcement of fraud debt collections.

--Explore with the Congress and the States the possibility of a uniform statute allowing collection of Federal fraud judgments without regard to presently differing State laws.

## AGENCY COMMENTS

The Justice Department agrees with GAO's conclusion that coordination of civil and criminal sanctions is beneficial. However, Justice contends it has been promoting the coordination of civil and criminal remedies. GAO stands by its position that Justice must take a more active posture if its coordination of civil and criminal remedies is to be more effective. (See pp. 25 to 31.)

Justice generally disagreed with the conclusion that improvements are needed in the settlement and collection of fraud debts. Justice asserts that it does not settle cases without adequately determining defendants' present and future ability to pay. The fact remains that in 3 U.S. attorney's offices, 34 of 39 cases settled or closed on financial ability grounds did not have the support required by the Civil Practice Manual and 28 C.F.R. § 0.166.

While Justice concedes that its collection unit provides only limited monitoring and oversight, it contends collections have not been ignored. Justice's lack of attention, however, is clearly evidenced by the fact that, of the 194 fraud judgments GAO reviewed, about 73 percent had either paid nothing or were delinquent. (See pp. 39 to 43.)

# Contents

ABBREVIATIONS

| | |
|---|---|
| FBI | Federal Bureau of Investigation |
| GAO | General Accounting Office |
| GSA | General Services Administration |

# CHAPTER 1

## INTRODUCTION

No one knows the magnitude of fraud against the Government, but the amount of suspected fraud which has surfaced indicates the problem is severe. The Congress has established both criminal and civil statutory remedies to cope with fraud. Criminal fraud statutes impose punitive sanctions--imprisonment and fines--while civil statutes provide a means to make the Government whole. While there is debate as to which remedy serves as the best deterrent to economic crimes such as fraud against the Government, the severity of the fraud problem warrants vigorous enforcement of both criminal and civil remedies. This report addresses the Justice Department's enforcement of civil remedies.

We performed work at the Department of Justice's Civil and Criminal Divisions and various U.S. attorneys' offices. Our work at the U.S. attorneys' offices was primarily performed in northern and southern Texas, eastern and southern New York, and New Jersey. For further information on the scope of our review, see chapter 4.

## MAGNITUDE OF FRAUD IS UNKNOWN

Opportunities for defrauding the Government are virtually unlimited due to the number and variety of Federal programs. Available figures estimating the magnitude of fraud against the Government vary depending on the definition used to define fraud. At best, these estimates are guesses. As a result, no one knows the potential civil fraud recoveries for which the Government may have a claim.

Exploitation of Government programs may be accomplished by numerous means and an almost endless variety of schemes. A few of the means by which the fraud may be accomplished are:

--false claims for benefits or services,

--false statements to induce contracts or secure goods or services,

--bribery or corruption of public employees and officials, or

--claims for payment where goods or services are not delivered.

Likewise, the schemes by which a fraud is committed range from small unsophisticated frauds perpetrated by single individuals to sophisticated frauds perpetrated by large corporations. The dollar amounts involved may be small, amounting to several hundred dollars, or major, with frauds amounting to millions of dollars. The fraud may be an isolated transaction occurring at one point in time or a series of transactions taking place over several years. Some of the schemes may include the following:

--A corporation obtains a series of contracts from a Government agency. The corporate president directs a company employee to falsify the time records and bill the Government at an artificial ceiling which he establishes, and which bears no relation to actual labor costs.

--A corporation bribes a Government employee in exchange for acceptance of false claims filed by the corporation for work which the company does not perform.

--A doctor bills medicare and medicaid for work not performed. The work may include blood tests, x-rays, and surgery. The overbilling may take the form of hundreds of false claims submitted to the Government.

--A Federal employee files fraudulent travel vouchers for moving costs incurred in the course of Government business.

## CRIMINAL AND CIVIL REMEDIES ARE AVAILABLE

Fraud against the Government may result in both criminal and civil liability for the individual and/or corporation committing the fraud. For a corporation,

criminal liability may take the form of a fine. However, high managerial officers generally are not subject to criminal liability unless the fraud can be directly traced to them. For an individual, the criminal liability may take the form of a fine and/or a prison sentence. The corporation and the individual may be civilly liable for double the amount of the damages sustained by the Government, together with the costs of the lawsuit and forfeitures of $2,000 for each false claim. Both these remedies can have a deterrent effect depending on the entity involved and the strategy used to enforce the remedies.

Criminal remedies

The Government relies on specific criminal fraud statutes which are suited to a particular fraud and three general criminal fraud statutes. The three general fraud statutes are the conspiracy to defraud (18 U.S.C. 371), the false claims statute (18 U.S.C. 287), and the false statement statute (18 U.S.C. 1001). However, the criminal fraud statutes and civil fraud statutes vary in the elements of proof required. They may be compatible or incompatible with the civil statutory remedy. For example, the criminal false claims statute (18 U.S.C. 287) is the criminal counterpart of the civil false claims statute (31 U.S.C. 231).

The criminal fraud statutes may not provide a penalty which is commensurate with the scope of the fraud. For example, 18 U.S.C. 287, the criminal false claims statute, provides for a maximum penalty of $10,000 and/or imprisonment for not more than 5 years. Although a corporation may have committed a multimillion dollar fraud against the Government through the acts of its managerial agents, the maximum amount the Government may fine the corporation is $10,000 for each fraudulent claim. If the corporation pleads guilty or is judged guilty on two charges of fraud under the statute, the corporation may be liable for a criminal fine of $20,000. Without a civil action followup by the Government, the corporation succeeds in substantially benefiting from the fraud at a very small cost.

Civil remedies

While civil remedies in the nature of damages are not intended to be punitive, the civil remedies may have a

greater deterrent effect in that the civil remedies may be more commensurate to the scope of the damage caused by the fraud. The civil remedy seeks to make the Government whole for the loss it has incurred. One civil statutory remedy provides for recoveries which may make the Government more than whole. For example, under the False Claims Act, a corporation and/or individual may be liable for double the amount of the damages sustained by the Government as a result of the fraud, together with the cost of the suit and a forfeiture of $2,000 for each false claim.

Civil remedies are available both in statute and in common law. The principal civil fraud statute is the False Claims Act (31 U.S.C. 231). In addition to the False Claims Act, there are two other laws which contain special double damage and forfeiture provisions--the Federal Property and Administrative Services Act (40 U.S.C. 489(b)), and the Contract Settlement Act of 1944 (41 U.S.C. 119). A recently enacted law, the Contract Disputes Act of 1978 (41 U.S.C. 601), provides a civil remedy for fraudulent claims presented the Government which differs from that provided in the False Claims Act. The act provides that a contractor who is unable to support any part of his claim because of misrepresentation or fraud will be liable for the unsupported claim and all costs of the Government's review of the claim.

Common law theories may be used to recover fraudulently obtained monies where the statutory remedy may not be available or where the prosecutor is unable to meet the burden of a statute. The prosecutor who is able to prove common law fraud may also seek restitution on the grounds that the Government has a right to restitution and that the defendant was unjustly enriched. The statutory remedy is subject to a 6-year statute of limitations which begins when a false claim is made. The common law fraud remedy is subject to a 3-year statute of limitations which generally begins to run when evidence of fraud is discovered.

## ROLES OF JUSTICE'S CRIMINAL AND CIVIL DIVISIONS AND THE U.S. ATTORNEYS

Enforcement of Federal fraud statutes is primarily the responsibility of the Criminal Division's Fraud Section and the Civil Division's Commercial Litigation Branch (formerly the Civil Frauds Section). The Criminal

Division oversees criminal prosecution of fraud crimes. The Civil Division insures enforcement of the Government's civil claims to recover amounts fraudulently obtained.

The criminal prosecutive effort is delegated to U.S. attorneys in the 95 Federal judicial districts. The U.S. attorneys' offices have different organizations, such as separate criminal and civil divisions, fraud and white-collar crime units, economic crime units, and/or organized crime strike forces.

The Civil Division has continuously delegated increased authority to the U.S. attorneys to file suit, to compromise, and to close cases. While the Civil Division maintains primary responsibility for cases above the delegated amount, it may also delegate the case to a U.S. attorney's office and supervise the U.S. attorney's handling of the case. The following describes the delegations.

| Effective date | Delegation |
|---|---|
| July 1974 to January 1977 | $10,000 |
| January 1977 through August 1978 | $30,000 single damage |
| September 1978 to present | $60,000 single damage plus forfeitures |

The Civil Division has allowed several U.S. attorney's offices to handle civil fraud cases above the delegated amount on a case-by-case basis because of their expertise and available resources.

## THE ROLE OF FEDERAL AGENCIES

Federal agencies, other than the Department of Justice, generally do not have authority to litigate fraud cases--criminal or civil--in court or to enforce fraud judgments. However, Federal agencies have administrative remedies available to them which are civil in nature.

The Federal Claims and Collection Act of 1966 (31 U.S.C. 951) requires Federal agencies to attempt collection of all claims of the United States within their respective

jurisdictions. Congress designed the act to reduce the amount of litigation previously required to collect claims and reduce the volume of private relief litigation. However, the act exempts claims involving fraud, misrepresentation, or conduct in violation of antitrust laws. Such claims are referred to the Department of Justice.

Federal agencies can take limited administrative action to recover Government monies. For example, the agency may conduct administrative hearings to examine matters and direct recovery on an overpayment basis. However, such administrative action may preclude future use by the Civil Division of available civil remedies. The agency may not seek double damages and forfeitures since the authority to enforce the False Claims Act is vested in the Justice Department.

While agencies do not have authority to enforce criminal and civil statutes, they may serve the role of preventing and detecting fraud. Agencies have available to them the personnel who know and understand the agencies' programs and regulations: auditors, inspectors, and attorneys. When agency personnel become aware that a fraud may have taken place, the agency has the responsibility for referring the case to the agency's investigators. The agency investigators in turn have the responsibility for referring the matter to the Justice Department if they believe a fraud has been committed. The Justice Department has the final determination as to whether the matter warrants civil and/or criminal prosecution.

Legislation to establish Inspector General units in each major agency for the purposes of monitoring agency programs, detecting fraud, and preventing fraud has been enacted into law. The activities of the Inspector General units will cause increases in both criminal and civil fraud referrals to the Department of Justice.

## CHAPTER 2

## A COORDINATED PROSECUTIVE STRATEGY IS NEEDED TO MAXIMIZE THE GOVERNMENT'S EFFORTS AGAINST FRAUD

The Department of Justice does not capitalize on its opportunity to use civil sanctions in prosecuting fraud against the Federal Government. In many fraud cases, 1/ attorneys rarely consider using potential civil remedies until after the criminal case is complete. Because of untimely consideration of civil actions against fraud, the total prosecutive effort is less efficient, and the chances for recovering fraud losses are reduced.

A coordinated prosecutive strategy based on the full range of available criminal and civil sanctions is needed to effectively combat fraud in Government programs. This is crucial not only to recover the Government's losses, but also to discourage future fraudulent activities and to maintain integrity in Federal programs. The civil aspects of fraud need to be considered early--at the outset of criminal considerations. This early civil consideration would (1) permit more informed judgments on available prosecutive options, (2) improve investigative efforts, (3) improve the timeliness of civil action, and (4) assure that all available criminal and civil sanctions against fraud are used to the best overall interest of the Government.

Justice officials have recognized the benefits of coordinating criminal and civil actions and have developed policies advocating their coordination. Although Justice has made some effort to implement these policies to better coordinate its efforts against fraud, our review at nine judicial districts and at the Justice Department's Civil Division showed that little progress has been made in implementing these policies.

1/For simplicity, "cases," as used here, refers to all matters referred to and formally considered by the Justice Department, whether or not resulting in an indictment or trial.

Justice's tradition of giving preeminence to criminal sanctions continues to be implemented in such a manner that the decision to proceed against a fraud is made without early consideration of available civil remedies. This has impaired the Government's effort to effectively combat fraud in Federal programs. Justice has also not provided adequate guidance to address attorneys' concerns about legal barriers to early consideration of civil sanctions, nor developed an effective referral system which would help insure that fraud cases are reviewed for civil prosecution at an early stage.

## JUSTICE GUIDANCE ON A COORDINATED EFFORT NEEDS TO BE IMPROVED

Although Justice's policy recognizes that civil aspects should be considered from the outset, it has not provided sufficient definitive guidance to correct the current inadequate coordination. Justice guidance in the area consists of a policy memorandum, issued in February 1977, by the Acting Deputy Attorney General, which called for increased coordination of civil and criminal efforts between Justice headquarters and the U.S. attorneys' offices. Additionally, the Civil Practice Manual requires that civil fraud complaints be filed at the earliest practical moment.

We believe these limited policies are a step in the right direction because they require (1) institution of civil action on fraud cases at the earliest feasible date and (2) improved coordination between Justice units. However, these policies need to be further delineated so as to maximize Justice's efforts to combat fraud.

The Civil Division developed a plan to implement the intent of the 1977 policy memorandum. Under this plan, Civil Division officials were to visit U.S. attorneys in 13 large cities to convince them that implementing Justice's policy of coordination would improve Federal law enforcement in their districts. Justification for the plan was that an alarming percentage of cases were identified for civil referral 5 or 6 years after the fraudulent events took place. This caused the obvious problems which occur when prosecuting stale cases, such as using witnesses whose memories have dimmed and bringing cases against defendants whose pockets were empty.

However, as of June 1979 only 2 of the 13 planned visits to U.S. attorneys' offices had been made. We were advised by Justice officials that the visits were not made because adequate resources were not available.

In any case, Justice's manuals provide very limited guidance on the implementation of its policy. Its guidance has not been sufficiently detailed to

--address U.S. attorneys' fears of hampering a criminal case, and

--delineate the actions civil attorneys can follow to shorten the time it takes to pursue a civil case.

Justice needs to provide formal detailed guidance addressing these aspects to U.S. attorneys to achieve a uniform application of its policy for a coordinated effort against fraud.

Legal barriers causing delays in timely consideration of civil remedies

Current Justice policies recognize that early consideration and coordination of criminal and civil sanctions against fraud are beneficial. For example, Justice's Civil Practice Manual advises U.S. attorneys to consider from the outset all violations and the appropriate remedies, criminal as well as civil, and to develop all the issues with a single investigation. Further, the U.S. Attorneys' Manual, covering both criminal and civil policies, calls for prompt, vigorous enforcement of civil sanctions to make the Government whole and provide a possible deterrent to similar fraud.

Although many of the Justice attorneys agreed that a coordinated criminal/civil prosecutive strategy would have potential benefits, many also raised legal issues which they perceived, correctly in some instances, to be barriers to coordination. They were also legitimately concerned that concurrent criminal and civil action might jeopardize the criminal case. In some instances, these concerns have resulted in a "hands off" attitude toward the civil merits until the criminal case is completed. For example, in one district we visited, civil attorneys were instructed not to get involved until the criminal case was completed.

## Access to grand jury information

A question arises among Justice officials as to whether and when civil attorneys have access to criminal case grand jury information to build a civil case. In 1961 Justice's Office of Legal Counsel concluded that disclosure may be made to Justice attorneys considering other civil or criminal action. Studies performed in 1977 and 1979 by the same office found that the U.S. attorney can properly use grand jury material obtained in good faith criminal investigations for subsequent civil action. However, the study cautioned that it may be best to avoid access to grand jury material while the grand jury proceedings are pending or active or to keep records of access and seek guidance from the court.

Justice needs to resolve this question by establishing procedures for civil access to grand jury information where such access rights may be clarified administratively and seek legislative guidance from Congress where access rights are subject to conflicting judicial interpretation. For example, civil action had been delayed in the General Services Administration (GSA) scandal because the Justice's Civil Division and the U.S. attorneys could not agree on the Civil Division's access rights.

One assistant U.S. attorney in charge of the GSA investigation stated that she has refused to grant Justice's Civil Division full access because of fear that such access would be in violation of grand jury rules of secrecy. She stated she did not believe the Civil Division should have access because the investigation was ongoing and parties remained to be indicted. The assistant U.S. attorney informed us that the U.S. attorney offered to petition the court, on the Civil Division's behalf for limited access to grand jury materials. However, the Civil Division believed a court petition was not needed to get access to grand jury materials.

## Jeopardizing criminal case

Another concern is that disclosure of evidence to civil attorneys may jeopardize the criminal case by (1) providing grounds for dismissing the Government's charges or suppressing the Government's evidence against the defendant in the criminal case and (2) allowing the

defendant insight into the basis for the Government's case. 1/ A 1977 study by Justice's Office of Legal Counsel concluded that Justice attorneys cannot use civil proceedings to discover facts relating solely to the Government's criminal charges, and court cases have upheld this opinion. However, neither the court nor the study have ruled out early consideration and investigation of the civil aspects.

Use of civil settlements during criminal proceedings

Another legal concern is whether civil settlement may be properly discussed and obtained during criminal plea bargaining. A 1977 study by the Office of Legal Counsel stated that a defendant's willingness to settle the civil claim may be considered when determining criminal charges or the propriety of accepting a plea. However, using the threat of criminal proceedings to coerce payment of civil claims is considered unethical.

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Civil Division officials believe these considerations can be resolved through guidance and that criminal and civil remedies can be better coordinated. We interviewed 87 officials having criminal or civil fraud responsibilities at Justice headquarters and 9 U.S. attorney offices. While Justice personnel have widely varying views concerning the need for and benefits of coordinating criminal and civil action on frauds, most officials believe that better coordination of criminal and civil remedies is needed and would enhance Justice's overall effort to combat fraud. Views of some of the officials interviewed follow.

--One official indicated he would take steps to improve coordination.

--Some officials advised us of steps already underway to improve coordination.

1/Disclosure of evidence to civil attorneys may in some circumstances entitle a civil defendant to discovery of such evidence under Rule 26 of the Federal Rules of Civil Procedure.

--Others agreed that better coordination was needed but were not sure how to go about it.

The main concern of all those interviewed was to avoid legal problems which may arise if the civil case is pursued before the criminal case is completed.

Difficulties using available legal devices to quickly achieve judicial resolutions

Because of inadequate civil consideration and criminal preeminence, attorneys pursuing the civil aspects of a case cannot make full use of available legal devices such as the motion for summary judgment and court-ordered restitution. These devices allow for efficient use of judicial resources. Rather than relitigate the facts of a fraud case, the attorney may rely on the facts proven in the criminal case. Restitution also may be made part of the final disposition of the criminal case. Justice, however, cannot use these devices to effectively pursue fraud because decisions are made during the criminal case which hamper the civil case.

Justice obtains few motions for summary judgments on fraud cases. A Justice official stated that the Civil Division can file summary judgment motions in no more than 10 percent of the cases handled. He attributed this low figure to the fact that (1) criminal investigations have not determined damages to the Government, (2) the dollar amount involved in the criminal plea is not commensurate with the civil claim, (3) the defendants have been tried on unrelated criminal offenses, and (4) the defendants have been convicted of conspiracy. In short, the facts developed during the criminal trial may not be sufficiently developed to eliminate from dispute all but legal issues. Because of the emphasis given the criminal prosecution of fraud, the Civil Division has difficulty using the criminal case for its purposes. Some criminal assistant U.S. attorneys have stated that they trade away civil liability during criminal plea bargaining even though, according to the Justice official responsible for fraud matters, they are not supposed to do so.

Full restitution, as part of the final disposition of the criminal case, may be an alternative to civil action if considered as part of the overall prosecutive strategy. An order of restitution cannot include sums representing alleged losses caused by offenses which were not charged in the indictment or not agreed to as part of the plea bargain arrangement. However, by the time the Civil Division and the U.S. attorneys' offices pursue their cases it is often too late to request court-ordered restitution since the criminal case has been completed without thought of recovery.

Need to improve guidance on coordination and use of criminal investigation

Justice guidance explains that copies of correspondence in the criminal file should also be kept in a civil section file, but it does not spell out the civil attorneys' access rights to the criminal file. Justice attorneys said that the Federal Bureau of Investigation (FBI) has refused to provide civil attorneys any reports which directly or indirectly draw on information from a grand jury. One civil attorney stated that access to such FBI reports would enable the civil attorneys to monitor the criminal case better and give them 2 years lead time on the civil case. Justice's Civil Division recently requested an opinion from their Office of Legal Counsel concerning the rights of civil attorneys to such information. A Civil Division official stated that a favorable opinion was received and that a copy of the opinion was sent to the FBI with a request for such reports.

FBI officials stated that the FBI sends all their reports to Justice's Criminal Division with no restriction on their distribution to the Civil Division. A Criminal Division official stated that as a result of the legal opinion the Criminal Division is now releasing such reports to the civil attorneys.

Justice's guidance to attorneys handling fraud matters recognizes that it is more efficient and effective to have one investigation satisfy the needs of both the criminal and civil case. The longer the time between the fraudulent

acts and the investigation, the more difficult the investigation becomes, because witnesses are more difficult to locate and records are lost or destroyed. The FBI does not sufficiently develop provable damage, which is essential to sustaining a civil action, unless specifically requested by the assistant U.S. attorney handling the criminal case. We identified cases in which attorneys had to do further work because the investigation did not adequately address damages or other civil aspects of the case. Sometimes Civil Division attorneys had to look for witnesses who had testified in the criminal case, or reinvestigate because the criminal charges against the defendant had been reduced to expedite the criminal case. The following two cases illustrate the need to coordinate the criminal and civil remedies and, in particular, the need to have one investigation serve all case needs.

--In February 1974, the FBI referred information to a U.S. attorney alleging that the president of a trucking company had submitted false claims under Government contracts. A criminal investigation resulted in the indictment of the company president for conspiracy and falsifying 23 claims during 1973 and 1974. However, in March 1976, the defendant was found not guilty of conspiracy and the false claims charges were dismissed for lack of evidence. In June 1976, the U.S. attorney requested and received authorization to institute civil action. It was necessary to reopen the investigation to investigate other contracts and to determine the amount of damage to the Government. Civil suit had not been filed as of March 1979, although 5 years had passed since the alleged fraud had come to the U.S. attorney's attention. The Chief of the Civil Division in the U.S. attorney's office told us that, because of the delays in completing the action against this defendant, the Government would most likely recover far less than the $500,000 believed fraudulently taken.

--In fiscal years 1977 and 1978, the Civil Division devoted four attorneys full time to recover civil claims relating to a Department of Agriculture grain exporting program. According to a Civil Division attorney involved in this effort, much of their work related to frauds which criminal attorneys had not investigated or litigated. A Civil Division attorney told us that criminal attorneys had investigated only short-weighing of grain, but civil attorneys found the fraud was of greater magnitude and also involved the substitution of cheaper, inferior grains. The FBI official in charge of the criminal investigation informed us that the U.S. attorney specifically requested only a criminally oriented investigation.

## Delaying civil actions causes statute of limitations and evidentiary problems

Because of long delays the statute of limitations runs out on civil claims, and evidentiary problems develop which weaken the Government's cases. When the statute of limitations runs out on the civil case, Justice cannot use the strict civil sanctions provided for in the False Claims Act, which has a 6-year statute of limitations. When evidentiary problems develop because of lost or destroyed evidence and unavailable witnesses the Government has a weakened bargaining position. The following examples demonstrate the effect of these problems.

--In a Medicare case involving suspected false claims totaling almost $700,000, the statute of limitations had run out on all the claims preventing Justice from taking any civil action. Evidentiary problems also developed weakening the Government's case. A group of doctors filed the claims between October 1967 and October 1969. Civil Division received the referral on January 26, 1971. Justice never brought a criminal action against the parties. The U.S. attorney received from the insurance company a list of alleged overpayments in October 1973, and assigned an investigator to work on the case. The U.S. attorney notified the Civil Division in 1975 that so many witnesses had died that of 157

beneficiaries they sought to interview, only 27 were alive. Of these 27, only 3 were considered good witnesses because the others were too old or infirm to testify. However, only four claims were filed for these three witnesses. In addition, the insurance company had lost necessary records. Justice attorneys were evidently unaware that the statute had run out when the case was finally settled in August 1977 for $98,857, the amount the agency witheld from the doctors.

--Civil Division attorneys settled for much less than single damages in one case primarily because evidentiary problems developed. The fraudulent transaction took place between 1973 and 1974. A corporate defendant had filed $73,599 of false claims and gave $20,000 in bribes to a Government employee. Despite the fact that the case involved program fraud, U.S. attorneys charged the defendants with income tax evasion. The Civil Division was alerted to the case by FBI reports sometime in 1975 when the criminal case was completed. In the Civil Division the case was assigned at different times to three attorneys. They did not file suit until 1978 because, according to one attorney, the original investigation was criminally oriented and another investigation had to be made to prove which contracts were false. The attorney stated they accepted a low settlement of $43,500 against the corporate defendant and $6,500 against the former Government employee because available witnesses had poor recall, and one witness who knew of the scheme had been fired by the corporate defendant and did not wish to testify.

--A 1970 criminal investigation resulted in the indictment and conviction of three persons for submitting false statements to the Federal Housing Administration for mortgage insurance. The criminal cases were completed in 1972, but the civil case was not considered until 1974,

2 years later. In September 1974, the attorney in charge of the civil case decided not to file suit. The reasons given related, in part, to the preeminent position given to the criminal case. For example, the attorney noted that the investigation had not included civil considerations and additional time-consuming reconstruction of the files would be required. Also, the passage of time would complicate the task of proving false claims for counts not included in the criminal guilty plea. However, in January 1975, Justice's Civil Division recommended civil action. We were told that in May 1976, civil suit was filed against one of the three defendants, about 4 years after the criminal case was completed. As a result of this delay, the statute of limitations had expired on some of the fraudulent actions. As of January 1979, the civil case had not been tried or settled.

The problems highlighted as a result of long delays are directly related to the lack of a coordinated strategy against fraud. Thus, the Government's efforts to combat program fraud are hampered by not considering all possible legal sanctions.

## TRADITIONAL PREEMINENCE GIVEN CRIMINAL PROSECUTION LIMITS ADEQUATE CIVIL CONSIDERATION

Justice's tradition of giving preeminence to criminal sanctions continues to be implemented in such a manner that the decision to proceed against a fraud is made without early consideration of available civil remedies. This has impaired the Government's efforts to effectively combat fraud in Government programs. In eight of the nine U.S. attorney districts visited, the civil aspects of fraud cases were not considered. To assure that all available criminal and civil sanctions are used to the Government's best interest, Justice must encourage the early consideration of all available remedies and prosecutive options.

Although combating program fraud has always been a responsibility of the Justice Department, it has not emphasized the civil aspects of fraud cases. As a result, the criminal remedies, as in the past, continue to receive greater attention than civil remedies. A recent Justice

survey showed that U.S. attorneys' offices in fiscal year 1978, faced with competing criminal and civil demands, spent only a small fraction of their time on civil action for recovering Government funds, including fraud cases.

On the basis of a Justice listing of criminal fraud cases closed in 1976 and 1977, we identified, with the help of Justice attorneys, those cases which may have a counterpart civil remedy. While a civil claim is not practical or possible on all criminal violations, violation of certain criminal statutes, such as 18 U.S.C. 287 for false, fictitious, or fraudulent claims, make the possibility of a civil claim under the civil statute 31 U.S.C. 231 for false claims so likely that a civil review would usually be warranted. However, many cases having probable civil merit were not considered civilly.

Every district except the New Jersey district either deferred civil consideration until the criminal case closed or did not consider the civil aspects at all. For example, in one district we identified 82 criminal cases closed in 1976 and 1977 which had statute violations indicating probable civil merit but which were not referred for civil consideration. We reviewed a sample of 43 of these 82 cases, and at least 13 (30 percent) involved losses which had not been recovered through voluntary repayment, restitution, or administrative actions but nevertheless were not considered civilly. Of course, had these cases been considered civilly, some may have been declined because (1) the Government's loss was small, (2) civil action would have been too costly, or (3) recovery would have been unlikely even if the civil actions were successful. However, cases having potential civil merit should be systematically reviewed so that civil action can be taken.

A U.S. attorney usually does not consider civil aspects of a fraud case unless specifically requested to do so by the referring agency or by the Civil Division in headquarters. For example, in one case involving over 1,400 false claims and a loss possibly exceeding $100,000, the defendant was found guilty on two charges of conspiracy and 63 charges of false claims. However, the civil merits of the case were not considered. The Chief of the Criminal Division and the criminal attorney who handled the case told us that they were unaware of the civil possibilities.

The case was subsequently referred back to the agency because Justice officials believe the referring agency is responsible for requesting civil action. We subsequently discussed this case with an official of the referring agency. He said that he plans to send the case back to the U.S. attorney for civil consideration.

In 2 other districts, 28 out of 48 criminal cases with possible civil merit were not referred for civil consideration. According to several assistant U.S. attorneys involved, it never occurred to them to refer these cases for civil consideration.

If civil sanctions are to be used effectively to combat fraud in Federal programs, Justice must promote the consideration of civil sanctions as part of a coordinated prosecutive strategy.

## JUSTICE LACKS AN ADEQUATE SYSTEM FOR CASE REFERRAL

With some exceptions, Justice components--those at headquarters and at U.S. attorneys' offices--are organizationally and functionally divided along criminal and civil lines. Consequently, fraud cases should be referred between the various criminal and civil components to assure that both criminal and civil remedies are adequately considered. The current referral system, however, cannot adequately insure timely consideration of civil merits and provide sufficient information to the Civil Division for a national perspective on Justice's efforts to combat fraud. As a result, fraud cases are either not referred, referred back to the agency, or referred so long after the fraud is discovered that the potential for recovery is lost or significantly reduced.

Justice's current referral system is based on the guidance provided to the U.S. attorneys from the Civil Division. However, this guidance has been ineffective because the U.S. attorneys have either ignored or only partially implemented the guidelines.

This has led to a variety of procedures in the U.S. attorneys' offices. At the time of our review, none of the U.S. attorneys' offices visited had procedures which guaranteed that all cases with civil merit are routinely

considered in a timely manner. The procedures at three of the offices resulted in civil consideration of only some cases. For example:

--In the southern district of New York, an official informed us that a formal procedure has been established requiring that all fraud cases of one executive agency be referred to civil as well as criminal attorneys. However, referral of fraud cases from other agencies was left to the discretion of each criminal assistant U.S. attorney.

--In the northern district of Texas, the Chief of the Civil Division reviews some criminal cases as they come into the U.S. attorney's office to see if they have civil merit and sets up an information file. He does not make a comprehensive review of all cases having potential civil merit, nor do the civil attorneys get involved while the criminal case is pending. We identified several civil cases in this office which were initiated as a result of the review by the Civil Division in headquarters, although the criminal case was already under consideration, and in some instances had already been closed by the U.S. attorney.

--In the district of New Jersey, a formal referral system of some fraud cases was started in 1976. The district has recently revised its referral system to allow for referral of all fraud cases. (See p. 21.)

The remaining six offices visited had no internal referral procedures to assure that cases were considered both criminally and civilly. These offices relied on referrals from the Justice's Civil Division or direct agency referrals.

Several criminal attorneys told us that they lack knowledge of civil remedies and do not routinely refer cases to civil attorneys. When the criminal case is completed, the criminal attorney usually sends a letter to the referring agency summarizing criminal results and returns agency documents used as evidence. When criminal action is declined, criminal attorneys may inform the agency of the potential for civil action and suggest that

the agency refer the case back for civil consideration, but not all criminal attorneys follow this practice. (See p. 19.) The U.S. attorney should refer a case to the civil attorney for civil consideration rather than sending it back to the referring agency. This would enhance timely consideration of civil merits.

Because U.S. attorneys have failed to establish adequate referral systems, the Civil Division has developed its own system. However, such a system is not adequate because it relies on criminally oriented FBI reports rather than referrals from U.S. attorneys. As of January 1979, there was a backlog of about 7,000 FBI reports and agency referrals; therefore, it is unlikely the Civil Division can screen them all in a timely manner. This increases the risk that civil cases with merit are overlooked and that the statute of limitations will run out on the cases before the civil aspects are identified. Justice cannot have an effective referral system without the U.S. attorneys' cooperation. Justice must insure that U.S. attorneys establish an adequate system for referring their fraud cases.

Such a system can be developed as demonstrated by the New Jersey district. This district has developed and implemented its own approach, which we believe may be a successful solution for insuring timely consideration of civil sanctions. Attorneys in the New Jersey district began informally coordinating some civil and criminal prosecution of fraud cases in 1976. They took this action after a number of potential civil cases were lost because long delays between the criminal and civil proceedings allowed assets to be hidden or dissipated or allowed the statute of limitations to expire.

In January 1979, the U.S. attorney in the New Jersey district implemented a formal districtwide plan to systematically coordinate all criminal and civil fraud cases. This plan recognizes that civil sanctions are an important tool and provides that civil sanctions may be pursued as an alternative or as a complement to criminal prosecution. The plan also provides for criminal attorneys proposing to open fraud cases to determine whether a civil file should be opened, determine the amount of losses to the Government, determine if potential defendants have assets, and recommend through the Division Chiefs that a civil

file be opened. The Deputy Chief of the district's Civil Division monitors the progress of these coordinated fraud cases.

Attorneys of this district believe that coordinating the civil and criminal remedies will

--insure timely pursuit of civil sanctions,

--provide more efficient use of Justice resources,

--provide the means for one investigation to cover both criminal and civil cases prior to convening the grand jury or initiation of civil discovery, and

--provide incentive to pursue the civil aspects.

This coordinated strategy may also result in greater recovery of losses. One attorney noted that coordination will overcome the disadvantages associated with referring a civil case after the criminal case is completed and having unrecorded facts developed for the criminal case that are never conveyed to the civil attorney.

The following case shows how criminal and civil remedies can be successfully coordinated:

--While investigating a fraudulent use of $24,000 worth of food stamps, the assistant U.S. attorney in charge of the case considered both criminal and civil remedies available. He determined that key elements of the criminal case would be impractical to prove, but that a strong civil action under the False Claims Act could be made. Rather than discontinuing all action and sending the case back to the agency, he discontinued the grand jury's criminal investigation, and started gathering facts pertinent to civil action. The Government's case was sufficiently strong to obtain an out-of-court settlement of $40,000.

The New Jersey district should be praised for its initiative. However, to effectively combat fraud, Justice must guide the U.S. attorneys in the other 94 districts

and see to it that they establish an adequate referral system. U.S. attorneys should not be left to pick and choose the system they want to implement. Rather, Justice must insure a consistent and uniform application of one comprehensive referral system.

## CONCLUSIONS

Civil sanctions need to be considered as part of a coordinated prosecutive strategy against fraud. This is crucial not only to recovering losses, but also to discouraging fraudulent activities and maintaining integrity in Federal programs. Civil and criminal aspects of fraud cases should be considered at the outset so that decisions can be made on how to proceed in the best interest of both cases. Such consideration would provide for efficient investigations to satisfy both the criminal and civil cases, provide for timely civil actions, and enhance the possibilities for recovery of losses.

Justice has not fully used civil remedies because:

--preeminence has traditionally been given to criminal prosecutions, and civil actions have been subordinated in terms of the total prosecutive effort;

--referral practices do not assure that fraud cases will be reviewed for civil merit;

--some attorneys believe legal barriers prevent early consideration of civil remedies, and they are not totally aware of the benefits of coordination; and

--criminal and civil attorneys generally do not coordinate their fraud efforts.

Collectively, the above problems have prevented the Department of Justice from maximizing civil recoveries and realizing the deterrent value of vigorously enforced civil sanctions. The "hands-off" attitude towards assessing the civil merits of a case until the criminal case is complete foregoes the benefits of coordinating the criminal and civil remedies, including (1) better informed judgments on prosecutive options relating to plea bargaining,

drafting of indictments, and other criminal case decisions, (2) more timely civil action, and (3) more efficient investigations.

Justice officials have recognized the need to better coordinate criminal and civil efforts against fraud and have taken positive steps. However, to assure real progress toward this objective, Justice must provide better guidance to U.S. attorneys on how to develop a coordinated criminal and civil prosecutive strategy which gives full recognition to legal concerns about grand jury proceedings and civil discovery. Justice can do much in this area by requiring the Civil Division to implement its plan to visit U.S. attorneys in large cities and by conducting seminars through its Advocacy Institute. Other U.S. attorneys' offices may learn from the coordination plan implemented by the U.S attorney in the New Jersey district.

Justice can also strengthen the system by (1) establishing a formal mechanism specifically designed to identify cases with civil merit for referral to civil attorneys and the Civil Division, and (2) establishing a case management system which safeguards against untimely handling and statute of limitation problems.

Our review indicates that many Justice attorneys' concerns over early consideration of a case's civil merits may be allayed and addressed through more definitive guidance on how to coordinate criminal and civil remedies against fraud. Such a strategy would not give preeminence to either criminal or civil sanctions, but rather force an early decision as to how both criminal and civil sanctions could be used most effectively. Depending on the circumstances in each case, civil suit could be filed to toll the statute of limitations, then stayed pending the completion of the criminal case. The Government would then be in a much better position to proceed civilly or settle the civil case promptly.

## RECOMMENDATIONS TO THE ATTORNEY GENERAL

To insure that civil sanctions are considered as part of a coordinated prosecutive strategy against fraud, the Attorney General should

--address, through better guidance and training, the concerns which are unnecessarily preventing coordination of criminal and civil cases;

--develop an adequate referral system which will assure timely civil consideration of all fraud cases; and

--provide guidance and assistance to increase awareness of civil remedies and the benefits of coordinating criminal and civil remedies.

## AGENCY COMMENTS AND OUR EVALUATION

The Justice Department agrees with our conclusions that coordination of civil and criminal sanctions is beneficial and agrees with our concern that the Government's pursuit of civil fraud remedies must be strengthened. Justice contends that, having realized the need for coordination long ago it implemented a variety of reforms to promote coordination. However, our report points out that Justice's tradition of giving preeminence to criminal sanctions continues to be implemented in such a manner that the decision to proceed against a fraud is made without early consideration of available civil remedies. Also, Justice has not provided adequate guidance to address attorneys' concerns about legal barriers to early consideration of civil sanctions, nor developed a referral system which would help insure that fraud cases are reviewed for civil prosecution at an early stage.

We believe Justice must take a more active posture if its coordination of civil and criminal sanctions is to be more effective. Our recommendations are therefore geared to improve Justice's coordination and insure a more timely consideration of civil sanctions.

### Better training and guidance is needed

Justice disagrees with our recommendation that better training and guidance is needed to address the legal concerns that are unnecessarily preventing criminal and civil fraud cases from being coordinated. It contends that we

make light of the legal limitations and strictures to proceeding criminally. Justice stated that legal concerns, such as access to grand jury information by civil attorneys, are not susceptible to training.

As stated on page 10, the Office of Legal Counsel determined on two occasions that Federal Rule of Criminal Procedure, Rule 6(e), 1/ permits Justice attorneys to have access to grand jury materials for civil purposes without a court order. However, the Office of Legal Counsel expressed the need for considerable caution, particularly if the disclosure of grand jury information is to occur when criminal and civil actions are proceeding simultaneously. It is this issue that has resulted in much confusion among Justice attorneys in both headquarters and the U.S. attorneys' offices as to when and under what conditions access to grand jury information can be granted without a court order. Further, there is confusion about what actually constitutes grand jury information. Partly because of this confusion, Justice attorneys are hesitant to consider civil remedies in a timely manner. Justice must provide more definitive guidance in these and other areas so that an effective criminal and civil prosecutive strategy against fraud can be developed and implemented by its attorneys.

Definitive guidance from the Attorney General would do much to ensure timely consideration of civil and criminal remedies. We recognize that administrative guidance cannot resolve differing court opinions on the scope of grand jury secrecy or precisely when grand jury information may be disclosed to civil attorneys. Further, such guidance cannot fully resolve statutory ambiguities on the same subject. For example, some courts do not consider nontestimonial evidence developed independently of the

1/Federal Rule of Criminal Procedure, Rule 6(e), provides that "matters occurring before the grand jury" shall not be disclosed, except as otherwise provided by law. One exception to this secrecy requirement applies to disclosures of grand jury information to "an attorney for the government for use in the performance of such attorney's duty." Under another Rule 6(e) exception, disclosure may be authorized by court order preliminarily to or in connection with a judicial proceeding.

grand jury (but later introduced at a grand jury proceeding) as a matter clearly within the scope of grand jury secrecy. Other courts do, however. Some courts also are reluctant to disclose grand jury information to civil attorneys while the grand jury proceeding is pending. We point out on page 10 that the Attorney General may find it necessary to obtain definitive legislative guidance clarifying issues of this type.

When referring to a need for a coordinated prosecutive strategy, we do not mean, as Justice suggests, the simultaneous conduct of criminal and civil proceedings in every case. Nor do we recommend that civil and criminal remedies be pursued in all cases. Rather, as pointed out on pages 24 and 25, Justice attorneys need to consider the available remedies prior to formal initiation of a criminal or civil action. In this way, they can select the remedy or remedies that best suit the fraud. Through early consideration of available remedies, Justice will be able to decide the most advantageous and appropriate remedy, which, in some cases, may be the simultaneous pursuit of civil and criminal remedies.

We are not unmindful, as Justice suggests, of the important due process concerns that must be considered when a criminal prosecution and civil suit is conducted simultaneously. For example, the grand jury may not be used for the sole purpose of developing the Government's civil case. On the other hand, civil discovery may not intentionally be employed to develop the Government's criminal case. Other related due process considerations include the constitutional privilege against self-incrimination when civil discovery would carry criminal consequences for the defendant; the adverse publicity that may emanate from a civil trial, thereby affecting the defendant's ability to obtain a fair criminal trial, and burdens confronting defendants who must concurrently prepare a defense on both criminal and civil fronts.

Thus, we continue to emphasize the need for the Attorney General to provide guidance and training to promote a coordinated consideration of criminal and civil remedies.

Traditional preeminence given criminal sanctions should be overcome

Justice argues that the preeminence given criminal sanctions exists for sound policy reasons. Given scarce resources, Justice asserts that proper emphasis is on criminal cases because the criminal remedy has the greatest effect on the fraud perpetrator.

The choice, of course, is not simply a matter of whether to proceed criminally or civilly, but how to maximize the effectiveness of the overall prosecutive effort. It should be clear that we would not disagree with Justice's policy if the decision to proceed criminally was made after considering both the criminal and civil aspects from the outset. This, however, seldom has been the case and the overall effort to combat fraud has suffered. To adequately implement Justice's existing policies on coordinating the civil and criminal aspects of fraud, changes in the traditional way of handling fraud cases must be made.

Justice seems to agree when it states that Federal prosecutors are increasingly considering civil aspects of their investigations and points to three cases where the Department has simultaneously pursued criminal and civil remedies. As further evidence of its interest in civil remedies, Justice points to two legislative reforms it is proposing which emphasize civil rather than criminal remedies.

Justice quotes the Attorney General, in its comments on page 49, as having told committees that "it is only through the integration and support of various disciplines and remedies that we will be able to effectively tackle the problem of fraud and abuse in our programs." Justice recently stated in a letter dated August 17, 1979, to the Chairman, Senate Committee on Governmental Affairs, that a major gap in GAO's report on the Government's efforts to deter fraud 1/ was the lack of attention to remedies other than criminal.

1/"Federal Agencies Can, And Should, Do More to Combat Fraud In Government Programs" (GGD-78-62, September 19, 1978).

While Justice is to be commended for its proposed legislative reforms, the fact remains that if enacted by the Congress, the reforms are not comprehensive solutions to untimely consideration of civil remedies and the traditional handling of fraud cases.

To further emphasize its effort to coordinate criminal and civil remedies, Justice provides three case examples on pages 49 and 50. Justice should be commended for such efforts. These examples of early consideration of both the criminal and civil remedies available support our position that such a coordinated strategy can and does work. However, these are isolated cases and are not representative of how criminal and civil remedies are being coordinated throughout the nine U.S. attorney offices visited.

Justice claims it was unable to identify the cases we cited on pages 15 to 17, and therefore it was unable to address the detriment caused by a lack of coordination. In fact, Justice's Civil Division did ask us to identify the case examples, and we did so. If Justice had examined the cases we used to support our positions, Justice would have found that failure to give early considerations to civil remedies did precipitate the problems identified.

In reference to our case examples, Justice states the death of witnesses in Medicare cases is a recurring one, and the Department of Housing and Urban Development case was unrelated to early consideration of civil remedies. Of course, the death of witnesses in Medicare cases is a recurring problem when Justice waits as long as it does to consider a fraud case's civil merits. If the Department of Housing and Urban Development case does not indicate problems related to untimely civil consideration, then the question begging an answer is, why did Justice wait until 2 years after the criminal case was closed to pursue the civil case? We presented the case examples fairly in our report and if Justice had objectively analyzed the case files, it would have come to the conclusion that there is considerable room for improvement.

Justice suggests that more manpower may be needed to adequately protect a fraud defendant's due process rights if it were to pursue both criminal and civil remedies simultaneously. As previously discussed we are not proposing simultaneous pursuit of criminal and civil remedies

in each and every case but merely early consideration of all available remedies. This would allow Justice attorneys to select the remedy or remedies best suited to the fraud.

Further, our recommendations point to decreased use, not increased use of manpower. If the FBI addresses the civil damages during its initial investigation, Justice attorneys can target in on those civil cases meriting pursuit rather than haphazardly seeking cases with civil aspects to pursue. Such investigative action will, in the long run, save agent and attorney time. If civil remedies are considered by attorneys and investigators early, Justice can achieve timely civil recovery with minimum expenditure of time. Until Justice establishes a comprehensive time reporting system for its attorneys, one can only speculate on the resource issue. However, Justice may find that additional resources can be justified when it can demonstrate to the Congress the substantial recovery of monies to the Treasury that can be expected. If the attorneys plan ahead, they may be able to have the same judge hear the civil case thus saving judicial resources as well.

We support, and Justice agrees with, a balanced approach to tackling the fraud problem and not just reliance on one remedy. A coordinated strategy, relying on both criminal and civil remedies, should do much to help combat the fraud problem.

Adequate referral system is needed

Justice's comments on our recommendation for an adequate referral system are inconsistent. At one point, Justice contends that Departmental mechanisms already exist for early identifications of the civil fraud cases. In contrast, Justice also states that through the Advisory Committee of United States Attorneys and the Civil Division, it expects to increase the focus on and design mechanisms for referral of civil fraud cases. In fact, an adequate referral system does not exist.

As pointed out on pages 19 to 23, Justice's current referral system cannot adequately insure timely consideration of civil merits and provide sufficient information to the Civil Division for a national perspective on Justice's efforts to combat fraud. Justice appears to recognize this deficiency, since it refers to a meeting between

attorneys from the Civil Division and a Subcommittee of the Advisory Committee of the U.S. attorneys where the New Jersey District's experiences and procedures were discussed. Justice's comments refer to this meeting optimistically as "a new Civil Division/United States attorney cooperative effort." Justice needs to do all it can to promote a referral system which can alert both Civil Division and assistant U.S. attorneys of cases with civil merit in a timely manner.

# CHAPTER 3

# IMPROVEMENTS NEEDED IN JUSTICE'S SETTLEMENT AND COLLECTION OF FRAUD DEBTS

To effectively combat fraud, the Justice Department must improve settlement procedures and strengthen the management and enforcement of fraud collections. Justice's attorneys do not adequately consider the defendant's present or future ability to pay. This results in a failure of the Government to fully recover its losses. Also, Justice efforts to collect on settled fraud cases have been ineffective. The primary reason is that the responsible Justice unit is not effectively or efficiently overseeing and monitoring the collection of fraud debts. To successfully combat fraud in Federal programs, Justice must insure that attorneys adequately consider financial data when settling fraud cases and insure that the collection of fraud debts is aggressively pursued.

## ATTORNEYS ARE NOT CONSIDERING ALL FINANCIAL DATA WHEN SETTLING FRAUD CASES

Civil attorneys compromise and settle cases without adequately determining the defendant's present and future ability to pay. Failure to determine the defendant's financial position results in achieving less than full recovery of losses, or in declining civil action on potentially collectable cases. Justice must insure that attorneys give adequate consideration to the defendant's present and future ability to pay before compromising or closing a fraud case.

Justice policy emphasizes collectability over obtaining a judgment which is not likely to be collected. It allows for compromising or closing a case without action when collecting the full amount of damages and forfeitures is doubtful because of the debtor's present and future financial condition. Whenever collectibility is a factor for compromising or closing a case without action, the Civil Practice Manual requires that the attorney support his decision with either a sworn financial statement from the debtor or a report of current worth provided by the FBI or other Government investigative agencies.

In addition, the manual requires adequate consideration be given to the debtor's anticipated future financial status. These and other documents supporting the reasons for actions are to be made part of the permanent record.

Inadequate determination of the debtor's present and future ability to pay has resulted in compromising cases and closing others without a full review of pertinent facts. Examples of such cases follow.

--One case involved the embezzlement, or fraudulent conversion, of about $3,400 of Economic Opportunity Act funds. The defendant in this case held a college degree and at the time was in charge of a center for manpower education and training. He pled guilty in 1976 to one count of a six-count indictment and was sentenced to 6 months incarceration, 3 years probation, and a $1,000 fine payable at not less than $50 per month. The civil case was referred in 1977 but civil action was declined because the evidence indicated that collecting any judgment would be very difficult. The $50 per month fine payment schedule was used to support this conclusion, but no financial statements were obtained from the accused, and very little consideration was given to future earnings of the accused.

--Another case involved a $17,000 Small Business Administration loan to a Doctor of Veterinary Medicine. After the veterinarian defaulted on the loan, the case was referred to the U.S. Attorney in December 1973 for criminal consideration based on falsified purchase receipts used to obtain the loan. The criminal case was declined in 1974 because it lacked prosecutive merit, the defendant claimed that some of the money was used properly, and Justice did not prove that all the purchase receipts were falsified. The civil case was referred and declined in 1975. A major factor in closing the civil case was that the veterinarian had filed for bankruptcy. However, available records showed no verification that the defendant had actually filed bankruptcy and contained no financial information.

Both these cases were settled without determining the defendant's current or future ability to pay.

Civil attorneys complained that obtaining sufficient financial data on a defendant's ability to pay is difficult. They also stated that some defendants refuse to submit sworn financial statements and that no punitive action can be taken to force the defendant to provide financial information. The attorneys also mentioned that even though Justice requires that the debtor certify the accuracy and completeness of financial statements, this regulation may be difficult to enforce. The certification statement on the form provides for the penalties included in the statute on false statements (18 U.S.C. 1001). However, the U.S. Attorney's Manual cites the difficulty in applying this general statute to enforce Justice requirements for true and complete financial information. In fact, Justice officials told us the statute has never been used to enforce compliance. Consequently, the attorneys are skeptical of any financial information submitted by a defendant.

Although the attorneys have difficulty in obtaining reliable financial data it is no excuse for settling fraud cases without any data. One avenue the attorneys should actively pursue is the use of the FBI. In one case the FBI provided not only routine information, such as the amount of cash, investments, accounts receivable, and liabilities, but also details on investments, such as automobiles, guns, and art objects.

The attorneys believe that the best way to insure that one obtains accurate and truthful data on a defendant is by obtaining tax information from the Internal Revenue Service. However, the Tax Reform Act of 1976 prohibits the attorneys from obtaining such data. While we recognize that tax records may be the best source of financial information, other methods of obtaining financial data, such as FBI investigations and debtor examinations, should be exhausted and determined to be unsatisfactory before action is taken to change the tax law.

For the Government to recover losses through fraudulent acts Justice's civil attorneys must obtain the financial data to adequately determine the present and

future ability of the defendant to pay. Even though this may be a difficult task the attorneys must pursue every avenue available to them.

## NEED TO STRENGTHEN THE MANAGEMENT AND ENFORCEMENT OF FRAUD DEBT COLLECTIONS

To insure that fraud debtors are aggressively pursued and collections are made, Justice must strengthen the management and enforcement of fraud debt collections. Justice must insure that its Judgment Enforcement Unit effectively oversees and monitors the collection of all fraud debts. Currently, Justice cannot determine the amounts of money collected annually, the amounts of fraud debts outstanding, and whether collections are made in an efficient and effective manner because its management information system fails to provide accurate and comprehensive data on all fraud debts. To further complicate the enforcement and collection of fraud debts, State laws can impede the collection of the settlement agreed to by the fraud debtor and the Federal Government.

### Need to improve the oversight of fraud debts

The Civil Division's Judgment Enforcement Unit has been assigned the responsibility of overseeing and monitoring the collection of all nontax civil judgments. In carrying out this responsibility the Unit has assigned 94 percent of its civil judgment caseload to the U.S. attorneys' offices for collection. However, the Unit has not been effectively overseeing or monitoring collection activities which has resulted in the Government not making the most of collection opportunities. According to the Unit Chief, the present problem exists because of the lack of resources and an adequate management information system.

U.S. attorneys' offices do not give adequate attention to collection activities, and, as a result, fraud debtors are not aggressively pursued. Collection personnel have attributed the problem to the volume of impositions requiring enforcement attention, insufficient resources, and inadequate management attention. Examples of the problem follow.

--We analyzed the collection data submitted by the U.S. attorneys to the Office of Management and Finance. Out of a total of 194 debtors reported, as of January 31, 1979, 46 percent had paid nothing on their fraud debts, 27 percent appeared delinquent having made no payments in 6 months, and 27 percent were making regular payments. Of the debtors who have paid nothing, 50 cases involved judgments older than 3 years. However, U.S. attorneys' offices have not taken follow up action since October 1, 1978, on any of these cases.

--In one district, out of 12 outstanding fraud debtors, 9 debtors had paid the Justice Department nothing, and 2 others were delinquent. Further, these 11 cases have not been reviewed in 2 years.

Although the Judgment Enforcement Unit retains responsibility for debt collections it has done very little to monitor the effectiveness of U.S. attorneys' offices in collecting fraud debts. The Unit's Chief agrees that the collection of fraud debts delegated to U.S. attorneys' offices needs to be improved.

To collect fraud debts in an efficient and effective manner, Justice needs to make sure that one unit effectively oversees and monitors collection of all fraud debts. Without such a unit collection of fraud debts cannot be pursued aggressively, and the Government's efforts to recoup its losses from fraudulent activities will continue to be hampered.

## Need to establish one comprehensive system to track fraud debtors

To further complicate the collection of fraud debts, Justice lacks a comprehensive information system to effectively identify and track all fraud debtors and all debt collection activity. Justice's information system is not adequate because there are two separate organizations collecting fraud debt information. The Office of Management and Finance's system primarily includes only cases initiated and handled by the U.S. attorneys and often excludes those cases that are the responsibility of the Judgment Enforcement Unit. For example, the Office

of Management and Finance's system failed to account for at least 29 fraud debtors owing about $6.8 million. These cases were the responsibility of the Judgement Enforcement Unit. As a result neither organization's data can be used to oversee and monitor debt collection activity because of the discrepancies.

At a minimum Justice should have comprehensive information on debtors' payment status so it can adequately supervise collection activities. The Office of Management and Finance's automated information system has the potential to greatly assist a unit in both tracking fraud debtors and monitoring debt collection activity. For example, a unit can obtain information specifically identifying fraud debtors and track their payment activity. Also, it can analyze the information and concentrate on the offices which are not effectively and efficiently collecting debts owed the Government and assist them in improving their collection operations.

## Some State laws causing difficulties in collecting fraud debts

Some State laws impede the collection of fraud debts by protecting from attachment certain property and finances of fraud debtors. Rule 69(a) of the Federal Rules of Civil Procedure requires the Federal Government to follow State practice and procedure in executing judgments. The Judgment Enforcement Unit reported difficulties enforcing judgments in the following cases because of State laws.

--In a case involving a former Federal employee who embezzled $1.2 million over a 12-year period, the Judgment Enforcement Unit estimated judgment enforcement to be difficult since the debtor had moved to Texas. The fraud debtor executed in late 1973 a $1.2 million promissory note payable on demand in settlement of the fraud case. Since moving to Texas, the debtor has purchased a $50,000 home and earns about $800 a month. The Judgment Enforcement Unit reported that because Texas laws are favorable to debtors, the debtor's homestead and wages cannot be touched. In 1977, the Unit reported making demand on the promissory note. In 1978, the Unit brought suit on the note and

obtained a $1.2 million judgment, which it cannot collect because of the State laws.

--In a case involving a former member of Congress who has paid nothing as of March 1979 on a $41,000 civil fraud judgment, Civil Division officials estimate that future collectibility is poor. They stated collection of the debt is unlikely because the debtor resides in Florida, and the State protects debtors by providing a total homestead exemption and prohibition against garnishment of wages.

To effectively combat fraud Justice should consider exploring with the Congress and the States the possibility of a uniform statute that would allow collection of fraud debts without regard to presently differing State laws.

## CONCLUSIONS

To insure that the Government maximizes its recoveries and aggressively combats fraud, Justice should (1) insure that civil attorneys obtain adequate financial data before settlement, (2) make sure the Judgment Enforcement Unit effectively oversees and monitors the collection of fraud debts, and (3) develop one comprehensive system to track fraud debtors.

Civil attorneys settle fraud cases without obtaining adequate financial data on which to base an equitable settlement as required by Justice. Inadequate determination of the debtor's present and future ability to pay has resulted in compromising cases and closing others without a full review of pertinent facts. For the Government to recover losses through fraudulent acts, Justice's attorneys must obtain financial data to adequately determine a defendant's ability to pay.

Once a financial agreement is reached with a fraud defendant, Justice has difficulty collecting the fraud debts. This is because fraud debt collection activities are not being effectively overseen and monitored. Also, Justice needs one comprehensive system to provide data on the amount of fraud debts outstanding, the percentage of cases where payments are being made, the number of debtor examinations, and writs of execution issued.

Such a system can help Justice identify and track fraud debtors and determine the efficiency and effectiveness of its debt collection operation. Justice can achieve this by taking advantage of the Office of Management and Finance's information system which has the potential to assist a unit to do both. To add to the problem, some State laws impede the collection of Federal fraud judgments.

## RECOMMENDATIONS TO THE ATTORNEY GENERAL

We recommend that to effectively combat fraud in Federal programs the Attorney General should:

--Enforce Justice's policy of obtaining adequate financial information on a defendant before compromising or settling a case.

--Improve the oversight and monitoring of fraud debt collections.

--Develop one comprehensive management information system for tracking and identifying fraud judgments by incorporating Civil Division's fraud debtor payment records into the Office of Management and Finance's existing tracking system.

--Explore with the Congress and the States the possibility of a uniform statute allowing the collection of Federal fraud judgments without regard to presently differing State laws.

## AGENCY COMMENTS AND OUR EVALUATION

The Justice Department generally disagreed with our conclusion that improvements are needed in Justice's settlement and collection of fraud debts. Justice disputes that it settles cases without adequately determining the defendant's present and future ability to pay. With regards to collections, Justice concedes that its collection unit provides only limited monitoring and oversight but contends this has not caused collections to be ignored. In reference to the need for a comprehensive system to

track judgment debtors, Justice believes it already has such a system, while at the same time it admits that the system has problems.

Justice's arguments in response to our conclusions and recommendations are without merit. The fact is that Justice's Judgment Enforcement Unit, which is responsible for overseeing and monitoring the collection of fraud debts, has performed less than satisfactorily. Such performance has resulted in collection activities being neglected by the U.S. attorneys. While Justice does have a system to track judgment debtors, it by no means is comprehensive.

Attorneys are not considering all financial data when settling fraud cases

Justice contends that our report is wrong when we concluded that Justice attorneys are settling fraud cases without adequately determining the defendant's present and future ability to pay. Justice further believes our emphasis on obtaining financial statements or FBI financial ability investigations is misfocused in that these avenues have limited value.

Justice supports its view that attorneys are obtaining adequate financial data on the basis that the Civil Division attorneys give full consideration to all available financial information. Our report covered the broad spectrum of Justice's fraud activities, not just a single division. While the Civil Division attorneys for the most part obtained financial data, civil attorneys in the U.S. attorney's offices were delinquent in carrying out their responsibilities in this area. In 3 U.S. attorney's offices, 34 of 39 cases settled or closed on financial ability grounds did not have the support required by the Civil Practice Manual and 28 C.F.R. §0.166. Because Justice attorneys are not obtaining required financial information when settling or closing fraud cases, Justice must take action to insure that civil attorneys comply with Justice's policy. This becomes even a greater problem, considering that in September 1978 Justice substantially increased the dollar delegation authority of the U.S. attorneys for settling fraud cases.

We do not agree that we wrongly emphasize the need to obtain financial statements or FBI financial ability investigations. As we pointed out on page 32, Justice's policy requires that attorneys support their decision to compromise or settle a fraud case with either a financial statement or a report of current worth from the FBI. While we recognize that attorneys are having difficulty obtaining reliable financial data, this is no excuse for settling fraud cases without financial data. We merely suggest the FBI as one means of determining a defendant's worth.

In referring to our examples on page 33, Justice states that it would be wasteful and useless for the FBI to conduct financial ability investigations. In the first example Justice supports its contention by stating that a $3,400 loss to the Government does not warrant an FBI financial investigation. It may not warrant an FBI investigation, but the attorney should have obtained some type of financial information before closing the case. An individual had defrauded the Government of $3,400 and received a $1,000 fine. The attorney closed the case without obtaining the required financial data. On the surface, this appears to have been a very lucrative transaction. As for the second example, Justice stated that the attorney was aware that the defendant filed for bankruptcy so why obtain useless financial data? If the attorney had checked, as we did, he would have found that the defendant never filed for bankruptcy.

Need to strengthen the management and enforcement of fraud debt collection

Justice agrees that the Judgment Enforcement Unit provides only limited oversight and monitoring of all fraud debts. It contends, however, that the lack of monitoring and oversight has not resulted in the U.S. attorney's offices ignoring debt collection. Even so, it claims the Unit does not have the resources to supervise more cases or oversee the U.S. attorneys' offices. Justice claims it has a comprehensive system to track fraud debtors, while admitting that the system has shortcomings.

Justice is wrong when it contends that limited oversight and monitoring has not resulted in a failure to vigorously enforce debts owed the Government. It

should be pointed out that the Judgment Enforcement Unit was established so that a central unit could supervise debt collection and improve Justice's acknowledged inadequate collection practices, policies, and procedures. As discussed on page 36, Justice's collection practices are inadequate, and the Judgment Enforcement Unit had failed to meet its responsibilities for overseeing and monitoring collection activities.

In disagreeing with our conclusion, Justice takes issue with our examples on page 36. Justice contends that there is no indication that the cases referred to in the examples are collectible. Due to Justice's lack of oversight and monitoring, Justice is unable to identify those districts with problems or determine whether the judgments are collectible or uncollectible. We had to assume that the open case files, which our case examples represent, are judgments which can be collected now or in the future. In the eastern district of Michigan, for example, the collection official informed us he did not know whether the outstanding judgments were uncollectible or collectible, since collections had been neglected.

A problem Justice faces when attempting to oversee and monitor fraud debts is the lack of a comprehensive system to effectively track and identify fraud debtors. With such a system, the Judgment Enforcement Unit could identify U.S. attorney's offices with problems, rather than visiting districts haphazardly as it has done in the past and with little progress. Such a system would not only provide for effective collection activities but would make maximum use of limited resources.

We find Justice's comments regarding a comprehensive system to track fraud debtors inconsistent. While Justice claims that it already has a workable comprehensive system to track not only fraud debtors but all judgment debtors, it proceeds to describe the system's shortcomings. These shortcomings, which include the failure to include cases handled directly by Civil Division attorneys and some U.S. attorneys, were discussed on pages 36 and 37 as the reasons why Justice does not have a comprehensive system. Additionally, the Department was unable to inform the Senate Judiciary Committee in February 1979 exactly how much

in judgments and fines it had outstanding. In the May 15, 1979, report on the Justice Authorization Bill, the Committee noted that the Department testified it had between $500 million and $1 billion outstanding but did not know whether the discrepancy was due to its accounting systems, judgment proof defendants, or its judgment enforcement efforts.

Regarding the recommendation in our draft report that Justice develop one comprehensive information system for tracking fraud debtors, we did not intend to recommend development of a separate system only for fraud debtors. We have changed the recommendation's wording to clarify the matter.

State laws causing difficulties in collecting fraud debts

Justice believes that the report correctly describes the effect of State law on judgment enforcement. Some States have exemption laws which are favorable to debtors and which make fraud-claim judgments--indeed all judgments--difficult to collect. Particularly troublesome are those State exemption laws which prohibit or restrict wage garnishment or which allow a huge or unlimited homestead exemption.

Accordingly, given the problems presented by collection of final judgments, Justice concurs with our recommendation that enactment of such a statute should be explored with the Congress and the States. In this regard, Justice said it plans to have the Law Enforcement Assistance Administration work with the States to develop a model State statute as well as assist in any other capacity compatible with the Administration's mission.

## CHAPTER 4

## SCOPE OF REVIEW

Our review was limited to the Department of Justice's handling of fraud cases with emphasis on the civil aspects of program fraud. We performed our review at the Criminal and Civil Divisions, Department of Justice, Washington, D.C., and at U.S. attorney offices in New Jersey, eastern and southern New York, and northern and southern Texas. Also, limited work was performed at U.S. attorney offices in central California, eastern Michigan, eastern Virginia, and western Washington.

We reviewed the Federal criminal and civil statutes on fraud and the Justice policies and procedures for handling fraud cases. We reviewed criminal fraud cases to determine civil merit and to determine if the civil aspects had been considered. In addition, we reviewed civil fraud cases to determine when civil action was considered and taken and to determine if the civil recovery was made. In all, over 300 cases were reviewed.

We held numerous discussions with various criminal and civil attorneys and administrative personnel, in the Civil and Criminal Divisions and the U.S. attorney's offices. Our field work was conducted during the period from June 1978 through January 1979.

APPENDIX I

ELIZABETH HOLTZMAN
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# Congress of the United States
## House of Representatives
Washington, D.C. 20515

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEES:
CRIME
CRIMINAL JUSTICE
IMMIGRATION, CITIZENSHIP, AND INTERNATIONAL LAW
COMMITTEE ON THE BUDGET
TASK FORCE ON STATE AND LOCAL GOVERNMENT

April 11, 1978

The Honorable Elmer Staats
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Staats:

I am concerned that the federal government has not developed a coherent policy to recover civil claims against individuals or corporations who may have improperly received or used federal program funds.

Recent testimony by Justice Department officials indicates that the Department will not proceed to recover money in civil proceedings until after a criminal conviction has been obtained. I believe such a policy has obvious shortcomings. First, delaying the initiation of the civil action until after a criminal conviction may allow the statute of limitations to expire before the civil claim can be filed. Second, in cases where no criminal conviction is obtained, no civil action will be instituted at all, even though the decision not to prosecute criminally may be totally unrelated to the merits of the case.

In view of your recent report that "U.S. Attorneys Do Not Prosecute Many Suspected Violators of Federal Laws" (February 27, 1978), better use of civil recovery in cases of fraud in federal programs is clearly warranted.

I have also found from my own investigations of the Department of Agriculture Summer Feeding Program and the Department of Labor Summer Jobs Program that coordination between agencies administering federal programs and between those agencies and the Justice Department is haphazard. When irregularities in the operation of programs are discovered they are often not reported to the Justice Department -- thereby allowing miscreants to continue to profit at the taxpayers' expense.

APPENDIX I

ELIZABETH HOLTZMAN
16TH DISTRICT, BROOKLYN, NEW YORK



Because I feel this is an issue of major importance, I respectfully request that you study current federal policy in recovering civil claims from those improperly operating federal programs, and make recommendations accordingly.

I look forward to your response.

Sincerely,

Elizabeth Holtzman
Member of Congress

EH/jsk

APPENDIX II

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

SEP 04 1979

Mr. Allen R. Voss
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Voss:

This is in response to your request to the Attorney General for comments of the Department of Justice (Department) on your draft report entitled "Fraud In Federal Programs Is Not Being Effectively Pursued--Civil Actions Need To Be Coordinated And Strengthened."

Before commenting specifically on the draft report, we would like to point out one significant issue raised by Congresswoman Holtzman which is a key premise of the report. Her letter of April 11, 1978, requesting the study, states that inasmuch as Departmental officials indicate not all cases are prosecuted, increased use of civil recovery in those cases of fraud is warranted. Of course, one reason for not prosecuting every case is the question of limited resources--investigators, prosecutors, and judges, for example. This resource limitation applies to the civil remedy process as well, and the report fails to address that very real issue.

The report highlights several significant operational problems which the Department has encountered in pursuing the Government's available civil remedies against individuals who fraudulently abuse Federal programs. We share the General Accounting Office's (GAO) concern regarding the need to strengthen the Government's pursuit of its civil fraud remedies, and our comments are directed toward that goal.

GAO's comments appear to fall into two broad categories: (1) the need to develop a coordinated prosecutive strategy, and (2) the need to improve procedures for the settlement and collection of fraud debts. These categories are addressed in that order below.

APPENDIX II

1. The need to develop a coordinated prosecutive strategy

Our comments on this portion of the report have been organized around the three recommendations to the Attorney General set forth on page 25.

Based upon our experience and professional judgment, we strongly differ with the first recommendation which states that " . . . the Attorney General should--address the legal concerns which are unnecessarily preventing coordination of criminal and civil cases through better guidance and training, . . ." This difference arises because the principal legal concern set forth in the draft report relates to the use of grand jury information in civil actions, which is not simply a training matter. At the present time, access to grand jury information is governed by the provisions of Rules 6(e) and 54(c) of the Federal Rules of Criminal Procedure. In the myriad of different cases to which they must apply, these rules are inevitably susceptible to different interpretations by judges and lawyers exercising their best professional judgment. In our view, the differing opinions of several of the Department's attorneys regarding the propriety of such access, as set forth on page 10 of the draft report, reflect the legal problem involved. Recent court decisions likewise reflect the complexity of the legal issues of grand jury secrecy. 1/

The report makes light of the legal limitations and strictures to proceeding criminally and suggests that the Department establish appropriate procedures to permit access to grand jury material for other than criminal investigation and prosecution purposes. Review of the Supreme Court opinion in United States v. Procter and Gamble, 356 U.S. 677 (1958) and the Fourth Circuit decision in United States v. Litton Systems, Inc., d/b/a Ingalls Nuclear Shipbuilding Division, 573 F.2d 195 (4th Cir. 1978), clearly reveals that although joint pursual of civil and criminal remedies is possible, the legal requirements especially relating to legitimate due process concerns are considerable. In addition, the secrecy of grand jury proceedings, until recently, was

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1/ See, e.g., Douglas Oil Co. v. Petrol Stops Northwest, No. 77-1547 (U.S., April 18, 1979); In re Grand Jury, 583 F.2d 128 (5th Cir. 1978).

APPENDIX II

believed by some to exclude Civil Division attorneys from access to such materials. After a lengthy review, the Office of Legal Counsel (OLC) concluded that access is permitted, but expressed the need for considerable caution and prudence is so doing (see enclosure). This matter is also discussed in subsequent paragraphs. See also In Re Grand Jury, 538 F.2d 128 (5th Cir. 1978), in which the Fifth Circuit treated the grand jury problem and concerns.

GAO expresses concern with the "preeminence" of the criminal over the civil process. First, such preeminence exists for sound policy reasons. It would be highly inappropriate to barter criminal considerations with recovery of monies. Such a process favors the rich and powerful over the weak, and suggests the criminal process is for sale. Second, as described above, serious due process concerns are raised every time the Federal Government proceeds against a private party on several bases. Each time, serious consideration and care has to be given to the legitimacy, independence, and good faith of each element. The various prosecutors are very much aware of these legal concerns which suggest that although the civil and criminal remedies should be considered in many cases, simultaneous implementation of both processes may properly be the exception.

A major emphasis of the Department in the past 2 years has been the identification and employment of alternative remedies to the criminal process to combat fraud in Government programs. On March 15, 1979, before the Committee on the Budget, United States Senate, Mr. Civiletti, then the Deputy Attorney General, stated, "I believe it is only through the integration and support of various disciplines and remedies that we will be able to effectively tackle the problem" of fraud and abuse in our programs, ". . . and most importantly, all the deterrent and control mechanisms, criminal and civil remedies, and department and agency administrative actions must function in a coordinated and supportive manner." He repeated those views in June before the Joint Economic Committee.

The Department is currently making sizeable efforts to jointly consider both civil and criminal remedies. In two major cases, United States v. Simmons, (N.D. W. Va.) and United States v. Garcia, (D. Puerto Rico), the Department pursued both criminal and civil remedies simultaneously and recovered approximately $4.0 million and $500,000, respectively. After the criminal conviction of a major

APPENDIX II

Department of Defense meat producer in 1978, the Criminal and Civil Divisions jointly staffed a civil law suit which resulted in a $500,000 settlement. We intend to use the joint Civil/Criminal Divisions' efforts in United States v. Stevens Foods, (N.D. Texas), and other cases, as a model for treatment of future major fraud cases.

The Department has also initiated several other important efforts which should be emphasized. The use of an administrative civil fraud remedy has been proposed and has the support of the Department for Department of Health, Education and Welfare (DHEW) programs under H.R. 4106, Civil Money Penalties Bill. The Civil and Criminal Divisions and DHEW have already executed memoranda of understanding to implement the Bill, if passed, to insure its effective integration with the criminal and civil remedies. This new procedure would provide the Department a means outside of District Court for recovery of civil fraud matters of a certain size. This proposal realistically takes into account both the limited resources of the Federal judicial systems and the important role of civil remedies. The Department is presently considering the proposal of a bill to provide the civil money penalty authority for 14 other Federal departments and agencies.

In addition, the Department is presently preparing and will propose shortly significant amendments to the False Claims Act which seek to strengthen the Government's civil fraud recovery abilities. In particular, changes to the burden and elements of proof and the damage provisions of the False Claims Act promise to improve the Government's ability to utilize civil remedies to deal with fraud in Government programs.

Last month, the Civil Division and a subcommittee of the Advisory Committee of United States Attorneys met and discussed the increased civil fraud role of the United States attorneys through prompt referral, coordination, and assistance of the Civil Division. Specifically discussed were the experiences and procedures in the District of New Jersey. From these discussions, a new Civil Division/United States attorney cooperative effort is expected.

APPENDIX II

The joint consideration of other remedies is not only the subject of Departmental memoranda, the United States Attorneys Manual, and discussion with the Advisory Committee of United States Attorneys, but has been the specific area of discussion and training at white collar crime conferences between the Federal Bureau of Investigation (FBI) and key assistant United States attorneys involved in white collar crime cases. Twice a year, assistant United States attorneys and FBI agents participate in white collar crime training sessions. Through these efforts, Federal prosecutors are increasingly considering the civil aspects of their investigations and cases. We expect the recent meeting with the Advisory Committee of United States Attorneys and the experiences in the District of New Jersey will result in the implementation of more effective mechanisms to assist in this early consideration.

Finally, through the new inspectors general, we expect a closer focus by the departments and agencies on the full range of remedies available to treat the problems of fraud and abuse in Federal programs. Alternative remedies are a priority issue for the Executive Group to Combat Fraud and Waste in Government, which is chaired by Mr. Civiletti.

The GAO report also suggests the Department provide formal detailed guidance in manuals to ". . . address United States Attorney fears of hampering a criminal case, and --delineate the actions civil attorneys can follow to shorten the time it takes to pursue a civil case." In the ideal, the suggestion is sound but clearly reflects a lack of understanding of the depth of the issues. Parallel proceedings, due process, good faith, taint, and grand jury secrecy do not lend themselves to a step-by-step treatment that can be outlined in a manual. Procedures that exist in the District of New Jersey and are reflected in the litigation of United States v. Simmons, United States v. Garcia, and United States v. Stevens Foods will assist this process, but in fact, once one takes the civil and administrative aspects of a case into consideration early, the subsequent steps vary widely.

APPENDIX II

The GAO report addresses the "Perceived Legal Barriers" of the United States attorneys and their reluctance to initiate civil action. The barriers are more than perceived, as described above; they are real. Effective protection of the integrity of both civil and criminal processes is complicated, may require additional manpower, and may be more, rather than less, costly to the Government. Through discovery in a prematurely initiated civil or administrative proceeding, an ongoing criminal investigation can be severely prejudiced.

The GAO report notes that a Civil Division attorney estimated a summary judgment motion is available ". . . in no more than 10 percent of the cases handled." It is unclear what the observation indicates, but it surely would not encourage lengthier criminal investigations to satisfy civil processes. Such a system would be impractical, illegal, and impossible due to the nature and structure of criminal indictments. 1/

The GAO report notes the FBI's concern over the release of their reports containing grand jury information to the Civil Division. Until the OLC opinion was issued this concern had merit. We would point out that the OLC conclusions are cautiously made and warn of several areas. For example, the opinion concludes that the problem is "substantial" and ". . . unless there is a genuine need for disclosure during the pendency of the grand jury investigation, it might well be the better practice to forestall the disclosure until the grand jury is discharged. This is the course of prudence." Where such disclosure is made, the opinion suggests restrictions on the contacts between the attorneys handling the civil and criminal matters and limiting the civil attorneys to a ". . . passive role of simply receiving requested information."

Pages 14-17 of the report identify facts relating to four cases wherein it asserts the lack of coordination leads to a detrimental result. Without being able to identify and review the files on each case, specific response is difficult. However, we would point out that reasons other than consideration of civil aspects may have precipitated the problems identified by the report. For example, two examples indicate the necessity of reopening and expanding the investigation to satisfy civil needs. Such a requirement for an expanded investigation is required by the nature

1/Subsequent to receiving these comments, we contacted the Justice official who made this statement. He stated that we used his statement correctly and that it was not taken out of context.

of the civil process and an expanded investigation frequently is not possible or practicable during the active investigative phases of an investigation due to time, resources, and strategy. The problems of the deaths of witnesses in Medicare cases is a recurring one. The income tax/program fraud case took over 3 years to develop with a change of three attorneys. It is not clear how any recommendation in the report would solve these resource and complexity of case problems. The last example of the Department of Housing and Urban Development case again indicates problems largely unrelated to early consideration of civil cases. Without knowing the particular cases referred to in the GAO report, we suspect that those comments were not in their full context. Presently, the Department is emphasizing consideration of other remedies in addition to criminal prosecution.

The report notes that United States attorneys' offices spend "only a fraction of their time" on civil fraud cases. The Department operates in an environment of limited resources. Not only are staffs small, including that of the United States attorneys, but the court or judge time available to them is limited. Only a small portion of fraud cases--indeed of any type case--can be brought before the court. The Department feels that given this situation of scarce resources, the proper emphasis is upon criminal cases. Criminal cases have the greatest deterrent effect. Much of the crime in this area is committed by well-educated, employed individuals who are not driven by a need for cash to subsist or drugs to sustain their physical needs. 1/ They are individuals who perceive a loosely administered Government program, where, at little apparent risk, one can easily be enriched. The regular, well publicized imposition of criminal sanctions can change that perception and create a risk grave enough (as opposed to mere money loss) to deter many future wrongdoers. The Department does not feel that a reversal to a civil priority would create any comparable deterrence. We would direct GAO's attention to its report requesting the Government to spend more effort on criminal fraud cases. (See "Federal Agencies Can, And Should, Do More To Combat Fraud In Government Programs," GGD-78-62, dated September 19, 1978.) Also, in the view of the United States attorneys, increased activity of FBI agents in civil fraud cases seems unlikely. In fact, recent reductions in the number of agents makes United States attorneys reluctant to endorse the allocation of scarce agent time away from the major criminal cases to which they are now devoted.

1/It should be noted that to refute our report here Justice defines a fraud perpetrator as a well educated, employed individual who is not driven by the need for cash to subsist or drugs to sustain his physical needs. On page 57 in refuting our claim that Justice is not collecting fraud debts, Justice defines a fraud debtor as a class in worse financial condition than the usual debtor.

APPENDIX II

In summary, one cannot disagree with a key conclusion of the report--increased coordination of the civil and criminal perspectives is beneficial. The Department came to that realization long ago and has implemented a variety of reforms described above. The recent development of Rule 6 and parallel proceeding law has supported this trend. However, the report raises, but does not treat with any satisfactory discussion, certain foregone implications of such coordination as:

--appropriateness and consequences of eliminating the lead role of the criminal justice system, "preeminence of criminal prosecution";

--impact on and adequacy of resources in simultaneously pursuing parallel criminal and civil proceedings; or

--impact of premature initiation of civil proceedings on the results of criminal investigations.

To improve coordination strategy, the Criminal Division, Fraud Section, is presently examining its role in civil fraud cases arising out of criminal cases prosecuted or directed by that office. Through joint efforts such as in the United States v. Stevens case we hope to be able to provide the necessary coordination and guidance. Departmental mechanisms already exist to identify early the civil fraud cases, and through the inspectors general we expect to pursue initiatives which will result in increased utilization of civil remedies. The President's Executive Group to Combat Fraud and Waste in Government has identified alternative remedies as an important goal of the Federal Government. Through the Advisory Committee of United States Attorneys and the Civil Division, we expect to increase the focus on and design mechanisms for referral of civil fraud cases. Finally, through white collar crime seminars and training at the FBI Academy, increased emphasis is being placed on the legal mechanics and barriers to joint civil and criminal proceedings.

2. The need to improve procedures for the settlement and collection of fraud debts

Comments on this portion of the draft report are directed toward those portions of Chapter 3 dealing with settlement and collection procedures.

APPENDIX II

A. Settlement Procedures

We consider the statements in the draft report regarding settlement procedures to be extreme, based upon cases pulled out of context, and of dubious legal merit. We believe that they convey an inaccurate picture of the process of settlement of fraud cases.

Based upon our experience, it is simply inaccurate to state that "Civil attorneys are compromising and settling cases without adequately determining the defendant's present and future ability to pay". On the contrary, where collectibility is a factor in settlement of a fraud case, 2/ Civil Division attorneys give full consideration to all available financial information in order to assess the likelihood that a judgment or settlement for a greater amount will be collectible. The Department's files regarding cases settled on the ground of collectibility contain the necessary memoranda required by 28 C.F.R. § 0.166, which specifies that a full statement of the reasons for closing a claim must be set forth in memorandum form.

Additionally, we believe that the emphasis placed on obtaining financial statements or FBI financial ability investigations is misfocused. The Government, like any other creditor, has no legal basis upon which to extract financial information from a potential defendant in advance of civil action. Typically, potential defendants refuse to volunteer financial ability information to the FBI, and, even after a civil action has been commenced, prejudgment discovery information is severely limited as a matter of law.

Moreover, we seriously question the value to the Government of the FBI's conducting financial ability investigations, as suggested by GAO, where there is some other available basis for a personal judgment regarding collectibility. As another alternative, several United States attorneys suggested that the client agencies might be in a better position to find and prepare the additional financial data needed. Absent cooperation by the defendant, the cost of such an investigation may approximate or exceed the

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2/ The other factor, which is not mentioned in the draft report, is litigative risk.

amount of the debt. In the first case discussed on page 33 of the draft report, in which the Government's loss was $3,400, this surely seems possible. Likewise, where the attorney handling a case is aware that the potential defendant has filed for bankruptcy, as in the second case discussed on page 33, we believe that it would be wasteful and useless to have the FBI conduct a financial ability investigation. Far more complete information is readily available from the bankruptcy court and the debt giving rise to the claim may have been discharged in any event.

In our view, tax returns are the best and easiest method of obtaining financial data where it is required. We believe that the greater access to tax returns which existed prior to the enactment of the Tax Reform Act would well serve the Government in the settlement of fraud cases.

We reiterate that attorneys in the Department are not settling civil fraud cases without adequately determining a potential defendant's ability to pay. We believe that the statements to this effect in the draft report are unfounded, and we would welcome the opportunity to discuss the matter further with your staff.

B. Collection Procedures

We believe that the draft report accurately describes the limited degree of oversight and monitoring which the Judgment Enforcement Unit (Unit) provides over the collection of all civil fraud judgments, including cases which were delegated to United States attorneys in the prejudgment stage. However, the draft report is misleading when it implies that as a result of this lack of oversight and monitoring the United States attorneys are ignoring their collection responsibilities to the prejudice of the Government's creditor rights.

It is true that most of the judgment enforcement cases, including the fraud judgments, are handled exclusively by the United States attorneys, as delegated cases, without any oversight from the Unit except that which is requested by the United States attorney. We believe that this is as it should be--delegation is a proper and cost-effective management tool. Under current budgetary and manpower constraints, the Unit does not have sufficient resources to supervise additional cases should delegation limits be lowered.

Additionally, the Unit does not conduct regular field trips to the United States attorneys' offices to see how the delegated judgments are being enforced. A regular field trip program--one visit every 2 years to each of the 95 United States attorneys' offices--would require at least one attorney work-year, which the Unit cannot spare. Random field trips were tried until a few years ago, but they were haphazard and did not prove to be very cost-effective. Now we undertake inspection trips only when an individual United States attorney invites us to do so, the Executive Office for United States Attorneys requests that we make such a visit, or we have information that the United States attorney's office would benefit from the assistance that we could provide by such a field trip.

We dispute the implicit conclusion in the draft report that delegation means the United States attorneys are not doing their job or that the creditor rights of the Government have been jeopardized. The report assumes that there are substantial sums of money simply waiting for vigorous collection. There is a substantial difference between unenforced collectible judgments and unenforced uncollectible judgments. It has been our experience that once an initial investigation determines that a fraud debtor is judgment-proof, the debtor is likely to remain in that condition until the case is closed. 3/ Most of the active supervised and delegated fraud judgment cases are in the uncollectible category, and therefore need only annual reviews to identify changes in the debtor's financial status. Several United States attorneys noted that the Right to Financial Privacy Act and Tax Reform Act has closed off many of the best and most effective means of determining a defendant's financial status. The clear intent of Congress in those Acts cannot be circumscribed.

We do not agree that the two groups of statistics cited on page 36 of the draft report support the conclusion that more rigid control by the Civil Division is desirable. In its first example, the draft report sets forth statistics

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3/ Why fraud debtors as a class are in worse financial condition than the usual debtor is understandable. Often the fraud debtor has a bad reputation at best--a criminal record at worst--so that no businessman, lender, or prospective employer will trust him. The debt itself can never be discharged in bankruptcy.

involving 194 debtors in a number of judicial districts. The draft report appears to equate an outstanding judgment with a creditor's access to assets. In fact, a judgment is merely a license to hunt for nonexempt assets. There is no indication in this example that any of the 194 debtors had any obtainable assets or that a United States attorney ignored any enforcement opportunity.

The second example involves one district--the Eastern District of Michigan--where lack of collection success was cited in 9 of 12 cases. Again there is no evidence that these cases involved collectible debts or that the United States attorney ignored a collection opportunity. While we believe that United States attorneys should review even presently uncollectible cases once a year, it is not unusual for 2 years to elapse between reviews where an initial investigation has determined that the judgment debtor is clearly judgment-proof.

The reference to the case involving a former member of Congress in in error. The entire amount was collected in that case. Indeed, collection in that case required virtually no effort since there was a bond on which to collect. 1/

In general, figures on amounts can be very misleading. For example, a single large collection, usually from a solvent corporation, or the lack thereof, can significantly distort measurement statistics. We believe a better means of measuring a district's efforts would be to note the percentage of cases where payments are being made, the number of debtor examinations, and writs of execution issued. Based on these more realistic measures of activity, we believe an already effective and aggressive collection program will be found to be in place. 2/

C. Need to establish one comprehensive system to track fraud debtors

We believe that the Department already has a workable, comprehensive system to track not only fraud debtors but all judgment debtors. However, this system, which was devised by the Department's Office of Management and Finance, has not been fully utilized by all United States attorneys, and there have been some shortcomings in the information

1/Justice is referring to the wrong case. In fact the Department made no effort to have us identify the case. The case cited in our report on page 38 is factual and correct.

2/While we agree such measures are more helpful, we found that only one district (central California) had developed such measures. Furthermore, Justice was unable to provide us a comprehensive figure on fraud debts collected.

APPENDIX II

submitted to the system. In particular, cases handled directly by the Civil Division attorneys, in both District Court and the Court of Claims, have been left out of the system except where the United States attorney has been specifically requested to take some judgment enforcement action in a case he had not handled previously.

While we agree with GAO that a comprehensive tracking system is needed, a separate system to track fraud debtors is not necessary and would be of little value except for reporting purposes. The collection of all judgments is important, and there is no reason to classify judgments on the basis of reason for referral. Fraud referral information is important only in evaluating a specific case and in determining whether or not a judgment debtor's financial representations are to be believed in view of his prior fraudulent conduct, or to determine, in a bankruptcy involving a fraud judgment debtor, the dischargeability of that debt.

D. State laws causing difficulties in collecting fraud debts

We believe that the draft report correctly describes the effect of State law on judgment enforcement. Some States have exemption laws which are favorable to debtors and which make fraud-claim judgments--indeed all judgments--difficult to collect. Particularly troublesome are those State exemption laws which prohibit or restrict wage garnishment or which allow a huge or unlimited homestead exemption.

A Federal Exemption Statute would help us to collect fraud debts--or all debts, for that matter--and would enable the Government to collect sums it cannot reach because of State law. We believe that enactment of such a statute is feasible. Congress has already enacted a Federal Exemption Statute as part of the Bankruptcy Reform Act of 1978 (11 U.S.C. § 552) and the Consumer Credit Protection Act of 1968 (15 U.S.C. §§ 1673, 1675). Both of these Statutes operate in conjunction with, rather than exclusive of, State law and give the debtor the more favorable exemption.

Accordingly, given the problems presented by collection of final judgments, we concur in GAO's recommendation that enactment of such a statute should be explored with Congress and the States. In this regard, the Law Enforcement Assistance Administration (LEAA) would consider working with the States to develop a model State statute as well as assist in any other capacity compatible with LEAA's mission.

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We are hopeful that the above comments provide some insight as to the Department's problems in meeting GAO's recommendations concerning the concurrent enforcement of both criminal and civil statutory remedies to cope with fraud in Federal programs. Nevertheless, we share GAO's concern and, as we have pointed out, are making sizeable efforts to improve the Government's ability to more effectively pursue its civil fraud remedies.

We appreciate the opportunity to comment on the draft report. Should you desire any additional information, please feel free to contact us.

Sincerely,

for Kevin D. Rooney, acting
Kevin D. Rooney
Assistant Attorney General
for Administration

GAO note: Page references in appendix II were revised to correspond to pages in the final report.

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