

House Subcommittee on Crime, Terrorism, and Homeland Security
“War Profiteering and Other Contractor Crimes Committed Overseas”

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Good afternoon. Thank you very much for the opportunity to be here today, and to speak before this honorable Subcommittee.

My name is Alan Grayson. I’m an attorney. I represent whistleblowers in numerous cases involving fraud by government contractors in Iraq. At the moment, there are only four such cases in litigation that have been unsealed, and I am attorney of record in all four of them. Three of them are against KBR.

Needless to say, there have been far more than four instances of war profiteering in Iraq. Billions of dollars are missing, and many more billions wasted. How it came be that only four such cases are unsealed and in litigation – and how it is that even in those four cases, the Bush Administration is not participating – are the subjects of my testimony today.

War profiteering cases often are brought under the Civil False Claims Act. This statute was enacted in 1863, to combat war profiteering during the Civil War. Lawyers often refer to the statute as the “Lincoln Law.”

In 1986, when Congress enacted Congressman Howard Berman’s amendments to the Civil False Claims Act, it lauded the Act as the “Government’s primary litigative tool for combating fraud.”¹ The U.S. Supreme Court has recognized that the Civil False Claims Act is “intended to reach all types of fraud, without qualification,

¹ S. Rep. No. 99-345, at 2 (1986).

that might result in financial loss to the Government.”²

There are criminal laws, such as mail fraud, wire fraud, false statements, and criminal false claims statutes, that could be used to address war profiteering.³ These laws do little to punish war profiteering corporations, however. There are several reasons for this. First, the burden of proof -- beyond a reasonable doubt -- may be difficult to establish. Second, corporations cannot be incarcerated. Third, the fines often are so small that crime does pay.

The Civil False Claims Act, in contrast, imposes treble damages and penalties on war profiteers. The threat of having to pay three times what you steal can be a real deterrent.

Moreover, the Civil False Claims Act “deputizes” whistleblowers to bring lawsuits in the name of the U.S. Government, against war profiteers. The whistleblowers can keep between 15% and 30% of the recovery, but with treble damages, the U.S. Government ends up well ahead.

The Civil False Claims Act yielded total recoveries of over \$3 billion last year alone.⁴ Yet in Iraq, where there has been war and war profiteering for over four years, the total recovery to date is less than \$6 million – in the midst of what Senator Dorgan rightly has called “an orgy of greed” by military contractors. Why has the Civil False Claims Act so far been unsuccessful in punishing or preventing war profiteering committed in Iraq? And what can be done to change that?

² *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

³ 18 U.S.C. 287, 1001, 1341 & 1343 (2000).

⁴ “Justice Department Recovers Record \$3.1 Billion in Fraud and False Claims in Fiscal Year 2006,” DOJ News Release (Nov. 21, 2006), www.usdoj.gov/opa/pr/2006/November/06_civ_783.html

One reason is that the Bush Administration has swept such cases under the rug, by obtaining and perpetuating court orders sealing the cases. These orders allow the Administration to threaten whistleblowers with dismissal of their cases, or even contempt of court, for simply telling people what they know.

According to SIGIR information, most of the Civil False Claims Act cases filed regarding war profiteering in Iraq remain under seal. The False Claims Act requires whistleblower cases to be kept under seal for 60 days.⁵ Thanks to extensions that the Bush Administration has obtained, those 60 days have become 60 weeks, and are heading toward 60 months. Although the judges almost always rubber-stamp these extensions, in one recent case against KBR, the judge refused to do so, and the case was unsealed.

To prevent the abuse of the sealing provision, there should be a firm limit on extensions. Certainly, one year is enough. If the Executive Branch simply wants more time to investigate a case, and can show good cause, it might have that extra time, but not at the expense of keeping the public and Congress in the dark. The seal is meant to help uncover fraud, not to bury it.

A second reason why the Civil False Claims Act has been unsuccessful in punishing and preventing war profiteering in Iraq is that after cases are unsealed, the courts create and apply rules to the cases that have no basis in the statute. For instance, the Act punishes anyone who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.”⁶ Last year, in our Custer Battles case (the first Iraq war

⁵ 31 U.S.C. 3730(b)(2) (2000).

⁶ 31 U.S.C. 3729(a)(2) (2000).

profiteering case to go trial), a jury found the Defendants guilty of over 40 acts of fraud. The judge suspended the verdict, however, because he added a “presentment” requirement – a requirement that simply doesn’t appear in the statute.

Another recent case alleged that KBR, under its infamous cost-plus LOGCAP Contract, ran empty trucks back and forth across the desert in Iraq, in order to run up the bill on the taxpayers. The judge dismissed the 24-page complaint because, he said, it wasn’t “specific” enough. Yet this “specificity” requirement also doesn’t appear in the statute.

Long ago, the U.S. Supreme Court said that the courts should “refuse[] to accept a rigid restrictive reading” of the Civil False Claims Act, and should “broadly construe[]” it.⁷ That is simply not happening. Based on my experience, Congress needs to make the Supreme Court’s wise words the law, by providing that the Act shall be liberally construed, in accordance with its remedial purpose. Other Acts have such language; this Act needs it.

Thanks to Congress, the Civil False Claims Act already makes it clear that only a preponderance of the evidence, not “clear and convincing evidence,” is required. It also makes it clear that only a defendant’s knowledge of the fraud, not a specific intent to defraud, is required.⁸ What is needed now is for Congress to provide that as for the Complaint, only “a short and plain statement of the claim showing that the pleader is entitled to relief” is required. This is the normal standard under Federal Rule 8(a), it is the standard when a contractor sues the Government, and it would be the standard when the Government sues a contractor, if the lower courts had not

⁷ *Niefert-White*, 390 U.S. at 786 & 788.

⁸ 31 U.S.C. 3729(b) (2000).

imposed a higher standard on their own.

A third reason why the Civil False Claims Act has been unsuccessful in punishing and preventing war profiteering in Iraq is that the Bush Administration has done virtually nothing to pursue such cases. It has settled two cases, without litigation, for pennies on the dollar. It has declined to prosecute nine more cases. All the others remain under seal. In our fifth year of the War in Iraq, the Bush Administration has not litigated a single case against any war profiteer under the False Claims Act. It evidently has not even sued any U.S. contractor in Iraq, for breach of contract. Two years ago, Senator Grassley wrote to the Attorney General, asking why the Administration was taking no action in such cases. There was no reply. For all the Bush Administration claims to do in the war against terrorism, it is a no-show in the war against war profiteers.

It appears the Civil False Claims Act has a flaw that remained hidden for 138 years, but is now apparent – it gives a do-nothing Administration the opportunity to do nothing. Congress can try to fix that flaw by providing that the Executive Branch's "see no evil, hear no evil, speak no evil" policy regarding fraud perpetrated against the soldiers and the taxpayers -- in a war zone -- is no longer an option. I recommend that the False Claims Act be amended to provide that the Administration shall participate in all war profiteering cases, whenever the whistleblower complaint establishes a *prima facie* case of fraud. Both the troops and the taxpayers deserve no less.

Fraud against the taxpayers is bad enough. But when that fraud is committed against the U.S. Army, engaged in battle, it is intolerable. As Lincoln said, 144 years ago, "worse than traitors in arms are the men who pretend loyalty to the flag, feast and

fatten on the misfortunes of the Nation, while patriotic blood is crimsoning the plains . . . and their countrymen moldering the dust.”

For four years, I have fought the war profiteers, who have been feasting and fattening on our misfortune. The Bush Administration has not fought them, not in the least. Let us acknowledge how far we have fallen from President Lincoln’s standards and ideals, and amend the Lincoln Law, to remind this President and future Presidents of their constitutional duty to see that the laws are faithfully executed.