

68167

**MEDICAID MANAGEMENT INFORMATION
SYSTEMS (MMIS)**

**HEARINGS
BEFORE THE
PERMANENT
SUBCOMMITTEE ON INVESTIGATIONS
OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
UNITED STATES SENATE
NINETY-FOURTH CONGRESS**

SECOND SESSION

PURSUANT TO SECTION 5, SENATE RESOLUTION 363,
94TH CONGRESS

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MEDICAID MANAGEMENT INFORMATION SYSTEMS (MMIS)

WEDNESDAY, SEPTEMBER 29, 1976

U.S. SENATE,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met at 9:30 a.m., in room 6202, Dirksen Senate Office Building, under authority of section 5, Senate Resolution 363, agreed to March 1, 1976, Hon. Sam Nunn (acting chairman) presiding.

Members of the subcommittee present: Senator Sam Nunn, Democrat, Georgia; and Senator Charles H. Percy, Republican, Illinois.

Also present: Senator Herman E. Talmadge, Democrat, Georgia; and Senator Frank E. Moss, Democrat, Utah.

Members of the professional staff present: Howard J. Feldman, chief counsel; F. Keith Adkinson, assistant counsel; David P. Vienna, investigator; Walter S. Fialkewicz, detailed employee, Department of Justice; Stuart M. Statler, chief counsel to the minority; Jonathan Cottin, investigator to the minority; Ruth Y. Watt, chief clerk; Jay Constantine, Finance Committee staff; and Val J. Halamandaris, Special Committee on the Aging staff.

Senator NUNN. The subcommittee will come to order.

[Member of the subcommittee present at time of convening: Senator Nunn.]

[The letter of authority follows:]

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
Washington, D.C.

Pursuant to Rule 5 of the Rules of Procedure of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, permission is hereby granted for the Chairman, or any member of the Subcommittee as designated by the Chairman, to conduct hearings in public session, without a quorum of two members for administration of oaths and taking of testimony in connection with Medicaid Management Information Systems on Wednesday, September 29, 1976.

SAM NUNN,
Acting Chairman.
CHARLES H. PERCY,
Ranking Minority Member.

OPENING STATEMENT OF SENATOR SAM NUNN

Senator NUNN. The Permanent Subcommittee on Investigations begins today the first of what we intend to be a series of hearings into management, consulting, and computer service companies in the health and welfare industries. Among the largest consumers in these industries are the State and Federal Governments.

These hearings are part of a larger subcommittee review of fraud and abuse in Federal health and related welfare programs.

Today we begin with a look at the operations—and possible improprieties by an official—of the Office of Information Systems within the Health, Education, and Welfare Department's Social and Rehabilitation Service.

The Office of Information Systems administers a program to encourage the States to develop and operate computerized medicaid management information systems [MMIS], which are funded by HEW.

The systems' purpose is to spot patterns and numbers of medical procedures performed, of drugs prescribed and other health services delivered. Through surveillance and utilization review reports, States can develop statistical profiles on providers and identify possible areas of fraud as well as program defects.

Another series of reports called management and administrative reporting systems give the States data on the monitoring of claims processing, the status of payments to providers and other fiscal information for proper program management.

In my view the MMIS program is a good plan. The potential savings from it could more than offset the Federal investment in it. But to understand its broader impact, we must place this program into perspective.

The winning contractor of the MMIS bid for system operations becomes the fiscal agent for the State medicaid agency.

The fiscal agent receives the bills for patient services from physicians, nursing homes, pharmacies, and hospitals and processes these claims, running them through sophisticated computer programs. The fiscal intermediary receives payments from State medicaid agencies, subsequently mailing checks to the providers. For this service, the fiscal intermediary receives a fee.

There are fiscal agents or intermediaries in the medicare, medicaid, and CHAMPUS programs. Total claims processing costs to Government agencies run close to \$1.5 billion a year. There are wide variations in charges by these intermediaries within programs with apparently in many cases no relationship to the volume of claims processed or the sophistication of the systems.

The contractors who will win the MMIS contracts and operate the medicaid computer programs will most likely be the computer service firms for any national health insurance plan that may emerge in the future.

Their charges, the way in which they obtain the contracts, Government contracting practices and the management of HEW's program are the foundations upon which a multibillion dollar computer claims processing element of that national health plan may be built.

No less important in the process is the integrity of our Government employees.

HEW Secretary Mathews was reported to have told a Cabinet meeting discussing hearings held by Senators Moss and Percy last month into fraud and abuse in New York's medicaid program that the MMIS program puts the administration "well ahead of Moss" in identifying medicaid fraud and abuse.

I hope that HEW will not respond to these hearings with the cavalier attitude with which it responded to the very serious disclosures in the hearings conducted by Senators Moss and Percy.

While HEW may claim it is well ahead of a Senate committee in spotting fraud and abuse, I think the witnesses in the next couple of days will show very clearly that HEW has not discovered improprieties within its own agencies.

Today, we will hear of questionable payments received by a Government official who has played a leadership role in the operations of the system designed to help the States identify fraud and abuse in their medicaid programs.

Senator Percy will be coming in a few minutes. In the meantime, I am delighted to have join us this morning Senator Talmadge, Chairman of the Senate Finance Subcommittee on Health, as well as Senator Moss, chairman of the Senate Subcommittee of Long-Term Care of the Special Committee on Aging.

I have asked both of them if they would like to make an opening statement. I will ask Senator Talmadge first.

OPENING STATEMENT OF SENATOR TALMADGE

Senator TALMADGE. Thank you very much, Mr. Chairman. I appreciate the invitation of your chairman and that of fellow members of the subcommittee to participate in this hearing. We share a common concern with the need to expose and then correct fraudulent and abusive practices in the medicare and medicaid programs.

The Subcommittee on Health of the Committee on Finance has cooperated informally during the last year with the investigative efforts of the Permanent Subcommittee on Investigations and Senator Ted Moss' subcommittee of the Committee on Aging.

We have been very careful in this work not to duplicate or overlap each other's efforts. Rather, what we sought—and I think achieved—was cooperation toward common objectives. The work of the three committees provides an excellent example of the Senate working at its best in the public interest.

Some time ago, along with 41 other Senators, including Senators Nunn and Moss, I introduced a tough medicare and medicaid anti-fraud and antiabuse bill.

That bill is now pending in committee on the House side, notwithstanding prompt approval by both the Finance Committee and the full Senate, without one dissenting vote.

I do not know whether the House shares our awareness of the extent and persistence of fraudulent and abusive activities in medicare and medicaid; programs which will cost the taxpayers of this country almost \$41 billion in the fiscal year beginning October 1.

I am hopeful, however, that the work of the Finance Committee, Senator Moss' extensive and hard-hitting investigations, as well as what will come out of these hearings, will serve to persuade the House to act expeditiously on my bill.

Finally, I want to congratulate Senator Nunn, Senator Jackson, and Senator Percy on the splendid contribution they and their staffs have made.

I know that the subject matter of this hearing and the hearings to follow have not just happened. They reflect the digging and the doggedness of more than 1½ years hard work. You are to be congratulated for your efforts.

Senator NUNN. Thank you very much, Senator Talmadge. I might add that I am a cosponsor of that bill which I think is a major step towards trying to bring some discipline to this field and some efficiency and effectiveness in the overall medicaid and medicare programs.

Senator TALMADGE. I certainly agree. I hope the House will act before we adjourn.

Senator NUNN. I think that is extremely important. Otherwise, we lose 4 or 5 months in correcting these abuses. I hope the House does act. We are also delighted this morning to have Senator Moss who has done an extraordinary job in this particular area and other areas.

Senator Moss, we are pleased to have you this morning. We welcome any statement you may have.

OPENING STATEMENT OF SENATOR MOSS

Senator Moss. Thank you very much, Mr. Chairman. I am honored to be invited. I am very glad that I could come and sit here with you and Senator Talmadge, Senator Percy, who will be here and others who have worked so diligently in this area.

I want to express my appreciation for being invited. I have received a quick briefing from your staff as to the subject of these hearings which is the operation of the medicaid management information systems program by the Department of Health, Education and Welfare.

What I have heard from the staff has caused me great concern as to how that is operating.

I am sure everyone in this room knows of our recent investigation referred to by both you and Senator Talmadge in which we looked into medicaid millions. This capped about 7 years of evaluating various segments of the medicaid program.

My subcommittee has examined nursing homes, clinical laboratories and home health agencies, factoring firms, and just about every aspect of the program.

When HEW Secretary David Mathews learned that I had posed as a medicaid patient, he reacted by telling the Cabinet that Moss was "grandstanding."

He added that because of the MMIS program, "We are well ahead of identifying the problem of fraud and abuse and doing something about it."

Secretary Mathews later reconsidered saying that I had dramatized events and that he had no objection to my doing so, once again extolling the MMIS program and the achievements of the Department of Health, Education and Welfare.

For obvious reasons, I am more than casually interested to learn how the department is handling the MMIS program. I don't wish to be misunderstood, I believe the MMIS program can play an extremely important role.

By using computers effectively, we can pay doctors and other providers more accurately and more rapidly.

We can also use computers to develop investigative tools such as "vendor" and "recipient" profiles.

However, the cause for concern in today's hearing is that there appears to be mismanagement if not outright fraud and abuse within the very program that HEW has extolled as the panacea for reducing fraud and abuse in the medicaid program. Everyone can judge for himself after today's hearings the extent to which this is true. For my part, I think these hearings reinforce what I said a few days ago.

Medicaid fraud is endemic, it is pervasive at all levels. I think the people of this country, especially the sick, blind and aged, deserve better than this.

I would like to encourage the House of Representatives to take the kind of aggressive action here in the Senate by Senator Talmadge and the Finance Committee. While it is obvious that the management of the medicaid program needs an overhaul, one important and necessary step is the creation of a central fraud and abuse unit within HEW. Other provisions of the recently passed Senate bill, S. 3801, such as the disclosure provisions, the outlawing of factoring are just as important.

In closing I would like to compliment the staff of this subcommittee for their aggressive investigation. I would also like to compliment Sam Skinner, U.S. Attorney for the Northern District of Illinois, who yesterday announced 22 indictments involving six of the clinical laboratories we highlighted in our February 16 hearings as well as about eight medicaid mill operators.

I suspect that U.S. Attorneys all over the country will soon be following this example with indictments of their own. I am glad to see the Justice Department increase its attention to medicaid fraud issues.

I say once again how pleased I am with the aggressive action taken by this investigative subcommittee and by the Finance Committee, others who are now alerted to the terrible problem we have on our hands and are moving rapidly to put things into proper place and to take appropriate remedial action.

Thank you.

Senator NUNN. Think you very much, Senator Moss.

Senator Percy will be here, I am sure, in the next few minutes and when he comes we will have his opening statement. I believe it has already been given out to the press.

Our first witness this morning is a very capable staff person who has headed up this investigation, Mr. David Vienna, who is accom-

pained by Mr. Walter Fialkewicz. We have also had very able assistance from the minority chief counsel, Stuart Statler, and Mr. Jon Cottin.

I would like to thank all of the staff for their intensive work and I would also like to emphasize that this is only the beginning hearing. We may have some delay because we have a good many other matters that we will be having hearings on in this overall area.

Some of them are not completed in terms of investigation, but over the next few months we will be having a good many hearings in this area.

I believe David, you have a statement, a comprehensive statement that will be given out. You are going to summarize your statement this morning.

Both of you take the oath. Do you swear the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. VIENNA. I do.

Mr. FIALKEWICZ. I do.

**TESTIMONY OF DAVID P. VIENNA AND WALTER S. FIALKEWICZ,
INVESTIGATORS, SENATE PERMANENT SUBCOMMITTEE ON
INVESTIGATIONS**

Senator NUNN. You may proceed.

Mr. VIENNA. Thank you, Mr. Chairman. My name is David Vienna. I am a member of the staff of the Permanent Subcommittee on Investigations. With me is Walter Fialkewicz, another member of the staff.

We have been assigned to conduct the preliminary inquiry into the role of computer service companies serving health and related welfare government programs.

It is respectfully requested that our lengthy statement and exhibits be printed in their entirety in the record at the close of these summary remarks.

Senator NUNN. Your full statement will be part of the record, without objection.

Mr. VIENNA. This inquiry will cover the role of these companies in the processing of claims filed by providers and beneficiaries in these programs, the largest of which are the medicare and medicaid programs.

As part of this inquiry, we are reviewing prices charged by these companies; Government procurement practices; access to sub-contractor costs, and the security of the systems with their sensitive and private information.

The hearings today and tomorrow will focus on one phase of the subcommittee's overall inquiry—the medicaid management information systems [MMIS] program.

With regard to the operations of the Office of Information Systems, we found:

1. The agency does not have necessary financial data to manage its program properly. It does not keep track of design, development,

and installation contract overruns and add-ons. At least when we asked for this data, the agency gave us information in some cases we knew from a review of its own records to be incomplete.

2. The agency could not tell us how much additional Federal funds it has been responsible for authorizing through its certification of systems.

3. Neither the Office of Information Systems nor the Medical Services Administration, the Federal medicaid agency, determine if the States actually use the information generated by the sophisticated systems, for which the Federal Government is paying 75 percent of the operating costs.

In California, for example, though the system has been certified, the Federal Government is paying 50 percent of the operating costs instead of 75 percent because the State has declined to meet certain Federal requirements. Nonetheless, this system is generating substantial data, which State medicaid officials told us they simply pile on a desk and never read or use it for the purposes for which it was intended—program management.

The staff also reviewed two recent decisions by the Office of Information Systems: one in the State of Washington and another in Texas.

In the State of Washington, the Office of Information Systems approved a contract award by the State to a company whose bid was \$4.5 million higher than another firm judged by the State to be a qualified and responsive bidder.

Federal records show that after the bids were in, officials of the State of Washington changed the ground rules under which it had previously announced the bid would be judged. The evaluation process was changed in such a way as to favor the high bidder.

Another decision by the Office of Information Systems with regard to the State of Texas appears to be contrary to the intent of Congress.

When the Social Security Amendments of 1972 were passed, the legislative history clearly shows that Congress intended that several States join in the use of one centralized MMIS system to avoid duplications of development and operating costs.

The record shows a good effort on the part of the Office of Information Systems to follow that intent, but it was difficult to coordinate—perhaps in most cases impossible.

Recently, however, the Office of Information Systems has rendered a decision that effectively will allow for more than one system within the State of Texas. To allow for possible multiple systems within a State may be necessary to accommodate the peculiarities of a State, but it clearly is contrary to the intent of Congress—and even good judgment.

Since the States have to pay only 10 percent of the development costs for these systems and only 25 percent of the operations costs, they have little to lose through unnecessary duplications of development and operating costs.

Today, the subcommittee will hear from six witnesses. The first witness is Francis J. Melly, president of FMS Management Services of New York. Mr. Melly is appearing voluntarily before the subcommit-

tee after spending several weeks providing the staff with important information that has contributed a great deal to the building of a record for legislative reform.

Mr. Melly's company has contracts to design and develop medicaid management information systems in West Virginia and Maryland. It has a subcontract for an MMIS design job for the State of Arizona.

Mr. Melly will discuss his relationship with Charles Cubbler. At the time, Mr. Cubbler was the Acting Director of the medicaid systems division of the Office of Information Systems. As such, Mr. Cubbler was in a key job in the MMIS program.

Richard Ney and Cheryl Anderson are officers of Richard Ney Associates, Inc., a health consulting firm that served as the FMS marketing representative in Washington, D.C.

Mr. Ney and Miss Anderson, like Melly, have cooperated with the subcommittee inquiry and are appearing voluntarily. They had frequent contact with Mr. Cubbler on behalf of FMS.

Finally, the subcommittee will hear from two officers of Delphi Associates and one official of Blue Cross of Idaho. These witnesses will testify to another aspect of the inquiry, the role of competition in the award of MMIS contracts.

Robert Trombly and Francis Hawthorne are officers of Delphi Associates, which is one of a dozen or so companies that design, develop and install MMIS systems. Recently, Delphi joined Blue Cross/Blue Shield of Washington-Alaska in bidding on an MMIS for the State of Washington. They lost the contract even though the Delphi-Blue group was the low bidder.

Similarly in Idaho, Delphi joined Blue Cross on an MMIS and lost the award, even though it was the low bidder.

Mr. Chairman, that concludes my summary remarks. I have our complete statement to which is attached 12 exhibits.

Senator NUNN. That will be admitted for the record, without objection.

[The complete statement follows:]

STATEMENT OF DAVID VIENNA AND WALTER S. FIALKEWICZ, STAFF INVESTIGATORS,
ON THE MEDICAID MANAGEMENT INFORMATION SYSTEM PROGRAM

Introduction

Early in the Medicaid program, the situation with regard to management and the need for good information systems became apparent. Program fraud and abuse was spotted from the very first years of operations. Then came the economic downturn of the early seventies when States began to curtail benefits and look for better management tools.

So did the Department of Health, Education and Welfare (HEW) which developed a mechanized or computerized claims processing and information retrieval system called the Medicaid Management Information System (MMIS), which was to serve as a model and which could be adapted by the States to meet their own individual needs. At the same time, this system would produce information from each State that the Federal Government could use in its oversight of the Medicaid programs.

The Social Security Amendments of 1972 (Exhibit 1) authorized 90 percent Federal matching for the costs of design, development and installation of mechanized systems, and 75 percent matching for the costs of operation. It was expected that these systems would foster better program administration and would ultimately reduce program costs.

The systems' purpose is to spot patterns and numbers of medical procedures performed, drug prescribing and other services. Through Surveillance and Utilization Review reports, States can develop statistical profiles on providers, identify possible areas of fraud and abuse and possible areas of program defects. Another series of reports called Management and Administrative Reporting Systems give the States data on the monitoring of claims processing, the status of payments to providers and other fiscal information for proper program management. A background paper prepared by the Library of Congress is attached as Exhibit 2.

The broader issues

HEW Secretary Mathews was reported to have told a Cabinet meeting on August 31, 1976, during a discussion of the Moss hearings on Medicaid fraud, that because of the MMIS program, "We are well ahead of Moss in identifying the problem (of fraud and abuse) and doing something about it."

The MMIS program is a good plan. The potential savings from it could more than offset the Federal investment in it. But to understand its broader impact, we must place this program in perspective. The winning contractors of the MMIS bids for system operations sometimes become the fiscal agents for the State Medicaid agencies. The fiscal agents receive the bills for patient services from physicians, nursing homes, pharmacies and hospitals and process these claims, running them through sophisticated computer programs. The fiscal intermediaries receive payments from State Medicaid agencies and then mail checks to the providers.

For this service, the fiscal intermediary receives a fee. There are fiscal agents or intermediaries in the Medicare, Medicaid and CHAMPUS programs. Total claims processing costs to Government agencies run \$1,448,000,000 a year. There are wide variations in charges by these intermediaries within programs with apparently no relationship to the volume of claims processed or the sophistication of the systems.

There is no question that the contractors who will win the MMIS contracts and operate the Medicaid computer programs will most likely be the computer service firms for any national health insurance plan that we may be developing.

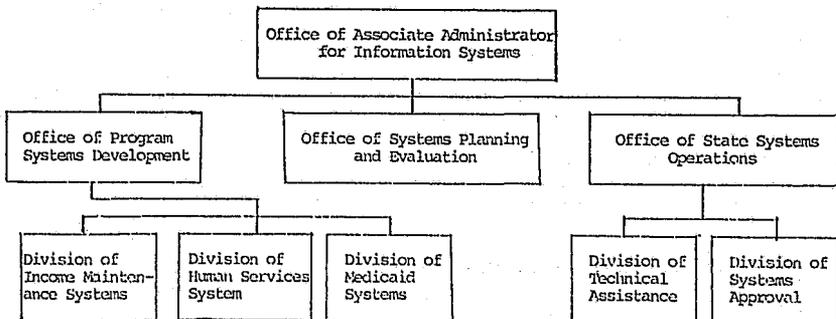
Their charges, the way in which they obtained the contracts, Government contracting practices and the management of HEW's MMIS program are the foundations upon which we may be building a multi-billion dollar computer claims processing element of that national health plan.

Program administration

The MMIS program is administered by the Office of the Associate Administrator (of the Social and Rehabilitation Service) for Information Systems. Harold Weinberg is the responsible Federal official with the title, Associate Administrator.

There are a total of four "Offices" under the Associate Administrator along with the National Center for Social Statistics (Exhibit 3). These offices include, Systems Planning and Evaluation, Program Systems Development, State Systems Operations and Information Sciences. They employ about 120 people. Two of these offices perform the MMIS program functions with about 50 employees. Table 1 is an organizational chart of responsibility relating to MMIS.

TABLE I



Participating States

A total of eleven States have had MMIS programs certified by the HEW Office of Information Systems, which means they are entitled to receive 75 percent Federal matching funds for the cost of operating these systems. Those States without such systems receive 50 percent matching funds for operations of less sophisticated systems. To develop these better systems, the Federal Government pays 90 percent of the total costs. Table II¹ shows States with certified systems, the contractors who developed them with 90 percent matching funds and the minimum estimate of total costs of their development.

Table III² shows States that have not yet been certified but which have approved contracts for the development of systems.

TABLE II

State	Contractor	Minimum estimate of total cost
Arkansas.....	Health Application Systems.....	\$476,000
Hawaii.....	Blue Cross/Blue Shield.....	(1)
Michigan.....	Consultec.....	800,000
Minnesota.....	Operations Research Inc.....	900,000
Montana.....	Dikewood.....	(1)
New Hampshire.....	Delphi/Keane Associates.....	400,000
New Mexico.....	Dikewood.....	603,000
Ohio.....	Consultec.....	1,000,000
Texas.....	No contractor.....	2,129,000
Utah.....	Consultec.....	1,300,000
California.....	Blue Cross/Blue Shield with subcontract to EDSF Corp.....	(1)

Did not apply.

TABLE III

States	Contractor	Minimum estimate of total costs
Arizona.....	The Computer Co. with a subcontract of FMS Management Services...	\$113,900
Georgia.....	Delphi.....	407,600
Kentucky.....	Consultec.....	1,069,000
Indiana.....	Blue Cross/Blue Shield with a subcontract to Consultec.....	998,700
Maine.....	Health Application Systems.....	111,540
Maryland.....	FMS Management Services.....	299,800
West Virginia.....	FMS Management Services.....	460,270

A total of nine States are expected to have their systems certified within the next six months and another six States are expected to have their systems certified within twelve months. Seven States are planning to develop MMIS systems. These States are set forth in Table IV.³

TABLE IV

Certification expected within 6 mo.: Georgia, Idaho, Indiana, Maine, Nebraska, North Carolina, Oklahoma, Washington, West Virginia.

Certification expected within 12 mo.: Arizona, Florida, Kentucky, Louisiana, Maryland, Virginia.

MMIS systems being planned: Massachusetts, Pennsylvania, Connecticut, Illinois, Kansas, Missouri, New York.

A review of the tables shows that only 11 States have had systems certified and nine more are expected to have certification within the next six months. The Subcommittee staff has reviewed the operations of the program and its management. It has certain criticisms the Subcommittee may want to consider bringing to the attention of HEW. If the criticisms are deemed appropriate, there are still as many as 39 State certification processes that could benefit from a response to these criticisms.

¹ Data supplied by Office of Information Systems.

² Ibid.

³ Ibid.

OIS management review

The Office of Information Systems (OIS) is responsible for approving, for purposes of Federal funding, State proposals for the design, development, installation and operations of Medicaid Management Information Systems (MMIS). From the Subcommittee staff review of the operations of OIS, it appears that the agency, itself, is in need of a management system.

The agency does not have necessary financial data to manage its program properly. It does not follow through to determine if States are using the data generated by the systems financed with higher-level Federal fundings.

In addition, the Subcommittee staff is concerned with certain decisions made by the agency with regard to approval of State proposals involving questionable competitive procedures and possible fragmentation of computer systems.

Furthermore, there is a serious problem arising over the diverse authorities of certain Federal regulations. Enforcement by one level of officials at HEW may adversely affect program management of the Office of Information Systems.

Internal OIS operations

The office filing system may well indicate the broader management issues in OIS. That system is so sloppy that key documents are missing. But there are other, more important issues.

Though approval of State efforts to design, develop and install MMIS systems carries with it 90 percent Federal funding of such efforts, the agency does not keep track of overruns and systems add ons, which also receive 90 percent funding. This was admitted in a letter from the Administrator of the Social and Rehabilitation Service to Subcommittee Acting Chairman Sam Nunn. (Exhibits 4 and 5).

Though certification of developed systems carries with it 75 percent Federal funding for the operation of such systems, the Office does not know exactly how much money this involves.

Furthermore, the Office of Information Systems never verifies whether the sophisticated management information developed by the new systems are actually used by the States to spot fraud and abuse, identify problem areas of utilization and other key data elements required by the systems. For example, California Health Department employees have told the Subcommittee staff that sophisticated data produced by their certified MMIS system⁴ are stacked on a table and are not read.

Importance of competition

While there are elements of financial information needed for basic management decision making, there are other issues involved in management of the program that the Subcommittee staff questions. These relate to decisions made by the Office of Information Systems.

No small part of the MMIS program management problem is the fact that perhaps 50 technicians and specialists are trying to oversee the installation of complicated computer systems that must be tailored to the special needs of each State and conform to relatively rigid, yet reasonable Federal standards. These Federal standards are required so that HEW, itself, can obtain data by which it can evaluate the performance of State Medicaid programs.

But these government employees have no precedents to follow. They are cutting a new trail. Their actions and decisions will affect not only the quality of Medicaid program management, but also the price of claims processing in the Medicaid program which today costs \$550 million a year.

Furthermore, and from a prospective view, the quality of the systems developed, who operates them and the integrity of the competitive process by which these contracts are obtained will form the foundation upon which this nation may well be building its management system for a national health insurance program.

It is the prospective importance of this rather small HEW unit that was the primary cause of the Subcommittee's interest. If a comprehensive national health insurance program is passed by Congress and enacted, claims processing costs could well amount to a multi-billion dollar program. Already,

⁴ Though the California MMIS has been certified, it does not receive 75 percent Federal funding because the State objects to compliance with certain regulations.

the Federal Government is paying almost \$1.5 billion a year for processing Medicare, Medicaid and the Civilian Health and Medical Program for the Uniformed Services (CHAMPUS).

The Subcommittee, as part of this overall inquiry, has asked the General Accounting Office to review the price the government pays for CHAMPUS claims processing. That review was sought following the staff's finding of a curious set of circumstances.

Earlier this year, CHAMPUS sought for the first time competitive bids on claims processing in five Southwestern and Western States. The largest claims processor in the region was charging the CHAMPUS program \$7.65 per claim on a "no profit-no loss" basis. When this particular contractor had to come out from under the no profit-no loss umbrella and bid against other companies to keep this business, his price dropped about \$3.40 per claim to around \$4.25. The winning bidder walked away with the contract prize with an offer of \$3.26 and he says he will make a good profit at this price level which represents a savings of more than 50 percent.

For government not to subject contracts such as these to the pressures of the open market place is to deny taxpayers the relief that could be provided by relying on our free enterprise system. And for government to be a party to any frustrations of free and open competition for health and welfare program business belies any statements of program integrity or claims of good management.

This year is the tenth anniversary of the Medicaid and Medicare programs, both of which were hastily thrust upon an electronic data processing industry that was basically in its infancy. There were relatively few companies capable of providing services needed to process the immediate flood of thousands of claims per day generated by these massive new programs. But over the years, new companies have developed.

New firms can enter this industry easily. Much like the electronic industry of the fifties and early sixties that started in small shops and even garages in Massachusetts and California, the companies that can design computer management systems depend almost solely on the technical ability and imagination of a few people. Large amounts of capital are not required. Indeed, it has been relatively small firms that HEW has relied upon to get the MMIS program off the ground.

But once a system is designed and installed a new contract is in the offing for the operations of the management system, which receives and processes claims through the computer. These runs yield analytical data for management use. In California, a charge of slightly more than \$1 per claim means sales of \$40 million a year for the corporation with which the State contracts for Medicaid claims processing.

In short, the stakes are high.

HEW role in MMIS competition

MMIS program guidelines (Exhibit 6) require that the State must provide the Federal Government of "assurance of fair competition and public advertising within Federal and State procurement Standards" in order to qualify for 90 percent and/or 75 percent matching funds. Further, the guidelines state, "procurement of automatic data processing services and/or equipment for mechanized medical claims processing and information retrieval system, must meet the provisions" of those same Federal procurement standards.

Those standards as set forth in 45 CFR 74 (Exhibit 7) require open and fair competition. One section of these regulations states, "the awards shall be made to the responsible bidder whose bid is responsive to the invitation and is most advantageous to the State or local government grantee, price and other factors considered."

Discussion of competition

Because of the possible long term management and financial impact of MMIS contract awards and certifications it is the Subcommittee staff's view that HEW should not only do all in its power to encourage competition for these contracts but also, and most importantly, it should not affirm and certify any State contract award decision where there is clearly doubt over the integrity of the competitive process.

It is the staff's view that serious questions can be raised over a recent State of Washington bid evaluation process. The State of Washington last year sought bids on the development and operations of an MMIS system (Exhibit 8). Two companies were judged to be responsive, qualified bidders. Yet, after the proposals were evaluated the contractor whose proposal was \$4.5 million higher was selected.

HEW staff members objected to the selection, citing their view that each bidder was equally qualified and therefore they concluded that the award should be made to the low bidder.

HEW officials sought the opinion of the National Bureau of Standards, which confirmed the qualifications of the winning bidder, but raised questions about the fairness of the Washington State evaluation process.

In a March 26, 1976, letter (Exhibit 9) to Harold Wienberg, the Associate Administrator of SRS for Information Systems, Richard Dunlavey, a Bureau of Standards technical expert, wrote:

"For me the issue comes down to a choice between strict adherence to the rules of an RFP and selecting the vendor who will do the most good for the State Medicaid program at an acceptable cost. Although there is no question in my mind that the State altered the ground rules under which it said selection would be made, I have been persuaded that it is in the best interests of the State to accept their selection . . ."

Fragmentation

The second issue with which the Subcommittee staff is concerned is HEW approval and certification of multiple computer systems within one State.

First of all, if the Office of Information Systems approves the design, development and installation of more than one computer management system in a State, it not only unnecessarily duplicates these costs, but also such approvals represent Federal concurrence in unnecessary duplications of operating costs, for which the Federal Government pays 75 percent.

Where fragmented systems are approved, there is the very serious question as to whether information can be generated by each system that can be easily assembled into consistent and comprehensive reports on surveillance and utilization review and management and administrative reporting systems.

The congressional intent behind the MMIS program clearly calls for numbers of States to join in the use of a single MMIS system, so as to avoid duplications of development and operating costs (Exhibit 10). Clearly, therefore, any ratification of multiple systems within a State would appear to contradict the intention of Congress to consolidate numbers of States around one MMIS unit.

While it seems appropriate for the Federal Government to accommodate the needs and desires of the States, it is likewise appropriate for the States to respond to the regulations and parameters of programs through which Federal funds can flow to them. It is the Subcommittee staff's view that a recent decision by the OIS regarding the approval of a fragmented system in Texas may well be contrary to congressional intent as well as efficiency and effective Federal program management.

The Texas certification

The Texas Medicaid program is composed of two parts with separate and distinct administrations. Group Hospital Services, Inc. (GHSI), the Dallas-based Blue Cross plan for the State, pays for hospital and physician services to Medicaid beneficiaries on a pre-paid, at-risk basis. In short, it is an insuring arrangement. Approximately 60 percent of the Medicaid claims are processed through this system.

The State of Texas at Austin manages the drugs and nursing home elements of the State Medicaid program.

The Subcommittee staff has reviewed the HEW files (Exhibit 11) on the Texas request. Basically, the State of Texas sought 75 percent Federal funding for the operations of each of the two Medicaid systems—the Blue system out of Dallas and the State system in Austin. In addition, the State sought retroactively 90 percent Federal funding for the costs of developing the system based in Austin. These costs were reported to be \$2 million.

Between January 12, 1976, and January 16, 1976, a team of technicians from HEW Washington reviewed the two systems for purposes of determin-

ing whether they should be certified. The staff turned in a unanimous report that the combined Dallas and Austin systems did not meet Federal standards.

The critical element of the evaluation by HEW staff was that each system had deficiencies. The HEW team found that the required reports on surveillance and utilization review and management and administrative review could not be produced by the systems. In short, the key elements in any MMIS system as set forth in Federal regulations and guidelines did not exist.

Notwithstanding this decision, the Associate Administrator for Information Systems reviewed the materials and on April 22, 1976, sent a memorandum to the Dallas regional office certifying the State system in Austin.

This action set a precedent for fragmented systems. In the Subcommittee staff's view, the decision opens the door to approvals of certifications of fragmented systems in other States, which could now reasonably ask for separate MMIS systems for the drugs, physician, hospital and other elements of their Medicaid programs.

With systems' development costs ranging from \$300,000 to \$2 million, the Federal Government could be in store for State requests, based on the Texas precedent, for multiple systems that would result in duplications of expenditures, 90 percent of which will be funded by HEW.

Under this decision it is conceivable that the State of New York, where the Medicaid program is administered by counties, could seek separate and distinct MMIS programs for each of the State's 62 counties.

Carrying this hypothetical situation, perhaps to the point of absurdity, each county could seek individually tailored systems at possible costs of \$300,000 each. This could result in a total cost of more than \$18 million, 90 percent of which would be funded by HEW.

Then, if HEW certified each of the 62 systems, it would pay 75 percent of the costs for operating the systems, with unnecessary duplications in personnel and equipment.

It is the Subcommittee staff's view that the decision to certify the Texas State system was contrary to congressional intent.

It is conceivable that this decision by itself could perpetuate the very type of management disorganization that the MMIS program was intended to eliminate.

On July 16, 1976, William Cleaver, a technical specialist in the MMIS program, wrote a memorandum to Wienberg, the Associate Administrator for Information Systems. Cleaver discusses in this memorandum the procedure followed by Texas in seeking Federal funding and he cites violations of the regulations as well as their intent.

At the close of his memorandum, he states that "probably the most confusing part of this review has been the indeterminate role of SPAE [The Office of Systems Planning and Evaluation] in the Texas procurement, particularly that of Mr. [Charles] Cubbler," presently assigned to SPAE, an office of four advisors to the Associate Administrator for Information Systems.

The following is from Cleaver's memorandum:

"My understanding of the role of SPAE is that they perform a planning and review function in your behalf, but do not have any OPERATIONAL role in matters which fall within the functions of other Offices.

"Yet Mr. Cubbler reports that he has had a copy of the Texas RFP for six months. He also has a copy of the bid evaluation report. He had made several trips to Texas in the past few months, the last one during July 6-7. I understand that he provided some sort of assistance to Texas relative to this procurement. What kind of assistance? Was it relative to the contract, which other parts of AAIS have not yet seen? Was it medical/technical advice? Or was it relative to procurement practices? Did he represent AAIS? If so, in what capacity? Did he write a trip report of his visit in July, and is it available for review?

"With so many unknowns in hand, and with the peculiar status of OPSD and OSSD being asked to review an outdated APF and RFP, while SPAE appears to be intimately involved in the final stages of contract negotiations, it seems ludicrous to proceed until the entire Texas procurement situation has had a thorough review within AAIS.

"Please understand that I do not mean to depreciate the role Mr. Cubbler has played, nor to question your need and authority to assign him in any

way that you may have. All I am saying is that, knowing what I do (and don't) about the Texas procurement, simply commenting about the APD and RFP would have been a disservice to you."

It is clear that Mr. Cubbler played a role in the Texas process. Cleaver cites Cubbler's presence in Texas in July and a letter from the Texas Department of Public Welfare of April 23, 1976, to HEW requests Cubbler's assistance. Furthermore, the Subbler himself set forth in a memorandum prepared May 27, 1976, at the Subcommittee's request, his associations with Texas (Exhibit 12).

Cleaver states in his memorandum that Cubbler had for many months materials, relative to the OIS decision-making process, which were slow to come officially to HEW from the State of Texas. Furthermore, Cleaver says that Cubbler did not share these materials with staff responsible for evaluating the Texas system.

Objectively, the hoarding by Cubbler of materials from fellow HEW employees appears to be a rather petty bureaucratic matter. But it is the Subcommittee staff's view that this situation with regard to the role of Cubbler and Texas caused a major change in direction of the MMIS program. And it is indicative of the influence of Cubbler over the entire MMIS program which will be studied in detail at these hearings.

[The exhibits referred to in the preceding statement were marked "Exhibits No. 1 through 12 for reference." Exhibits 3, 6-11 may be found in the files of the subcommittee; exhibits 1, 2, 4, 5, and 12 follow:]

EXHIBIT No. 1

APPENDIX A

PAYMENTS TO STATES UNDER MEDICAID FOR INSTALLATION AND OPERATION OF CLAIMS PROCESSING AND INFORMATION RETRIEVAL SYSTEMS

SEC. 235. (a) Section 1903(a) of the Social Security Act is amended by redesignating paragraph (3) as paragraph (4), and by inserting after paragraph (2) the following new paragraph:

"(3) an amount equal to—

"(A) (i) 90 per centum of so much of the sums expended during such quarter as are attributable to the design, development, or installation of such mechanized claims processing and information retrieval systems as the Secretary determines are likely to provide more efficient, economical, and effective administration of the plan and to be compatible with the claims processing and information retrieval systems utilized in the administration of title XVIII, including the State's share of the cost of installing such a system to be used jointly in the administration of such State's plan and the plan of any other State approved under this title, and

"(ii) 90 per centum of so much of the sums expended during any such quarter in the fiscal year ending June 30, 1972, or the fiscal year ending June 30, 1973, as are attributable to the design, development, or installation of cost determination systems for State-owned general hospitals (except that the total amount paid to all States under this clause for either such fiscal year shall not exceed \$150,000), and

"(B) 75 per centum of so much of the sums expended during such quarter as are attributable to the operation of systems (whether such systems are operated directly by the State or by another person under a contract with the State) of the type described in subparagraph (A)

(1) (whether or not designed, developed, or installed with assistance under such subparagraph) which are approved by the Secretary and which include provision for prompt written notice to each individual who is furnished services covered by the plan of the specific services covered, the name of the person or persons furnishing the services, the date or dates on which the services were furnished, and the amount of the payment or payments made under the plan on account of the services; plus".

(b) The amendments made by subsection (a) shall apply with respect to expenditures under State plans approved under title XIX of the Social Security Act made after June 30, 1971.

EXHIBIT No. 2

[Appendices referred to in this exhibit may be found in the files of the Subcommittee.]

BACKGROUND

Title XIX of the Social Security Act provides for "Grants to States for Medical Assistance Programs" for certain low-income individuals and families. The program, popularly known as Medicaid, is administered by the States within broad Federal guidelines, and is jointly financed by the States and the Federal Government, with the Federal Government matching State expenditures at specified rates. The Federal matching rate for medical vendor payments (payments to providers for care provided to Medicaid eligibles) currently ranges from 50 percent to 78 percent, depending on the per capita income in the State, with a special matching rate of 90 percent for family planning services.

Federal matching of State expenditures for administration and training is generally at the rate of 50 percent, with the exceptions that the costs of professional medical personnel used in program administration are matched at 75 percent, and the costs of skilled nursing facility inspectors are matched at 100 percent. In addition, the Federal matching rate is set at 90 percent of a State's costs of developing automated claims processing and management information systems, and 75 percent of the costs of operating such systems.

FISCAL AGENTS

States may administer their Medicaid program directly or may contract out all or part of the administration to fiscal agents, health maintenance organizations, or health insuring organizations, with contracted functions ranging from claims processing for portions of the program to assumption of underwriting risk for the program.

Regulations

Federal regulations establish certain general requirements for States in contracting with other organizations for program administration. These regulations (45 CFR 249.82) are included as Appendix A to this report and are summarized below.

The regulations establish a number of requirements which must be met in State contracts with all contractors, specifying that the contracts must be in writing and must specify the contract period, functions of the contractor, population covered, and the amount, duration and scope of medical assistance provided. In addition, the contracts must provide for the right of State and Departmental inspection, evaluation and audit, establish provisions for extension, renegotiation and termination of the contract, provide for an appropriate record system, and specify the functions which are to be carried out under subcontracts; subcontracts must be in writing and must fulfill all appropriate requirements of the regulations.

The regulations set forth additional requirements for health insuring organizations, including that premium or subscription charges be reasonable, and not subject to renegotiation during the contract period except in specified situations. Such contracts must also provide for assumption of underwriting risk by the contractor, or must specify the apportionment of the risk. Where the contractor assumes full risk, the contract must provide that payment to the contractor constitutes full discharge of State responsibility, and cannot include payment for recoupment of losses incurred for which the contractor was at risk. The contract must specify the apportionment of any "savings"

between the contractor and the State agency, must specify whether the contractor can obtain reinsurance, and must specify the actuarial basis for premium computation.

Additional requirements for contracts with fiscal agents require that the contracts include termination procedures requiring the contractor to supply the materials necessary to enable the State to continue program operations. If proprietary rights are claimed, the contract must provide that the contractor or subcontractor offer to the State the purchase, lease, or buying the use of such material. Contracts must also establish the amounts and basis of payment to the contractors, and must specify that reimbursement to providers by the contractor meet the applicable requirements.

The regulations specify that for purposes of receiving Federal financial participation, the contract must meet the procurement requirements under 45 CFR 74 (Appendix B) and must require that expenditures in excess of \$100,000 be approved by the Regional Commissioner.

Current information

Thirty-seven States and jurisdictions currently contract out some portion of their Medicaid program administration. Appendix C lists the States and the names of their fiscal agent and subcontractors, if applicable.

Information on State-fiscal agent relationships was the subject of a survey by the Medical Services Administration during fiscal year 1975. Appendix D presents the tabulated results of that survey, and the material is summarized below.

The first section presents information on functions performed by fiscal agents. The information is summarized as follows:

Function:	<i>Number of States or jurisdictions in which fiscal agent performs the function</i>
Recipient eligibility:	
File development.....	4
File maintenance.....	15
Billing forms:	
Development and/or printing.....	24
Actual supply and distribution to vendors.....	26
Audit of claims:	
Recipient eligibility verification.....	26
Provider eligibility verification.....	28
Reasonable charge determination.....	29
Application of resources.....	19
Disbursement of payments to providers.....	26
Report development:	
Preparation of Federal reports.....	10
Preparation of State reports other than S/UR.....	20
Preparation of S/UR reports.....	15
Provider liaison:	
Preparation or maintenance of provider manuals.....	22
Interpretation of program to providers.....	26
Adjudication of disputed claims.....	22
Routine use of field staff to contact providers.....	22
Utilization review:	
Prepayment audit of claims.....	29
Postpayment audit of claims.....	21
Postpayment audit including use of profiles and/or followup field visits.....	19
Medicaid-medicare relationship:	
Establishment of medicaid liability.....	22
Maintains "Buy-in" file for title XVIII, part B.....	8
Maintains "Buy-in" file for title XVIII, part A.....	7
Consultative services.....	15

The second section of the report details information about the basis on which the fiscal agents are paid. The results are summarized as follows:

	<i>Number of States and/or jurisdictions using as basis for payment</i>
Basis of payment for performance of administrative services:	
Same as medicare.....	2
No profit, no loss, or actual cost.....	11
Fixed rate per claim.....	10
Specified percentage of medical service expenditures.....	4
Differential rate related to volume.....	2
Cost plus incentive fee.....	0
Other.....	5

The survey also provides information on the basis for the establishment of the contract. The results are summarized as follows:

	<i>Number of States and/or jurisdictions using as basis for establishment of contracts</i>
Basis for establishment of the contract:	
Competitive bidding.....	14
Negotiations with only 1 fiscal agent.....	14
Legislative requirement.....	4
Other.....	3

In addition to the above mentioned materials, the survey collected information on fiscal agent claims processing for specified services in the States. The tabulated results are presented in Appendix E.

MECHANIZED CLAIMS PROCESSING AND INFORMATION RETRIEVAL SYSTEMS

Section 235 of the Social Security Amendments of 1972 authorized 90 percent Federal matching to States for the costs of design, development, and installation of mechanized claims processing and information retrieval systems, and 75 percent for the costs of operating such systems. The Report of the House Committee on Ways and Means summarized the proposal as follows.¹

Your committee proposes to aid the States in meeting their responsibilities by authorizing 90 percent Federal matching for the cost necessary to design, develop, and install mechanized claims processing and information retrieval systems deemed necessary by the Secretary. The Federal Government acknowledges the obligation to provide technical assistance, including the development of model systems, to each State operating a Medicaid program. It is expected that this financial and technical support will aid the States in realizing efficient and effective administration of the program, and that it will reduce program costs.

Your committee also recognizes the importance of this activity by providing in the bill for Federal matching funds at the 75 percent rate for the operation of the system approved by the Secretary.

Regulations

Federal regulations establish certain requirements which States must meet in order to receive increased Federal matching for mechanized claims processing and information retrieval systems (45 CFR 250.90). The regulations are included in Appendix F, and summarized below.

The regulations provide that the 90 percent matching is available for systems likely to afford more efficient, economical, and effective administration of the program. Systems must receive approval of the Social and Reha-

¹ U.S. Congress. House. Committee on Ways and Means. Social Security Amendments of 1971; Report on H.R. 1. Washington, U.S. Govt. Print. Off., 1971. (92d Cong., 1st sess. House, Report No. 92-231) p. 103.

bilitation Service, with approval based on the following criteria. The system must meet criteria established in guidelines, be compatible with the Title XVIII systems, and support the data requirements of PSRO's. The State agency must agree in writing that the State must have all ownership rights in software or modifications, that methods for properly charging costs are in accordance with SRS Procurement Regulations, that the system funded will be used for a period of time consistent with the planning document, or sufficient to justify the funds expended, and that information in the system will be safeguarded.

The regulatory requirements established for 75 percent Federal participation in the costs of operating such systems include some of the same requirements established for 90 percent matching, as well as additional ones. The system must meet criteria established in guidelines, be compatible with the Title XVIII systems, and support the data requirements of PSRO's. The State agency must agree in writing that methods for properly charging costs are in accordance with SRS Procurement Regulations, that the system funded will be used for a period of time consistent with the planning document, or sufficient to justify the funds expended, and that information in the system will be safeguarded. The system and its subsystems must operate on a continuing basis, must provide both patient and provider profiles for utilization review and management purposes, and must provide written explanations of benefits to program recipients. Access to all aspects of the system must be made available to the SRS.

Current information

(Information on States with systems currently in place, in various stages of development, and the names of any contractors and subcontractors is available in SRS and is included among the questions to be asked of the Central Office.)

EXHIBIT No. 4

UNITED STATES SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
Washington, D.C., September 20, 1976.

HON. ROBERT FULTON,
Commissioner, Social and Rehabilitation Service, Department of Health, Education and Welfare, Washington, D.C.

DEAR MR. FULTON: As part of its preliminary inquiry into the Medicaid Management Information Systems program, we have had some difficulty in obtaining exact amounts of Federal expenditures both for systems design, development and installations, for which the Federal Government pays 90 percent of the costs, and the operating costs of these systems, once they are certified, for which the Federal Government pays 75 percent of the costs.

The figures reported to the Subcommittee by Associate Administrator for Information Systems (AAIS) do not include additional amounts of Federal funds flowing to these States, which have either added new elements to their initial contracts or have experienced costs overruns.

We would be grateful if you could provide the Subcommittee by the close of business on Friday, September 24, 1976, the reasons why the AAIS does not have these figures, where this data can be found, and when the Subcommittee can have the information.

In those States where certified systems are operational the Federal Government is funding 75 percent of the cost of operations. The AAIS referred the Subcommittee to the Associate Administrator for Management for information on just how much the Federal Government is paying in increased costs (over the 50 percent base) attributable to the system certification. We talked to employees in your Management unit and were told that these figures are available in the States, which submit to the regional offices, requests for 75 percent matching funds for MMIS, but which are comingled with requests for 75 percent matching funds allowed in other programs.

We want to assure ourselves that the information we received from your Management is correct. Therefore, in your response to this letter, please tell us if your Management unit has for each of the States which has operational MMIS systems quarterly or annual reports on increased costs attributable to the 75 percent matching. If the Management unit does not have this information, please explain where this information can be found and when the Subcommittee will receive it from you.

We appreciate your continued cooperation with the Subcommittee as well as the assistance provided Subcommittee staff by the Associate Administrator for Information Systems.

Sincerely yours,

SAM NUNN,
Acting Chairman.

EXHIBIT No. 5

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
Washington, D.C., September 24, 1976.

Hon. SAM NUNN,
*Acting Chairman, Senate Subcommittee on Investigations,
U.S. Senate, Washington, D.C.*

DEAR SENATOR NUNN: This is in response to your September 20, 1976, letter about expenditures for the Medicaid Management Information System (MMIS).

The Associate Administrator for Information Systems could not furnish you more information than he did because such information is not available in Social and Rehabilitation Service (SRS) records. Let me explain why.

States report expenditures for Administration of the Medical Assistance Program on the SRS-OA-41 Quarterly Statement of Expenditures. The report does not provide a laundry-list of expenditure classification, e.g., MMIS, family planning, skilled medical professional, etc. . . . The report requires only that expenditures be reported at the separate Federal matching rates, i.e., 100, 90, 75, and 50 percent. (This is consistent with OMB reporting requirements.)

Because of these reporting requirements, SRS can not determine from the expenditures reported and claimed by a State the MMIS expenditure information you requested. What you want must be obtained from State records by an analysis of such records which support a State's quarterly statement of expenditures. This analysis would have to encompass all quarters where expenditures at either the 90% or 75% rate were claimed by each of the 20 states that have been approved for MMIS funding. This would require significant travel expenditures and a redirection of certain regional work plans.

Messrs. Howard Feldman and David Vienna of your sub-committee staff advised us that, in view of the foregoing, you did not want us to visit the states and do such analyses.

Sincerely,

ROBERT FULTON, *Administrator.*

EXHIBIT No. 12

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL AND REHABILITATION SERVICE,
May 27, 1976.

Memorandum to: Mr. Harold F. Wienberg, Associate Administrator for Information Systems.

From: Charles A. Cubbler, Office of Information Systems.

Subject: Your Request for Information.

Reference your request for information, focused specifically on the States of Texas, West Virginia, and Arkansas, the following is submitted:

Texas

1962—I was directed by Dr. Thomas McKneely, Medical Consultant to the Bureau of Public Assistance to assist the State Agency and BO/BS in Texas

in the development of the original prepaid health services contract for MMA (later Medicaid) as provided for in State Law.

1968-69—I was directed by Warren Whitted, Confidential Assistant to the Commissioner, MSA to provide extensive technical assistance during 1968-69-70 to the Texas PWA in the rewrite of the Texas BC/BS Medicaid contract. Contract was approved by State Attorney General and HEW General Counsel in 1970.

March 4-7, 1975—Organized for BQA/PSRO/OPSR staff of HEW an on-site briefing of the Texas Admission and Review Program (TARP) developed under the sponsorship of the Texas Medicaid Agency. Intercession was required because TARP was reputed to be superior to PSRO's in philosophy, operation, and program savings, and the Texas Agency did not wish to have its effectiveness abrogated by personnel from an unfamiliar agency. As a long-time technical advisor in the development of the Texas Medicaid Program, I was asked by Mr. Harberson, the SRS/PSRO Coordinator to persuade the Agency to share its technical expertise with the PSRO/OPSR staff. The Agency consented with the proviso that I accompany the group and provide clarification on differing points of view.

During this visit on TARP, Agency staff asked if a review for certification for MMIS could be accomplished. I advised them to submit an APD and a request for technical assistance through channels to AAIS/SRS. This they did and James Cole provided the appropriate technical assistance. The Agency followed through and prepared its APD. It then requested certification early this year. Certification of the State's part of the system has been accomplished.

1961-76—At various times over the years, I have had to answer many questions over the telephone regarding Medicaid regulations, funding, policy, procedures, and the technical ramifications of medical assistance administration.

I have not, however, participated in any contractor negotiations other than the BC/BS prepaid contracts of 1962 and 1970. Contracts which under Texas Law at that time had to be met with a Texas based non-profit organization. Sometime since 1973 the law has been changed.

February 6, 1976—In addition to the above official activities, early this year, on February 6, while on official leave, I shared a program on a personal basis with Senator Thomas McIntire of New Hampshire and Dr. Douglas Harland of the Office of the Secretary, HEW on the occasion of the opening of a new hospital in San Antonio, Texas—the Administrator of which is a fellow alumnus of the Hospital Administration course of Baylor University.

April 28 to May 1, 1976—At the request of the State Agency, provided consultation and technical assistance by reviewing data processing standards and data processing management proposals. In addition, I provide consultation regarding policy as it relates to the production of HEW regulations.

West Virginia

August 24-30, 1974—I represented J. J. Delaney, Acting AAIS at the Agency's request at West Virginia bidders conference along with Cope Reihl, the OSSO Project Officer and John Gallagher, Regional Representative. Answered technical questions. I was not involved directly or indirectly in the selection of the winning contractor. Concurred in the contract approval process as the Acting Director of Medicaid Systems—to Director of OSSO, James Trainor.

Reviewed such information relating to the technical content of the proposed MMIS as was referred to me by Cope Reihl. Concurred in the approval of the Addendum to West Virginia's APD for its MMIS to include, at the State's request, a quality/quantity/cost control module for long term care which would insure compliance with all of the pertinent requirements of Sec. 1903 (g).

This project is the product of the State's Chief Medical Consultant, Dr. James Mangus' development and operation. Supported this project and consider it superior in terms of cost/effectiveness to others currently in development, including the Utah project.

Arkansas

I have had no contact relating to this State other than to coordinate on the changes recommended by Mr. Rosene (then a member of my staff) to the HAS/Ark. contract.

Senator NUNN. Senator Talmadge has a couple of hearings that he has to go to. I will defer to him at this point and let him pursue the questions as he sees fit.

Senator TALMADGE. Thank you, Mr. Chairman.

Mr. Vienna, your report was shockingly in the extreme, but I must say I am not surprised from some of the things we had learned from other sources. In May 1975, as chairman of the Subcommittee on Health of the Committee on Finance, I requested the Comptroller General, among other matters, to undertake a broad review of HEW and State policies and procedures in awarding insurance-type contracts under medicaid.

During the course of your investigation, did you encounter anything unusual relating to GAO's work on that Finance Committee request?

Mr. VIENNA. Yes.

Senator TALMADGE. What was it?

Mr. VIENNA. We had parallel inquiries which was one good reason for the coordination between our committees. We found during the course of our investigation that a company hired a private investigator to determine—among other matters—who was talking to an employee of the General Accounting Office attached to the review of the company that was commissioned by your subcommittee.

That private investigator said that in an effort to find out who was talking to this General Accounting Office auditor, he wiretapped the telephones of two company employees on December 8, 1975, and on December 9, 1975.

Senator TALMADGE. What company was that?

Mr. VIENNA. There were two companies, Health Application Systems (HAS), which is a division of the Bergen Brunswig Corp. of Los Angeles. Health Applications System has a management and administrative services contract with Paid Prescriptions, Inc., a non-profit corporation. Both HAS and Paid were involved.

Senator TALMADGE. Did they use the same private investigator?

Mr. VIENNA. Yes, sir.

Senator TALMADGE. Did you get a copy of the wiretap?

Mr. VIENNA. Yes.

Senator TALMADGE. Has it been referred to the Federal authorities for prosecution?

Mr. VIENNA. No, sir. I intend to bring it up at this hearing for disposition by the subcommittee.

Senator TALMADGE. Thank you, very much, Mr. Chairman.

Senator NUNN. I might add it is the intention of the subcommittee to turn that over to law enforcement authorities.

Mr. Vienna, the exhibit relating to this particular matter will be put in the record, without objection, as a sealed exhibit.

[The document referred to was marked "Exhibit No. 13" for reference, as a sealed exhibit, and will be retained in the confidential files of the subcommittee.]

Senator NUNN. Mr. Vienna, your detailed statement indicates various defects in the MMIS program. Because of the many upcoming contracts, States will be certified by HEW within the next few months. Would you describe the number of States that are expected to ask for certification and the dollars involved?

[At this point, Senator Percy entered the hearing room.]

Mr. VIENNA. Senator, HEW, expects to certify or at least rule on certification in the next 6 months on 9 States and on an additional 6 States within the next 12 months. There are a total of 15 States. There are 11 States certified to date, 10 of which are receiving 75 percent funding. California is not.

We have an interesting opportunity here. We see a program starting to go awry at its very inception. There are 39 States left to be certified if they all apply. So perhaps this oversight will result in a return of the program to its original congressional intent and perhaps some better management.

Senator NUNN. How much money is involved? Do you have dollar figures of those that will be certified?

Mr. VIENNA. No; we don't, Senator. That is very difficult. One of the exhibits in the file—

Senator NUNN. I believe on page 3 of your detailed statement, you go into some of that. Could you summarize that for us?

Mr. VIENNA. The figures run from \$300,000 for development costs up to \$2 million. From what we have learned in our interviews \$2 million is just too high a price to pay for design, development, and installation of MMIS systems.

This program was started on the basis of prototype design commissioned by the Department of Health, Education and Welfare for the State of Ohio. The intention of that prototype was to have it modified to fit the various States peculiarities.

It appears, though we don't know this, that there are systems being developed that are basically reinventing the wheel, developed originally in Ohio.

Senator NUNN. The best summary you have is on page 3 of your statement?

Mr. VIENNA. Yes, sir, on that table.

Senator NUNN. Yes.

Mr. VIENNA. We just don't know the dollar figures, nor does HEW.

Senator NUNN. At this point, I want to put in the record a letter that I wrote to Mr. Robert Fulton, Commissioner, Social and Rehabilitation Service, Department of HEW, on September 20, as well as a copy of a reply that he sent to me on September 24, relating to these cost figures, the basic summary of it is that HEW really cannot give us an answer on the questions raised as to the amount of money that has been invested. [See exhibits 4 and 5 on pp. 19-20.]

Mr. VIENNA. Senator, I find it ironic that an HEW agency responsible for helping States manage their medicaid programs doesn't even have the numbers it needs to manage its own agency.

Senator NUNN. I find that shocking and it is certainly not the way we intend in Congress for these programs to be run.

Mr. Vienna, one thing that concerns me is the possible duplication of programs within a State funded by Federal dollars. When this

happens, the taxpayers may pay two or three times to process claims which could be handled by one system. Has it happened in the past? Is there a potential for this to happen in the future?

Mr. VIENNA. This point is raised in Texas. I think the issue is just starting to come up in the program. It is one of the reasons why I think these hearings are timely. I use in our staff statement the example of New York, which I believe has 62 counties. It is possible in New York, with county-based medicaid program administration, that there could be 62 different MMIS programs which could cost anywhere from \$300,000, perhaps to \$2 million on the outside.

I doubt if it would go that high, but 62 counties could possibly each have MMIS systems. Then it is possible to expand from there. It is possible for each county in New York—this is absurd, but I want to show you how far it can go—to have a medicaid management information system for drugs, for nursing homes, for physicians, hospitals, and on and on.

If the Texas decision of the Department of HEW is a precedent, and we think it appears to be, then extraordinary and unnecessary duplications in development costs are in the offing. The States have nothing to lose.

Senator NUNN. You are saying the States have no real incentive to avoid duplication and it is going to be up to the Federal Government to do that? Texas is the example of exactly the wrong direction?

Mr. VIENNA. New York can get, for example, if it wants—it has not done this—62 MMIS systems at 10 cents on the dollar, 10 cents of its own money.

Senator NUNN. At this stage, Senator Percy may have a question, but he has not had an opportunity to have an opening statement. We will be glad to defer to you.

OPENING STATEMENT OF SENATOR PERCY

Senator PERCY. Mr. Chairman, this is the second time in as many months that I have participated in a hearing involving the maladministration of the Federal medicaid program. Just a few weeks ago, the Subcommittee on Long-Term Care, ably chaired by Senator Frank Moss of Utah, and on which I serve as the ranking Republican, learned how medicaid mills rip off millions of Federal dollars by treating people for illnesses they do not have and prescribing costly drugs that they do not need.

I know the public always asks when you have investigations such as we have had in New York on nursing homes, what ever happens? I can certainly report something that has happened. From our nursing home investigations in New York, indictments were brought, there were convictions, and people are serving prison terms right now.

It is not customary for a Senator to ask that an investigation of the Federal Government be brought to his own State, but several years ago, I became convinced that Illinois was just shot through with fraud. I suspected the possibility of syndicate crime moving into the health field. I became so concerned that I asked the Senate Finance Committee to conduct investigations. Of course, this subcommittee also has carried on work in the health care field.

For anyone who is cynical that hearings do not lead to something, I think we just have to refer to this morning's Chicago Tribune, where headline reads "United States indicts 16 here in medicaid swindle." Here is a case that could involve a \$20 million fraud against the Federal Government. Sam Skinner, U.S. Attorney, and the grand jury, indicted 16 people yesterday in Chicago.

I think these hearings demonstrated that the Department of Health, Education and Welfare is a long way from controlling the fraud and abuse of the medicaid program that is so prevalent throughout the United States. This is not to say that HEW is unaware of this problem. They are certainly aware of it. Secretary Mathews is deeply concerned about it and wants to move aggressively in this area.

HEW has developed a program to encourage States to detect fraud and abuse which helps to finance a computerized system for identifying patterns in wrongful charges and needless services. This program is known as the medicaid management information systems. HEW is authorized to pay up to 90 percent of the cost of developing a system in each State. Many States are contracting with private computer companies to develop worthwhile programs. They are late; but better late than never.

While I believe it is desirable for the Government to contract with private industry to perform such services, the relationship between Federal officials and private companies must be carefully monitored. Yet, as we will learn today, there are serious questions concerning the operations and integrity of the present office within HEW which controls the award of these computer contracts to private companies.

It would be the ultimate absurdity to have an office within HEW created to stamp out fraud and abuse which is itself flawed at the core because of an unchecked integrity problem.

Congress has created these health assistance programs and placed the responsibility for their implementation in the hands of a Federal agency that is having continuing difficulty in controlling abuses. Bringing these problems to the attention of HEW is, of course, part of our responsibility in the Senate.

However, we also have a legislative mandate to correct what an agency cannot or will not rectify. That is the responsibility given to us by the Constitution which we are bound and determined to carry out.

Mr. Chairman, our sponsorship, with Senator Chiles, of a bill creating an Inspector General's Office in HEW is a drastic but necessary first step in focusing additional agency attention on fraud and abuse. If these hearings suggest that still further legislative remedies are in order, I pledge my assistance to you in working toward that end.

The bill creating an Inspector General's Office in HEW has now passed both the House and Senate.

I think the public can be assured that those engaged in alleged criminal activities are being pursued aggressively by the U.S. Attorneys across the country, by grand juries, by the Senate, and hopefully now by HEW.

We are bound and determined to help HEW reorganize itself so that it audits these multibillion dollar programs. Otherwise, I see no

possibility for having national health insurance in this country. We must find a way to monitor flagrant fraud and abuse.

I would like to ask one question, Mr. Chairman. Mr. Vienna, you have been working on problems in HEW for more than 2 years now. Has the agency improved its administration of medicaid or in your judgment, it is stagnant or even going downhill in this regard?

Mr. VIENNA. Senator, I am not a very objective person in that regard. I think they are trying. I think the medicaid management information systems program points the agency in a fine direction. Certainly, there have been attempts by Commissioner Wiekell of the Medical Services Administration to bring in investigators.

But I will tell you something I heard. I don't know if it is true. The investigators hired have no investigative experience. They are basically program people. I think you know, working with the committees that you are on, that investigators provide different kind of staff work. If you don't have people with experience in that, you get program oversight which is different from an investigation.

One of the most curious things is the continuing work of the HEW Audit Agency which turns up time and time and time again the extraordinary audit exceptions, money that shouldn't have been spent. Yet, we find very, very weak, limited and minor efforts to collect the money.

Audits are ignored. The agency has within itself the ability to manage itself well, but it seems to ignore it. I think it is too big.

Senator NUNN. I might add on that point, there is a bill pending in the Senate now that will create that Inspector General that we sponsored, Senator Percy. That bill is placed on the calendar. I think we will have an opportunity to pass on it in the next few days.

On the House side, they are making substantial progress on another bill and we will have another opportunity on the fraud bill that Senator Talmadge alluded to. The House may put an Inspector General on that. We are working on it in four different directions and, hopefully, we will get a bill together with that provision in it that will become law this year.

The amazing thing to me is that the Agriculture Department with an expenditure, maybe one-tenth of overall HEW expenditures has many times more inspectors, with much higher qualifications than does HEW, administering a budget of about \$130 billion.

So I think one of the most crucial items in terms of efficiency in Government pending before the Congress right now is this Inspector General's bill that will set up an Office of the Inspector General to look for fraud, abuse, in effectiveness and inefficiency in HEW.

We have been working on that a long time. I hope we can see it through to fruition in this session.

Mr. FELDMAN. Mr. Chairman, could I just state that we have tried to work with HEW and their various agencies. As you know, after our guaranteed student loan hearings which looked into the Office of Education, they drafted John Walsh, one of our senior investigators, to become head of their Office of Investigations. He is a good one.

I would like to state for the record here that I hope after this hearing, they don't draft David Vienna because I am getting short of personnel.

Senator NUNN. I agree with you on that.

One question that we did not go into a minute ago, you mentioned this beginning example of the possible duplication which could lead to the colossal waste of expenditure based on the Texas case. Your full statement on page 9 goes into some detail on that particular point and some of the indications that all was not correct in that particular situation.

I think it would be helpful, before we get to our next witness, if you would begin on page 9, about the middle of the page, and begin reading where it says "on July 16, 1976," because I think this is very important background that should be in the record, not only in the record, but should be read aloud. If you could go through page 10 on that particular situation, I think it would be helpful.

Mr. VIENNA. This memorandum was written by William Cleaver, technical specialist in the MMIS program, in order to review what happened with regard to the Texas situation. He addressed the memo to Harold Wienberg, associate administrator for information systems.

Cleaver discusses in this memorandum the procedures followed by Texas in seeking Federal funding and he cites violations of the regulations as well as their intent. At the close of this memorandum, he states that, "Probably the most confusing part of this review has been the indeterminate role of SPAE, The Office of Systems Planning and Evaluation, in the Texas procurement, particularly that of Mr. Cubbler," presently assigned to SPAE, an office of four advisors to the associate administrator for information systems.

The following is from Cleaver's memorandum:

My understanding of the role of SPAE is that they perform a planning and review function in your behalf, but do not have any OPERATIONAL role in matters which fall within the functions of other Offices.

Yet Mr. Cubbler reports that he has had a copy of the Texas RFP for six months. He also has a copy of the bid evaluation report. He has made several trips to Texas in the past few months, the last one during July 6-7. I understand that he provided some sort of assistance to Texas relative to this procurement. What kind of assistance?

Was it relative to the contract, which other parts of AAIS have not yet seen? Was it medical/technical advice? Or was it relative to procurement practices? Did he represent AAIS? If so, in what capacity? Did he write a trip report of his visit in July, and is it available for review?

With so many unknowns in hand, and with the peculiar status of OPSD and OSSO being asked to review an outdated APF and RFP, while SPAE appears to be intimately involved in the final stages of contract negotiations, it seems ludicrous to proceed until the entire Texas procurement situation has had a thorough review within AAIS.

Please understand that I do not mean to depreciate the role Mr. Cubbler has played, nor to question your need and authority to assign him in any way that you may have. All I am saying is, that knowing what I do, and don't, about the Texas procurement, simply commenting about the APD and RFP would have been a disservice to you.

This is a very interesting case. I think it goes to the issue of management. Mr. Cleaver is one of the people who is supposed to know what is going on. He is the technical specialist. He doesn't know.

You have another man in this agency, traveling around the country, apparently dealing directly with the administrator of the office with the appropriate staff people, without any knowledge of what is happening. Indeed, according to this memo, they did not have access

to documents which one employee of the office had. That is rather important. Our subcommittee couldn't function if we operated that way, sir.

Senator NUNN. Why don't you go ahead and finish reading?

Mr. VIENNA. It is clear that Mr. Cubbler played a role in the Texas process. Mr. Cleaver cites Cubbler's presence in Texas in July and a letter from the Texas Department of Public Welfare of April 23, 1976, to HEW Cubbler's assistance.

Furthermore, Cubbler himself set forth in a memorandum prepared May 27, 1976, at the subcommittee's request, his associations with Texas. Exhibit 12.

Cleaver states in his memorandum that Cubbler had for many months materials, relative to the OIS decisionmaking process, which were slow to come officially to HEW from the State of Texas. Furthermore, Cleaver says that Cubbler did not share these materials with staff responsible for evaluating the Texas system.

Objectively, the hoarding by Cubbler of materials from fellow HEW employees appears to be a rather petty bureaucratic matter; but it is the subcommittee staff's view that this situation with regard to the role of Cubbler and Texas caused a major change in direction of the MMIS program. Also, it is indicative of the influence of Cubbler over the entire MMIS program which will be studied in detail at these hearings.

Senator NUNN. Thank you, very much, Mr. Vienna.

Our next witness is Mr. Francis J. Melly, president of FMS Management Services, Inc., a New York computer program design firm which has contracts with the States of West Virginia and Maryland for the development of Medicaid Management Information Systems. FMS is the subcontractor to The Computer Company of Richmond, Virginia, which is designing the MMIS system for Arizona.

Mr. Melly, would you please stand and let me administer the oath? Do you swear the testimony you will give today before this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MELLY. I do.

TESTIMONY OF FRANCIS J. MELLY, PRESIDENT, FMS MANAGEMENT SERVICES, INC., NEW YORK CITY, ACCOMPANIED BY EDWARD O'CONNELL, COUNSEL, AND WALTER J. BONNER, COUNSEL

Senator NUNN. Do you have an attorney with you here today?

Mr. O'CONNELL. Mr. Melly is represented by myself, Edward O'Connell, and Mr. Walter J. Bonner.

Senator NUNN. Thank you.

Mr. BONNER. Good morning, Mr. Chairman.

Senator NUNN. Good morning. Thank you for coming. We appreciate your being here.

I want to make certain for the record, that you are advised of all of your rights before this subcommittee. First, you have the right not to provide any testimony or information that may tend to incriminate you. If you do so testify, anything you say here may be used against you in any other legal proceeding.

Second, you have the right to consult with an attorney prior to answering any question or questions. You have your attorneys here with you. You are certainly allowed to consult with them if you so choose before answering questions.

Third, under the rules of procedure for the Permanent Subcommittee on Investigations, your attorney may be present during your testimony and you have afforded yourself of that right today. In that regard, the record should reflect that Mr. Melly does have two attorneys with him, who have stated their names.

As I have indicated, in addition to your rights as a witness, you also have an obligation while testifying before this subcommittee. You have sworn to testify truthfully. If you do so, you are obligated to provide truthful responses so as not to subject yourself to the laws of penalty regarding perjury.

Mr. Melly, you understand all of those rights?

Mr. MELLY. Yes, I do, Senator.

Senator NUNN. Mr. Melly, for the record, would you please state and spell your name and provide us with your home and business address?

Mr. MELLY. My name is Francis J. Melly, M-e-l-l-y. My home address is 49 Undercliff Terrace, Kinnelon, K-i-n-n-e-l-o-n, N.J. 04405. The business address is Six East 45th Street, New York City, N.Y. 10017.

Senator NUNN. Would you also briefly, for the record, describe your personal background in the computer business?

Mr. MELLY. My major experience in the computer industry was gained as a director of MIS, which is Management Information Systems, for the Xerox Corp. in Rochester, N.Y. I spent approximately 7 years with them and then joined Booz, Allen & Hamilton, a management consulting firm. My experience with Booz, Allen & Hamilton was to provide computer consulting advice to business corporations throughout the country.

After Booz, Allen & Hamilton, I joined Cambridge Computer Corp. for approximately 2 years. I joined Fry Management Associates, which was a subsidiary of Management Consulting Subsidiary of ARA Food Services Corp. based in Philadelphia. This is a very small consulting group doing approximately \$3 million worth of business. ARA decided to divest themselves of the organization. Hence, FMS was really Fry Management Systems.

Senator NUNN. What is your present position now?

Mr. MELLY. I am president, chief executive officer for FMS.

Senator NUNN. FMS?

Mr. MELLY. Management Services, Inc.

Senator NUNN. What size firm is that? How much business does it do?

Mr. MELLY. We did approximately \$300,000 last year.

Senator NUNN. How many people do you have in the firm, approximately?

Mr. MELLY. It varies from 15 to 22.

Senator NUNN. Is that firm associated with or a subsidiary of any larger company or is this strictly an independent company?

Mr. MELLY. It is strictly independent.

Senator NUNN. You formed that after you left?

Mr. MELLY. Actually, it was a continuation of a division of Fry. What we did is took over the existing contracts and supplied service to those contracts.

Senator NUNN. Does Fry still exist as a company?

Mr. MELLY. No. That has been dissolved.

Senator NUNN. Mr. Melly, between June 26, 1974, and September 8, 1975, you wrote a total of \$4,670.28 in checks against the FMS Management Services account at Manufacturers Hanover Trust Co. in New York City to D.C. Chambless. Is that correct?

Mr. MELLY. That is correct.

Senator NUNN. There were a total of five checks, I believe.

Mr. MELLY. Yes.

Senator NUNN. I would like to ask the chief clerk of the subcommittee to show you copies of the checks and check stubs which you turned over to our subcommittee in response to our subpoena. Go ahead and let your attorneys examine them. We are not going to rush you on any of these questions. You can take a look at them.

I will ask you to verify if these are the actual copies of the original checks and stubs. Do those appear to be the actual copies of the checks?

Mr. MELLY. Yes, Senator.

Senator NUNN. And stubs?

Mr. MELLY. Yes, sir.

Senator NUNN. Mr. Melly, who is D. C. Chambless? Do you know a D. C. Chambless, the recipient of the checks, the payee?

Mr. MELLY. Initially, I was under the impression that D. C. Chambless was the name of a company.

Senator NUNN. When did you first hear of this name?

Mr. MELLY. Shortly after FMS Management Services, Inc., was formed, I came to Washington, D.C., approximately in March 1974. Mr. Richard Ney Associates was representing us. He had been previously representing Fry. Then continued to represent FMS after it had been formed.

About 2 months after this, I was informed by Mr. Ney that I had met Mr. Charles Cubbler in his trip to Washington and had discussed the capabilities of FMS and the fact we were interested in doing business in the health care administration field.

Senator NUNN. At that time, did you know who Mr. Cubbler was?

Mr. MELLY. I knew he had a position in HEW. I didn't know exactly what the position was.

Senator NUNN. You knew he worked for HEW?

Mr. MELLY. Yes, in SRS.

Senator NUNN. Go ahead.

Mr. MELLY. I received a call approximately a month later from Mr. Ney indicating that Mr. Cubbler had indicated that I and my firm which could really use some assistance in tutoring on the background in the Federal regulations covering medicaid; that Mr. Cubbler would be willing to do this on a weekend or whatever time would be convenient for us at night.

The most convenient time, we found, for our people was to do it on weekends since all of us were pretty much tied up and this is the only time Mr. Cubbler would be available. Sometime early in June 1974,

Mr. Cubbler came to New York, conducted an educational program for us over a 2-day period, Saturday and Sunday.

Senator NUNN. Getting back to the D.C. Chambless, you say when you first heard this name, you thought it was a company?

Mr. MELLY. Yes.

Senator NUNN. When did you find out it was not a company?

Mr. MELLY. I found out this during, immediately the end of 1975, when we were working on the Maryland proposal.

Senator NUNN. After you had written several checks?

Mr. MELLY. Yes.

Senator NUNN. I believe you had a check dated June 26, one October 8, both 1974; one dated January 3, 1975; one dated June 1, 1975; one dated September 8, 1975. When did you learn who D. C. Chambless was, approximately?

Mr. MELLY. During June or May 1975, we were working on the CHAMPUS proposal, Mr. Cubbler was in New York working on the proposal with us. I had asked him at that point as to what Chambless stood for. He said it was his wife's maiden name.

Later on, in August 1975, we were working on the Maryland proposal, again Mr. Cubbler was in New York working on that. He indicated to me D. C. Chambless was just his wife's name.

Senator NUNN. Could you discuss each check with us? Do you have a record of the amounts? What is your recollection of what those checks were for?

Mr. MELLY. Yes. The June 26, 1974 check in the amount of \$583.28 was for this 2-day seminar held in New York City in early June.

Senator NUNN. That check was made payable to D. C. Chambless?

Mr. MELLY. Yes, sir.

Senator NUNN. At that stage, you knew the check was given to Mr. Cubbler. Is that right?

Mr. MELLY. It was mailed to Mr. Cubbler. Excuse me, it was mailed to a bank account.

Senator NUNN. To a bank account?

Mr. MELLY. Yes.

Senator NUNN. Where was that bank, do you recall? Was it here in Washington?

Mr. MELLY. Yes, sir. He had given me the address and the account number.

Senator NUNN. Mr. Cubbler had given you the address and account number and this check was for services rendered by him?

Mr. MELLY. Yes.

Senator NUNN. That was for the 2-day seminar of FMS in New York?

Mr. MELLY. Yes.

Senator NUNN. Is that correct, that \$500 of that was for fee and \$83.28 was for expenses?

Mr. MELLY. That is correct.

Senator NUNN. The next check, October 8, 1974, could you give us the amount of that and what this was in payment for?

Mr. MELLY. The October 8, 1974, for \$1,087, was \$1,000 for which covered the professional fees, partial professional fees for preparation of the West Virginia proposal, for his work on it. The \$87 cov-

tered the expenses of the flying messenger service back and forth between Washington.

Senator NUNN. Were those trips from Washington to New York, were they on the weekends, at night, during the day or week?

Mr. MELLY. These were not trips. The \$87, what we were doing was sending sections of the proposal as they were completed to Mr. Cubbler in Washington. Then he would work on it, send them by flying messenger service.

Senator NUNN. This was for materials delivered by mail and not transportation for persons?

Mr. MELLY. That is correct.

Senator NUNN. At this time, did you know Mr. Cubbler was with HEW during all of this period?

Mr. MELLY. Yes, I did.

Senator NUNN. Did you know at that time what his exact job was in HEW?

Mr. MELLY. I believe he just had been appointed an acting director of medicaid systems.

Senator NUNN. What does this position have to do with your particular company?

Mr. MELLY. I have never been really able to quite understand the specific responsibilities of the various groups. I am familiar with two of them, which is medicaid Systems and State systems operations.

Senator NUNN. Let's go ahead and identify all of these checks. The check dated January 3, 1975, if you could give us the amount of that?

Mr. MELLY. January 3, 1975, check in the amount of \$1,000 was the final payment on his work on the West Virginia proposal.

Senator NUNN. His, you mean Mr. Cubbler's?

Mr. MELLY. Mr. Cubbler's.

Senator NUNN. Was that check also made payable to D. C. Chambliss?

Mr. MELLY. Yes, it was.

Senator NUNN. The check of June 1, 1975?

Mr. MELLY. FMS received an RFP from the Department of Defense for preparation of a similar system as MMIS for CHAMPUS. At that time, we were very busy, tied up with West Virginia, working on that. So Mr. Cubbler helped us write the Department of Defense proposal in New York, on weekends and at night.

Senator NUNN. The next check is September 8, 1975. If you could give us the amount of that?

Mr. MELLY. Here again, Mr. Cubbler came to New York as we were working on the Maryland proposal. He provided editing experience and also quite a bit of original writing. This was the payment for that.

Senator NUNN. Mr. Melly, you provided the subcommittee staff with some materials. I want the chief clerk now to show you a copy of the portions of the West Virginia proposal which you gave to the staff. If you could take a look at that, again your attorney certainly can take a look. The checks will be made exhibits with an appropriate number, without objection.

[The documents referred to were marked "Exhibit No. 14" for reference and may be found in the files of the subcommittee. A brief description follows:]

MELLY CHECKS TO CHAMBLESS

1. June 26, 1974.....	\$583.28	Check stub notation, "professional fees."
2. Oct. 8, 1974.....	1,087.00	No notation.
3. Jan. 3, 1975.....	1,000.00	Check stub notation, "West Virginia professional fees."
4. June 1, 1975.....	1,000.00	Check stub notation, "CHAMPUS proposal."
5. Sept. 8, 1975.....	1,000.00	Check stub notation, "Maryland proposal."

Senator NUNN. Have you had a chance to look those over?

Mr. MELLY. Yes, I have.

Senator NUNN. Would you identify this particular document?

Mr. MELLY. This is a copy of the West Virginia proposal submitted by FMS to the Department of Welfare in West Virginia.

Senator NUNN. Did Mr. Cubbler assist you with this?

Mr. MELLY. Yes, Senator, he did.

Senator NUNN. Do you have particular portions there that you can identify as to what he did and how he went about providing this assistance?

Mr. MELLY. Yes. We sent copies of what we had written to date to Mr. Cubbler. He would do a great deal of editing on it.

Senator NUNN. A great deal of what?

Mr. MELLY. Editing. The major sections that he worked on were the section 1 which were the executive summary; section 2 our understanding of the situation; section 5, qualifications for conducting the proposed assignment.

Senator NUNN. Do you have any particular way of identifying what he did there. How do you recall what he actually did?

Mr. MELLY. There were some portions in the qualifications section which he drew upon based upon my experience in Cambridge which was very limited as far as my association with that particular firm.

Senator NUNN. Do you have any handwriting by him on that document?

Mr. MELLY. No; not on this document in front of me.

Senator NUNN. But you do recall specifically those sections that he did work on?

Mr. MELLY. Yes, Senator, I do.

Senator NUNN. This will be made an exhibit, without objection.

[The document referred to was marked "Exhibit No. 15" for reference and may be found in the files of the subcommittee.]

Senator NUNN. You also provided the subcommittee staff with a copy of the West Virginia proposal which was edited so that it could be converted to serve as your proposal for the CHAMPUS contract. Is that correct?

Mr. MELLY. Yes.

Senator NUNN. I would like for the Chief Clerk to show you that document.

Do you recognize that document?

Mr. MELLY. Yes.

Senator NUNN. Could you identify it for the record in general terms?

Mr. MELLY. This was one of our final copies of the West Virginia proposal which has been decimated to a large degree as a result of using certain sections. It is not a complete proposal, whereas the previous exhibit is complete.

Senator NUNN. That West Virginia proposal, would you give us in layman's language what that proposal was and what the contractual relationship was that you were seeking? This was in the form of a bid in response to the request for bids. Is that right?

Mr. MELLY. That is correct.

Senator NUNN. Give us in your own language what that was, what you were seeking to do and what the contract would have entailed?

Mr. MELLY. West Virginia released an RFP in late July of 1974. They were requesting respective contractors to bid on a client information system. One of our major problems with medicaid is determining the eligibility of our recipients. So West Virginia elected to have a complete client information system which would automatically determine eligibility, not only for medicaid, but also for public assistance and food stamps.

The second part of their request was a complete Medicaid Management Information System, MMIS, which had been previously mentioned.

They wished to have the most advanced system in the country. It would be operating on what computer people call a data base management system. They wanted as early an implementation as possible.

Senator NUNN. How much money was involved in that contract?

Mr. MELLY. That contract was \$467,000.

Senator NUNN. Over what period of time would that contract be performed?

Mr. MELLY. Over a period of 2 years.

Senator NUNN. Did your company successfully bid on that contract?

Mr. MELLY. Yes. We won it.

Senator NUNN. Did you complete the contract?

Mr. MELLY. We are still working on it.

Senator NUNN. When will the contract be completed?

Mr. MELLY. We expect to have it completed early next year, probably January-February, next year.

Senator NUNN. Were there any other bidders on that contract?

Mr. MELLY. There was one other bid received from the Central State Computer Agency.

Senator NUNN. Where is that particular agency located?

Mr. MELLY. They are part of the Department of Finance Administration.

Senator NUNN. Of the State of West Virginia?

Mr. MELLY. Of the State of West Virginia.

Senator NUNN. You were bidding against the State?

Mr. MELLY. Yes, sir.

Senator NUNN. Do you have any way of identifying what Mr. Cubbler did on that particular proposal?

Mr. MELLY. Yes. Within this, there are certain handwriting, of where he did some writing and editing, modifying the original West Virginia proposal so it could more suitably meet the requirements for the Department of Defense.

Senator NUNN. You recognize his handwriting?

Mr. MELLY. Yes, I do.

Senator NUNN. How do you recognize it? What is your means of recognizing it? Are you just familiar with it over a period of time? Have you received correspondence in the mail from him? How do you know it is his?

Mr. MELLY. I have seen his previous writings on the West Virginia proposal. His handwriting is quite distinctive. He prints a great deal and also does a lot of underscoring.

Senator NUNN. His principal role here was in terms of editing and assisting in this particular proposal?

Mr. MELLY. Yes, Senator.

Senator NUNN. Would you please relate the Labor Day meeting you had with Cheryl Anderson and the circumstances surrounding that meeting and how Mr. Cubbler's name came up?

Mr. MELLY. I had been on vacation with my family and had returned on Labor Day. On Tuesday I called the office. One of my people, Mr. Art Carroll, informed me that Mr. Ney and Sherry Anderson were in New York wanting to get together.

There was no way I could possibly turn the motor home in and get into the office the same day. I came in on Wednesday, the Labor Day week, which was my plan all along. Mr. Ney had to return to Washington. So he was not present.

Miss Sherry Anderson, an employee of his company, came in and we discussed, amongst other things, his pending contract.

Senator NUNN. When did you first meet Mr. Cubbler?

Mr. MELLY. I first met Mr. Cubbler in 1972, I believe, when I was with Cambridge and I assumed additional responsibilities for HAS and also for another division of Cambridge.

Senator NUNN. Did he do any work for you at that time as a consultant?

Mr. MELLY. No, he did not.

Senator NUNN. When was the first time you had any contractual relationship with Mr. Cubbler?

Mr. MELLY. The first time I paid him for consulting was on the educational program up in New York city, 2-day seminar.

Senator NUNN. Did you negotiate that contractual arrangement with Mr. Cubbler or was that done through third parties?

Mr. MELLY. It was suggested by a third party, Mr. Ney, as a result of a conversation he had with Mr. Cubbler. The actual negotiation of the time and the amount of money was between Mr. Cubbler and myself.

Senator NUNN. When did that occur?

Mr. MELLY. That occurred in early June 1974.

Senator NUNN. Tell us a little bit about it in your own words. Did you bring up the question of money or did Mr. Cubbler bring it up?

Mr. MELLY. I believe I brought up the question of how much it was to be.

Senator NUNN. What was Mr. Cubbler's response?

Mr. MELLY. He responded that whatever I thought was appropriate.

Senator NUNN. Did you then make an offer?

Mr. MELLY. I said any time we retain consultants we normally pay \$150 a day.

Senator NUNN. Is that based on an 8-hour day or was it based on a weekend rate? What kind of arrangement was it?

Mr. MELLY. It was more of an 8 hours, but the normal payment is \$150 for an 8-hour day.

Senator NUNN. How did you go about ascertaining the amounts? Did he submit the vouchers to you or did you talk about it on the phone? How did that come about?

Mr. MELLY. We did not submit vouchers. I would discuss with him, how many hours, how many days he spent on the particular project and for the last two, he was in New York. So it was direct observation on my part.

Senator NUNN. Did Mr. Cubbler ask you to make the checks payable to D. C. Chambliss?

Mr. MELLY. Yes; he did, Senator.

Senator NUNN. Mr. Melly, did you know that during the period Mr. Cubbler was doing work for you that he was in the position to influence within HEW the approval of 90 percent Federal funding for the State of West Virginia MMIS system development?

Mr. MELLY. I was not aware that he could influence. The contracts that we obtain are with the States. They are directly between FMS and the State itself.

Senator NUNN. You were not aware that he was in the position where he could influence that contract?

Mr. MELLY. No, Senator. I was not.

Senator NUNN. Did you intend these payments to Cubbler to be not only of benefit to you as far as the writing and editing was concerned, but were you also intending to buy a little influence or help?

Mr. MELLY. Absolutely not, Senator. I might add that we are a small company. That kind of expertise to help us write a proposal which has to be done at night or on weekends, occasionally during the day by ourselves, was invaluable to us as far as having it available to us, that kind of expertise without the encumbrances of a fixed salary.

Senator NUNN. Did you have a feeling that you had an advantage over other contractors by having an HEW official help edit your proposals?

Mr. MELLY. I think the advantages in the fact that the proposal became a much better and much tighter proposal. But as far as using it for influence, there was never any intention.

Senator NUNN. You never discussed any influence with Mr. Cubbler?

Mr. MELLY. No, Senator. I did not.

Senator NUNN. Did you pay the money to Mr. Cubbler in part to make sure HEW cleared your contracts?

Mr. MELLY. Absolutely not. As I say, the process in selection of these contracts is that the Evaluation Committee of the State makes the selection. They prepare a report by this evaluation committee which is then forwarded to the regional office of HEW, SRS. They make any comments on it and then forward it on up for final assignment, by SRS.

But the selection process, the State makes the decision first.

Senator NUNN. Mr. Melly, on January 3, 1975, you drafted one of the checks for \$1,000 to D. C. Chambliss. Do you have the check stub? Do you have a copy of it? The chief clerk will give it to you.

Let us take a look at that check, January 3, 1975. Do you have that stub there?

Mr. MELLY. Yes, Senator.

Senator NUNN. What does that stub say?

Mr. MELLY. It says professional fees, West Virginia.

Senator NUNN. Four days after you drafted the check, HEW records show that Mr. Cubbler began work on the addition of long-term care under the MMIS program. The records shows Mr. Cubbler in April was a forceful advocate of this new proposal.

Indeed, it resulted in \$134,000 supplement to the contract by June of 1975. Please explain when you first became aware of this project to develop a long-term care element and tell us what the connection was between your payment of \$1,000 to Mr. Cubbler and his timely work on behalf of what came to be a substantial contract supplement for FMS.

Mr. MELLY. First of all, to identify this check, Senator, the check was the final payment for the preparation of the West Virginia proposal. I first became aware of the long-term care project while working in West Virginia with some of the medical staff under the Department.

They were quite advanced in doing their staff work on developing weekly patient characteristic profiles for our nursing home patients. Sometime in mid-January I was notified by Mr. Cubbler that West Virginia was going to make a request for an additional grant on the long-term care module.

Senator NUNN. Was he advising you of that as a consultant to you?

Mr. MELLY. I think it came up in a conversation where we were discussing some problems I was having with the contract. He mentioned that West Virginia was going to make a request at that time.

Senator NUNN. Wasn't that inside information?

Mr. MELLY. I was already aware of the fact that West Virginia was working on it.

Senator NUNN. Go ahead.

Mr. MELLY. In mid-January we made a presentation, FMS made a presentation to a number of staff of the Department of Welfare. Included in this meeting were two Federal officials, Mr. Jim Delaney and Mr. John Gallagher, who was the project officer from Philadelphia on the MMIS contract.

After the meeting we adjourned to the Commissioner's office and as part of the discussion there was a request made which I believe the Commissioner asked Mr. Delaney for some assistance in preparing a grant application. That was really pretty much the extent of it. The \$1,000 check was a final payment for the original proposal. There was no connection between the long-term care—

Senator NUNN. No what?

Mr. MELLY. There was no connection between that check and long-term care.

Senator NUNN. In your conversations with the subcommittee staff, you stated that beginning about June 1, 1975, you leased a Chrysler Cordoba automobile in Washington and allowed Mr. Cubbler to use it for about 15 months, in fact until just a few weeks ago.

Could you explain the relationship between the automobile and this contractual relationship?

Mr. MELLY. When we started work in West Virginia, one of the problems with doing these contracts is our people are away from their home 5 days a week. So in order to provide some kind of assistance, some help, we leased two automobiles, two Chryslers in Charleston, W. Va.

We were then talking about opening an office in Virginia and tried to lease a third car from the same dealer in Charleston, W. Va., to move over into the Virginia office. We had a number of people, personnel already stationed or based in Virginia.

We told the bank that our intent was to move it out of the State into Virginia. The bank said they were unable to lease or finance automobiles that were out of State. In our conversation with Mr. Cubbler, I asked him if he was aware of any leasing company in the Washington, D.C. area that we could do business with.

Subsequently, he did contact me about the L. P. Steuart Leasing Co. At the time the automobile arrived, none of us were in town. We were all in Charleston or in New York. I asked Mr. Cubbler to pick the car up.

We did not get the CHAMPUS contract that we had bid on, the proposal you saw previously. So we delayed opening up the Virginia office until just about 6 or 8 months ago. Just through a process of osmosis, I believe, as I already explained, is that Mr. Cubbler just, the car just stayed with him.

We just never found it convenient to remove it and start using it in our other operation.

Senator NUNN. What was the approximate date that the car was leased? June 1, 1975? Is that right?

Mr. MELLY. Yes.

Senator NUNN. Do you have any document there that would show that? You do have a document there?

Mr. MELLY. Yes.

Senator NUNN. Could you identify that document so we can put it in the record?

Mr. MELLY. One is a vehicle lease order with L. P. Steuart Leasing Co.

Senator NUNN. We will have this as exhibit No. 16 without objection.

[The document referred to was marked "exhibit No. 16" for reference and may be found in the files of the Subcommittee.]

Senator NUNN. When did Mr. Cubbler return the automobile or did he return the automobile? When did you take possession?

Mr. MELLY. On the advice of counsel, we took possession approximately 3 weeks ago.

Senator NUNN. About 3 weeks ago?

Mr. MELLY. Yes.

Senator NUNN. That was based on the advice of your attorneys?

Mr. MELLY. Yes.

Senator NUNN. We won't get into their particular advice and why, unless you want to explain that further.

Mr. MELLY. I might add in looking at this lease agreement, Senator, one of the reasons why, when the office was not open in Virginia, we did not immediately turn the car back to L. P. Steuart Leasing

because there was a tremendous penalty if you don't honor the lease for the first year which would have been approximately, I think, \$1,500 penalty.

Senator NUNN. Approximately \$1,500 penalty if you had not kept the automobile under lease?

Mr. MELLY. Yes.

Senator NUNN. How much were you paying per month for the automobile?

Mr. MELLY. \$202 a month.

Senator NUNN. Do you know whether Mr. Cubbler used this automobile or whether it was just parked in his driveway or do you have any knowledge of that?

Mr. MELLY. No. He does use the automobile. He did use the automobile.

Senator NUNN. Up until about 3 weeks ago?

Mr. MELLY. Yes.

Senator NUNN. Do you have a date on that?

Mr. MELLY. No, Senator, I do not.

Senator NUNN. During September of this year, 1976?

Mr. MELLY. I think it was in August.

Senator NUNN. Late August. Did you take possession of the automobile or did you turn it back in?

Mr. MELLY. We still have the automobile. In fact, it is actually being used now by another company that delivered a proposal for us. We have been unable to obtain it just because of our schedule conflicts.

Senator NUNN. Mr. Cubbler willingly turned the automobile back to you?

Mr. MELLY. Yes, he did.

Senator NUNN. Did you consider this part of any kind of contractual arrangement with him?

Mr. MELLY. Absolutely not, Senator.

Senator NUNN. This was not part of the services rendered in the normal relationship that you had with him, then?

Mr. MELLY. Yes.

Senator NUNN. It was not based on any kind of consulting services rendered?

Mr. MELLY. No.

Senator PERCY. Was there any business justification for it? Did he require it because of the nature of his consulting duties to drive back and forth to an office or was it just an additional form of compensation?

Mr. MELLY. No; it was not an additional form of compensation, Senator. The plan was to open an office here in Virginia. We had found that it is very expensive when our personnel use taxis all the time. So our plan was to let our personnel use the automobile as they operate out of the Virginia office.

Senator PERCY. You pay for the automobile on the basis of mileage? How does this \$202 accrue? Is it just a flat rate?

Mr. MELLY. A flat rate.

Senator PERCY. Regardless of mileage?

Mr. MELLY. Yes.

Senator PERCY. Did FMS or any other company pick up gasoline, oil, or repair costs?

Mr. MELLY. We did not. We did pay \$100 deductible on the insurance claim.

Senator PERCY. You paid for the insurance?

Mr. MELLY. Yes.

Senator NUNN. There was an accident. Is that right?

Mr. MELLY. Yes.

Senator NUNN. Mr. Cubbler was driving the automobile and had an accident or who was driving?

Mr. MELLY. He may have been driving. I am not sure.

Senator NUNN. There was an accident and you paid the \$100 deductible?

Mr. MELLY. Yes.

Senator NUNN. Mr. Melly, on March 8, 1976, two subcommittee investigators interviewed an FMS employee at the Driskell Hotel in Austin, Tex. You were in Austin at that time. Is that correct, March 8th, 1976?

Mr. MELLY. That is correct.

Senator NUNN. Subsequent to that interview, could you tell us the nature of the discussions you had with Mr. Cubbler about this Senate investigation?

Mr. MELLY. Mr. Cubbler called me in Texas after the two investigators spoke to one of my employees.

Senator NUNN. What was your employee's name?

Mr. MELLY. Miss Betty Owens. I spoke to him a little bit about the assignment we were doing for Texas. Then he brought up the point of the question of the investigation. He said, "I assume you have heard from Betty there is an investigation." I said, "That is right."

He said to me, words to the effect, that there were a couple of minor payments or checks paid to him by HAS, which is the former employer of Miss Betty Owens. He asked if I would destroy the check or lose the check which we had paid in previous years.

Senator NUNN. What was your response to that?

Mr. MELLY. I told him it would be useless to try to destroy the check, there are too many records and also microfilms by the bank.

Senator NUNN. Did he ask you about expense vouchers?

Mr. MELLY. He complained to me about putting them on his expense vouchers. I asked him why. He said—

Senator NUNN. About who putting them on—

Mr. MELLY. Mr. Richard Ney.

Senator NUNN. Richard Ney?

Mr. MELLY. Yes; I said, "Why Charlie?" He said Mr. Cubbler said when you receive a Federal contract or where there is Federal moneys involved, you cannot entertain, it is improper to entertain Federal officials. He can entertain apparently before you had the contract, but not afterwards. Some time in early 1975, Mr. Cubbler called me and asked me to request Mr. Ney to change the expense vouchers removing his name.

Senator NUNN. Removing his name from the expense vouchers? What kind of expense vouchers were they?

Mr. MELLY. These are expense vouchers that Mr. Ney forwarded to FMS once a month covering his various expenses and telephone, any entertaining he might do.

Senator NUNN. What were the primary expenses involving Mr. Cubbler?

Mr. MELLY. They would be lunches or dinners.

Senator NUNN. Do you have any recollection of the amounts involved?

Mr. MELLY. They would average anywhere from \$18 to \$20.

Senator NUNN. Do you have any idea about the overall amounts involving Mr. Cubbler?

Mr. MELLY. No; I do not, Senator. They have been turned over to your committee.

Senator NUNN. That would be a matter of record. We can identify those amounts later. Did Mr. Cubbler ask you to do anything in particular with these expense vouchers?

Mr. MELLY. Nothing other than having them changed and removing his name.

Senator NUNN. Removing his name from the vouchers. Did he ask you to change them to anybody else in particular? Did he just say change them?

Mr. MELLY. He just said to change them.

Senator NUNN. Did you change them?

Mr. MELLY. I contacted Mr. Ney and asked him to explain the problem to me, said that it was my understanding that we have three contracts and GAO audit might be very eminent. Mr. Cubbler was quite concerned because this apparently is improper, was frowned upon by HEW. I asked Mr. Ney to give me a full set of documents for the same amounts, but removing Mr. Cubbler's name—

Senator NUNN. You asked Mr. Ney to prepare another set of documents?

Mr. MELLY. Yes; he did.

Senator NUNN. And remove Mr. Cubbler's name?

Mr. MELLY. Yes; he did, Senator. However, in discussing with with another member of my firm, the advisement, we decided not to use them because we became aware of the Senate investigation and felt this was all part of it.

Senator NUNN. So you did have another set of vouchers prepared, removing Mr. Cubbler's name but what did you do with that second set that was prepared?

Mr. MELLY. We turned them over to the committee.

Senator NUNN. Did you turn over the first set, the legitimate set of vouchers to the committee?

Mr. MELLY. Yes.

Senator NUNN. Those were the ones with Mr. Cubbler's name in them?

Mr. MELLY. Yes.

Senator NUNN. So you did not go along in full with Mr. Cubbler's request?

Mr. MELLY. No, Senator.

Mr. FELDMAN. Mr. Chairman, could I put in the record the original expense vouchers and you could identify them, perhaps.

Senator NUNN. Let's identify the originals first, the ones that have Mr. Cubbler's name on them.

Mr. MELLY. Yes; these are the Xeroxes of the original vouchers.

Senator NUNN. Do you have copies of the substitute vouchers that were prepared at your request.

Mr. MELLY. Yes, Senator. They appear to be the substitute vouchers.

Senator NUNN. When Mr. Cubbler asked you to substitute the vouchers, was he aware of our investigation?

Mr. MELLY. I don't believe so, Senator. He never mentioned it to me.

Senator NUNN. I believe he asked you earlier to destroy the checks.

Mr. MELLY. That was after the March 8 meeting in Austin, Tex.

Senator NUNN. In other words, this expense voucher came up before that. Is that correct?

Mr. MELLY. Yes; January to February of 1975, 1976.

Senator NUNN. Were you aware of the investigation at the time Mr. Cubbler made his request about expense vouchers?

Mr. MELLY. No; I was not, Senator. First, I became aware of the Senate investigation, was on March 9—well, March 8 when the two investigators came to interview one of my employees.

Senator NUNN. Were you aware of the Senate investigation when those vouchers were changed?

Mr. MELLY. I don't think I heard the question.

Senator NUNN. Were you aware of the Senate investigation when the vouchers were changed?

Mr. MELLY. Excuse me, Senator. I received a request from Mr. Cubbler in January, February. But I do not know at this point in time when I made the specific request to Mr. Ney.

Senator NUNN. You do not remember exactly when you made the request to Mr. Ney?

Mr. MELLY. No.

Senator NUNN. I understand March 8, 1976, was when you first had the discussion in Austin, Tex., about this committee investigation. Is that correct?

Mr. MELLY. That is correct.

Senator NUNN. I also understand that the vouchers were changed between March 15 and April 15, 1976?

Mr. MELLY. If that is correct, then that is when I was aware of the investigation, at that point.

Senator NUNN. At that time? But you did turn over both sets to the subcommittee?

Mr. MELLY. Yes, I did.

Senator NUNN. You did tell subcommittee staff about the request of Mr. Cubbler to change the vouchers?

Mr. MELLY. Yes, Senator; I did.

Senator NUNN. So the subcommittee has the complete and accurate vouchers at this time? Is that right?

Mr. MELLY. Yes, Senator; they do.

Senator NUNN. You did not follow through with the request of Mr. Cubbler then to not only change the vouchers, but to have them submitted in a different form?

Mr. MELLY. No, Senator; I did not.

Senator NUNN. Did he actually tell you to submit them to the subcommittee in a changed form or to anyone else in a changed form?

Mr. MELLY. No; he did not. He did not ask me to submit them.

Senator NUNN. Did he renew his request after the March meeting?

Mr. MELLY. He did make another request on the checks about either destroying the checks or losing the checks.

Senator NUNN. Either what?

Mr. MELLY. Either destroying or losing the checks.

Senator NUNN. He asked you to change them first, then he asked you the second time to either destroy them or lose them?

Mr. MELLY. No. We are talking about the checks now. He did not bring up the expense vouchers to Mr. Ney, just the checks.

Senator NUNN. He asked you to change the expense vouchers, but he asked you to either lose or destroy the checks?

Mr. MELLY. Yes, Senator.

Senator NUNN. Do you want to add something here?

Mr. MELLY. I am really not positive of this, but I think there may have been another mention made by Mr. Cubbler asking for the vouchers to be changed. I am really not sure of that.

Senator NUNN. You conveyed the request about the expense vouchers to Mr. Ney?

Mr. MELLY. Yes; I did.

Senator NUNN. Was he the one that actually did the changing in submitting the second set?

Mr. MELLY. I would imagine it was probably his wife, former Miss Cheryl Anderson. She does most of his administrative work.

Senator NUNN. They forwarded those to you?

Mr. MELLY. Yes.

Senator NUNN. Did they have any other names substituted for Mr. Cubbler's name?

Mr. MELLY. Yes; they did substitute names.

Senator NUNN. Did you ask them to substitute names?

Mr. MELLY. Yes, Senator; I did.

Senator NUNN. Did you give them any instructions as to whose names to substitute?

Mr. MELLY. No; I did not.

Senator NUNN. Do you have knowledge of whose names were substituted?

Mr. MELLY. I would have to take a look at the records.

Senator NUNN. Could you do that for us? This would be the amended expense vouchers.

[The documents referred to were marked "Exhibit Nos. 17 and 18" for reference and may be found in the files of the subcommittee.]

Senator NUNN. I would like for you to give us the names of those, if you could, the second set.

Mr. BONNER. You want the names substituted for Mr. Cubbler's name, Senator?

Senator NUNN. That is right; substituted.

Mr. MELLY. There is a number of names here.

Senator NUNN. You don't have to give the particular names. Do you know who these people were, generally speaking?

Mr. MELLY. In one case, my name is substituted.

Senator NUNN. Do you have any other general classification of people whose names were substituted? I am not asking for specific names. We can have those documented on the record. I am asking if you know the general categories of people whose names were substituted?

Mr. MELLY. It appears to be the people on the Hill, Senator, that he might be involved in in the legislative process.

Senator NUNN. Mr. Ney might be involved with? Are they primarily committee staff people on the Hill?

Mr. MELLY. Yes, Senator.

Senator NUNN. At this point, Senator Percy, I know you have some questions. I have taken a lot of time. I want to turn it over to you.

Senator PERCY. Having spent the past year or so investigating the activities of the multinational corporation in their conduct of business abroad, I can assure you that it is an equally painful experience to look at the influence that may be involved in the awarding of Federal contracts. But I do wish to express appreciation to you and your counsel for your full cooperation with this committee. It enabled us to get to the heart of this matter much more quickly than we could have otherwise.

We dislike spending our time this way. It is not our primary function. We are legislators, not prosecutors. We are not trying to usurp the role of the U.S. attorney. On the other hand, many times it is our job to determine whether the organization and structure of the institution is adequate to protect the public against abuse.

It has been mentioned that HEW drafted our investigator, John Walsh, to head its investigative office. I don't know whether you know it, Mr. Chairman, but a very valued member of the minority staff has come from Mr. Bonner's office. She is Lynn Lerish, one of our dedicated and talented staff members.

We appreciate all the fine training she had in your office.

Mr. BONNER. We miss her, Senator.

Senator PERCY. I would like to ask Mr. Melly, whether you were aware that in paying Mr. Cubbler, you might have been involved in breaching the Federal laws? Were you hiring someone who had an expertise and knowledge of the matter that could help you or were you hiring Mr. Cubbler because of his ability to influence a contract?

Mr. MELLY. Senator, in retrospect, I find this is a very embarrassing thing. At the time I retained the services of Mr. Cubbler, all of his work was done on weekends and in the evening. I might point out that he is a very hard worker in working on these proposals. There was never any intention in my mind nor do I think I could have in obtaining through Mr. Cubbler the awarding of these contracts. It is my understanding it is a contract between a State and a company.

Senator PERCY. Yet, when we look at his job description, his job is listed as director, division of medicaid systems. The Civil Service Commission position description for his job is as follows:

This position is that of a Director of the Division of Medicaid Systems, Social and Rehabilitation Service. The primary purpose of the position is to

provide leadership, direction, and to carry over all responsibilities for developing model management systems and providing technical assistance necessary for efficiency and effectiveness of the Medicaid Program at the Central Office, SRS Regional Office, and State agency levels.

Did he at any time say to you this gets into an area of a conflict of interest where he should disqualify himself?

If so, when did he say it, and with respect to what relationship?

Mr. MELLY. No, Senator; he never did say he should disqualify himself or there would be a conflict of interest.

Senator PERCY. Pardon.

Mr. MELLY. No.

Senator PERCY. Did you make any phone calls or did Mr. Cubbler make any phone calls during what you might call normal working hours?

Mr. MELLY. I am sorry.

Senator PERCY. Did he make any phone calls to you or did you or any of your associates make any phone calls to him during the normal working hours?

Mr. MELLY. Yes; we did, Senator.

Senator PERCY. You did? Were those at the lunch hour when he was on his own time or during normal business hours?

Mr. MELLY. These would be during normal business hours dealing with the contracts that we were servicing at that time.

Senator PERCY. Could you give us the details of the type of phone calls? Did they relate to contracts? What were other reasons that they were carried on during the normal business hours, if he was in a sense moonlighting and carrying on these activities evenings and weekends?

Mr. MELLY. These conversations during the day were not in connection with his moonlighting activities. As was stated earlier, the Medicaid Management Information System is a model system. But there is a great number of Federal regulations being published every day, mainly in the area of utilization review and control. So we were discussing these regulations with Mr. Cubbler as well as also with other members of HEW concerning the data elements that are required for Federal certification.

Senator PERCY. You have been a very successful businessman and at one time, you did work for one of our highly respected management consulting firms. You have, by your own admission, paid an employee of HEW to help you prepare a contract proposal. We know that he was influential in the office which approved the contract.

Would you put yourself on the other side of the table now, envision yourself as a prudent administrator in HEW. Would you say in retrospect that the contract should have been awarded to FMS, knowing what the subcommittee now knows?

Mr. MELLY. Excuse me, Senator.

Senator PERCY. Surely.

Mr. MELLY. Senator, I believe our proposal was the best proposal submitted. I believe also that the State is quite pleased with the work that we have been doing for them. We are very happy and very proud to be part of working with West Virginia and Maryland.

In the case of West Virginia, we are developing and installing a system much more comprehensive than MMIS, but will help solve many of the problems that we have been seeing in the newspaper.

Senator PERCY. I recognize that. It is all well and good. Now, if you could respond directly to the question, assume you are an administrator and you know everything that you know now, should they have placed the contract—

Mr. MELLY. I believe they should have signed it.

Senator PERCY. Knowing that there was the appearance of conflict of interest. Let's take into account that it is the best proposal offering the best service, but we have such a thing as conflict of interest and appearance of conflict of interest. You know that there was influence used in the awarding of these contracts.

Do you think the contract should have been awarded under those circumstances?

Mr. MELLY. No; I am not aware of any influence that has been exerted by Mr. Cubbler.

Senator PERCY. You don't think he had any influence in placing any of these contracts?

Mr. MELLY. I am just not aware of any, Senator. The evaluation process is so extensive and complete and it requires many signatures, not only of the first selection made by the State, but also by the regional office and at the central level.

Senator PERCY. You are not aware that he short circuited some of these evaluation processes in order to see that a substantial improvement, a \$133,000 addition to a contract as I recall, was made? He actually intervened to see that the contract was awarded.

Mr. MELLY. I was informed that by the committee staff. I was not aware of it at the time it was happening. The request for the additional funding was requested by the State, that project was a State-initiated project.

Senator PERCY. Let's make an assumption that he had influence. He was accepting payments from you. Even though the terms of that contract were superior and the services offered were superior, is it fair to any other contractor if he is able to receive money on the one hand and then be a part of the evaluation and the contract-placing responsibility on the other?

Mr. MELLY. I believe, Senator, with that assumption, the answer is no.

Senator PERCY. I would agree. I just don't see how we could ever countenance that kind of thing. You couldn't get people to bid. It costs money for companies to make bids to the Government.

If someone has that kind of an inside track, it just seems impossible to assume that the normal competitive processes can operate. It is no different than the Lockheed plan for getting business abroad; having inside people receiving money.

How can anyone compete effectively unless they outbid Lockheed in these payments? It really corrupts the whole system, doesn't it?

In addition to your contacts and payments to Mr. Cubbler, would you tell the subcommittee if you have made payments, provided gifts, gratuities or services of any other kind to any other Federal officials in the health care area?

If so, for what purposes?

Mr. MELLY. No, Senator; no other payments made.

Senator PERCY. No payments, no gifts of any kind?

Mr. MELLY. No, Senator.

Senator PERCY. In the health care area or have they been made in any other area?

Mr. MELLY. No, Senator; the only payments we made are the ones discussed here for the work performed by Mr. Cubbler on the proposals.

Senator PERCY. The question could be raised, then, that if you had never made any payments in your business experience before, Mr. Melly, why in this particular case was it done?

Mr. MELLY. We had approximately 3 to 4 weeks to prepare this proposal, but at this point we were working very hard on it. When the suggestion was made we could obtain this kind of expertise from Mr. Cubbler, we were quite overjoyed by it.

We were working, as I said, many hours and our weekends on it and we were just starting to run out of time. When this availability became known to us, and he did work quite hard, and we knew we had to pay him.

Senator PERCY. You don't always have time to prepare a bid. You are always operating under deadlines and pressure. It is always conflicting with other work in the office.

I still don't understand why, if this practice had never been engaged in before, this exception was made?

Is this field any different? Is it necessary to do business in order to get business? The American corporations have testified and said, "Look, you don't understand how we have to do business abroad. This is the way it is done." Is there anything about the health care field that makes it different from other fields and made you feel that you really had to get a degree of expertise and help that you hadn't or that you ordinarily do not have to get?

Mr. MELLY. Senator, one of the major areas of expertise that Mr. Cubbler has is in the area of Federal regulations, translating that into the impact it has on MMIS. This was an expertise which we did not have. So he was extremely helpful in that area.

But to the best of my knowledge, there is no requirement or pressure that this is the way business is to be done in the health care field. I felt none of that pressure other than the pressure of preparing a good proposal.

Senator PERCY. Do you have any knowledge of any other companies doing business in the health field, where it is essential or desirable to pay people who have direct relationships with the Federal Government or have had immediate past relationships?

Mr. MELLY. I am not aware of any other company that did this kind of thing, who needed that kind of expertise.

Senator PERCY. No advice you ever received from any people in business that you really need inside help?

Mr. MELLY. Pardon me?

Senator PERCY. I just wonder how you and Mr. Cubbler came together then, what circumstances brought it about. I am sorry. I wasn't here at the beginning of the testimony. Did he seek you out or did you seek him out?

Mr. MELLY. Mr. Ney is a marketing representative that I have here in Washington. Through his assistant, Mr. Ney's assistant, she advised me that the proposal had been reviewed, copies of our proposal had been reviewed by Mr. Cubbler. He felt it was a great deal of work that needed to be done on it.

Senator PERCY. How did they have knowledge that he could help and would be available for that? Did you know that he had ever moonlighted for anyone else before?

Mr. MELLY. Not to my knowledge, no. I said at that time to Miss Anderson, well, we are about 3 weeks away from proposal submission and this needs a lot of additional work. Where can I get that kind of help? She suggested Mr. Cubbler.

Senator PERCY. I have lived in Cook County all my life. I don't have firsthand knowledge, but I have always heard how you have to do business sometimes in Cook County to get the business. I have an interest in West Virginia. I have more members of my family—grandchildren, my daughter and son-in-law—living there than in any other State.

I wasn't aware of the fact that you had to do business in West Virginia in any particular way, however. You testified that you engaged a public relations firm to assist you in obtaining the contract in West Virginia.

How did you happen to hire the firm? Didn't you feel you had the same access to HEW that any other private citizen does? Didn't you feel you had the same opportunity to win a contract award as any other company?

Mr. MELLY. Yes, I did. But we had no representation or no employees here in Washington in the marketing role. We were quite busy on the existing business. We just were unable to come to Washington on different occasions to keep track of what was happening in the health care field.

Senator PERCY. What representations were made to you by the public relations firm as to what they could do for you in West Virginia?

Mr. MELLY. You mean as far as—

Senator PERCY. What kind of a presentation did they make to you as to why you should hire them? What representations did they make as to how they could make up for your own firm's lack of knowledge or ability in this particular contract area?

Mr. MELLY. Mr. Ney had been retained by my former company and when FMS was organized we continued to retain Mr. Ney. There were no representations made by Mr. Ney that he could do anything in influencing the award of a contract in West Virginia.

Senator PERCY. I would like to again express our appreciation to you and to your counsel for your cooperation with this subcommittee. I would like to ask you one last question. It can be answered now or possibly you could on reflection, give us a more detailed answer for our record and I would ask unanimous consent that the record be held open for a week. Our problem is not to conduct an investigation of Mr. Cubbler. Our problem is to see how to get at the root of the problem. We just take this as a case.

If there is any criminal action indicated, it has to follow through ordinary law enforcement channels.

But our job is to see how we can basically improve the system so we can restore integrity to it and improve the management of the system at HEW so that the problems that are brought out do not recur.

Can you think of any ways that we can improve the procedures and practices or do you think existing law is quite adequate and it is just a matter of carrying it out?

Any suggestions you can make now or later we would appreciate.

Mr. MELLY. I would be happy to make some suggestions. I think it is such a complex question I would like to do it at a later time.

Senator PERCY. Thank you very much indeed.

Senator NUNN. Mr. Melly, I have a few more questions.

Could you give us your definition of an advanced planning document known as an APD?

Mr. MELLY. Yes; it is under Public Law 92-603, the State which wishes to apply for section 235 funding for the involvement and implementation of MMIS, must submit an advanced planning document to the SRS.

Senator NUNN. Does this document have confidential information in it in terms of the price that States expect to pay for contracts?

Mr. MELLY. The APD does contain price information. As to whether it is confidential, I don't really know.

Senator NUNN. Wouldn't it be of considerable advantage to prospective bidders on contracts to know what the State expects to pay for a particular contract?

Mr. MELLY. It would certainly be helpful to them, yes.

Senator NUNN. Do the State governments send out these APDs to the contractors for bid purposes or are they sent to the HEW officials?

Mr. MELLY. They sent them to the HEW personnel.

Senator NUNN. So that is not part of the request for bid?

Mr. MELLY. No.

Senator NUNN. You never received from the State government along with the request for bid an APD?

Mr. MELLY. No.

Senator NUNN. Have you ever been supplied with an APD by Mr. Cubbler?

Mr. MELLY. Yes, Senator; I have.

Senator NUNN. Can you give us the circumstances of that?

Mr. MELLY. Yes; he mailed to our New York office the APD from the State of Idaho.

Senator NUNN. This was an advanced planning document from the State of Idaho submitted to HEW. It was mailed to you by Mr. Cubbler?

Mr. MELLY. Yes.

Senator NUNN. Did he write you a letter along with the APD?

Mr. MELLY. No.

Senator NUNN. How do you know he mailed it?

Mr. MELLY. I can tell. It was in a big brown envelope in his handwriting.

Senator NUNN. Do you have that envelope?

Mr. MELLY. No.

Senator NUNN. Has it been thrown away?

Mr. MELLY. Yes.

Senator NUNN. You are testifying from your recollection of that envelope?

Mr. MELLY. Pardon me?

Senator NUNN. You are testifying as to your recollection of what was on that envelope?

Mr. MELLY. Yes.

Senator NUNN. When did you receive that?

Mr. MELLY. I received it approximately 2 months ago.

Senator NUNN. Did your company bid on Idaho?

Mr. MELLY. Yes; our company bid on the Idaho proposal.

Senator NUNN. Were you successful?

Mr. MELLY. No; we were not.

Senator NUNN. Who won that bid?

Mr. MELLY. It is my understanding that EDS did, Electronic Data Systems.

Senator NUNN. Did you have in that APD sent to you by Mr. Cubbler advance knowledge of what the State of Idaho expected to pay for that particular contract?

Mr. MELLY. Yes, Senator; it was in that document.

Senator NUNN. Did your bid correspond to that amount or was your bid under it or over it? Do you recall the amounts? I suppose that is the real question.

Mr. MELLY. I believe our bid was slightly over the amount. The APD provides a large range. For example, talked in terms of anywhere from \$1 to \$2 per claim.

Senator NUNN. Did you think there was anything wrong with your company receiving the APD?

Mr. MELLY. I didn't request it, Senator.

Senator NUNN. You did not request it from Mr. Cubbler?

Mr. MELLY. No.

Senator NUNN. You did not feel the fees you were paying him were for exchange of that kind of confidential information?

Mr. MELLY. No; the last payment to Mr. Cubbler was made in last year, 1975.

Senator NUNN. When was this APD sent to you?

Mr. MELLY. Approximately 6 to 8 weeks ago.

Senator NUNN. Was it a copy of the APD or was it the original?

Mr. MELLY. I believe it was a copy.

Senator NUNN. Was Mr. Cubbler using the leased automobile during this period of time?

Mr. MELLY. Yes; he was, Senator.

Senator NUNN. Mr. Melly, did you have any opportunity to read the West Virginia advanced planning document?

Mr. MELLY. With my former employer, Fry consulting group, we prepared the RFP for the State of West Virginia and as part of our work with the State we did read the advanced planning document.

Senator NUNN. Your former employer, you actually helped prepare for West Virginia the request for proposals?

Mr. MELLY. Yes.

Senator NUNN. You did see the advanced planning document?

Mr. MELLY. Yes.

Senator NUNN. Then you left that company?

Mr. MELLY. FMS started up in February of 1974.

Senator NUNN. Is there any kind of rule against a person who prepares these RFPs and APDs from actually bidding on the contracts?

Mr. MELLY. Not to my knowledge.

Senator NUNN. So the company you formerly worked for could have prepared the RFP and APD for West Virginia and then they could have turned around and bid on the contract?

Mr. MELLY. Yes; we did not bid the APD. It was given to us by the State as part of our normal work.

Senator NUNN. What is the name of your former employer?

Mr. MELLY. Fry consulting group, F-r-y.

Senator NUNN. So they prepared the RFD, but not the APD?

Mr. MELLY. Not the APD.

Senator NUNN. But they did prepare the request for proposals?

Mr. MELLY. Yes.

Senator NUNN. Didn't you find that a bit unusual in the contract relationship for the people who prepare for West Virginia the request for bid to turn around and bid on the contract?

Mr. MELLY. I don't see anything wrong with that, very honestly.

Senator NUNN. In other words, when you bid on the contract in your present position, you did not think there was anything wrong with it?

Mr. MELLY. No.

Senator NUNN. There is no regulation, rule or law that prohibits that, to your knowledge?

Mr. MELLY. Not to my knowledge, Senator; no.

Senator NUNN. Do you feel that access to the advanced planning document and the discussions with State officials regarding the request for bid itself gave you any advantage when you bid on the MMIS contract in West Virginia?

Mr. MELLY. The major benefit was that we were aware of how the State was thinking. We knew what their requirements and needs and objectives were.

Senator NUNN. Would you bid against another company if you knew it prepared the request for bid and also had access to the APD when you did not.

Would you invest much money and time in going out and preparing a proposal in that kind of situation if you had knowledge that another company had done that kind of work for the State?

Mr. MELLY. Depending upon the requirements of the RFP, which they are different from State to State, I would have to say yes. If these requirements met what we think our capabilities are.

Senator NUNN. You would go ahead and bid on it?

Mr. MELLY. Yes, Senator.

Senator NUNN. Do you think, based on your experience, is this a common practice in HEW to allow this kind of procedure by the States?

Mr. MELLY. I can't answer that one way or the other.

Senator NUNN. If you were running a State program, would you allow the company who put out the RFP for you and who consulted with you on that to be a bidder on that particular contract?

Mr. MELLY. Yes; I would.

Senator NUNN. Would you allow any company to have the APD before they put in a bid?

Mr. MELLY. I would say sitting here, no, Senator, I would not.

Senator NUNN. You would not let them have the advanced planning document if you were running the State? Why is that?

Mr. MELLY. I think it does give a company some additional information that may or may not be supplied to all bidders.

Senator NUNN. A few minutes ago in answer to Senator Percy's question, I believe that you answered that there had been no other Federal official that your company has ever paid or given a gift to. Is that right?

Mr. MELLY. Yes, Senator.

Senator NUNN. Would you make that same statement as to the State officials?

Mr. MELLY. Yes.

Senator NUNN. I believe you mentioned Dr. Mangus, medical director of the West Virginia medicaid program, to our subcommittee staff. Do you know him personally?

Mr. MELLY. Yes; I have been working with Dr. Mangus in West Virginia. He is a part-time medical doctor for the medicaid program.

Senator NUNN. He is the man in charge of the medicaid program in West Virginia?

Mr. MELLY. He is a medical director. He is not really in charge of the medicaid program.

Senator NUNN. How would you describe his position?

Mr. MELLY. Part-time medical director.

Senator NUNN. Part-time?

Mr. MELLY. Yes; he has his own private practice, plus other things.

Senator NUNN. What is his role as part-time medical director in regard to the medicaid program and the MMIS program in West Virginia?

Mr. MELLY. He spends a great deal of time in reviewing complaints or requests for additional payments for providers, to build what he considers necessary procedures. He spends a great deal of time looking at the Federal regulations, translating them into policy or program regulations for the State.

Senator NUNN. Does he deal with companies like yours that are involved in bidding on these MMIS programs and involved in carrying them out if you are the successful bidder?

Mr. MELLY. Yes; in the early stages of our work in West Virginia, we spent a great deal of time with Dr. Mangus.

Senator NUNN. What I am trying to get at is what is his relationship to this particular contract that you have. Did he help decide who would get the contract?

Mr. MELLY. Yes; I understand he was on the evaluation committee.

Senator NUNN. After you got the contract, what was his relationship in regard to the contract?

Mr. MELLY. With that contract, there is no specific relationship other than he is one of the staff from the department that works with us and our people on implementing the MMIS.

Senator NUNN. He is a consultant?

Mr. MELLY. To the State.

Senator NUNN. Does he get paid for that?

Mr. MELLY. By the State.

Senator NUNN. On a per diem basis?

Mr. MELLY. I believe on a salary basis.

Senator NUNN. Is he a stockholder in FMS?

Mr. MELLY. Yes; he is.

Senator NUNN. He is a stockholder in your company?

Mr. MELLY. He is, yes.

Senator NUNN. How did that come about? Did you offer him the stock? At what stage of this overall contractual relationship did he acquire the stock?

Mr. MELLY. After we started working in West Virginia, we were approached to become a subcontractor to another company in Arizona. We recognized the tremendous need for cooperation from the provider community and in the case of Arizona, medicaid was just starting up.

I asked Dr. Mangus if he would act as a consultant to FMS in our joint bid into Arizona. He checked with the Commissioner of Welfare to determine if this was proper. The determination was that it was as long as he did not do any consulting for us in the State of West Virginia.

Senator NUNN. Has he ever done any consulting for you in the State of West Virginia?

Mr. MELLY. He has not.

Senator NUNN. So his consulting relationship with you is strictly in Arizona?

Mr. MELLY. That is correct.

Senator NUNN. Is he continuing work in that relationship with you?

Mr. MELLY. No; he spent approximately 5 days in January of this year and he became a stockholder in March of this year.

Senator NUNN. In March of 1976?

Mr. MELLY. Yes.

Senator NUNN. When were you awarded the contract with the State of West Virginia?

Mr. MELLY. The contract with the State of West Virginia was awarded in November of 1974.

Senator NUNN. In November of 1974?

Mr. MELLY. Yes.

Senator NUNN. Dr. Mangus was not a stockholder then when you received the contract for the State of West Virginia?

Mr. MELLY. Absolutely not. There was no relationship between Dr. Mangus and FMS.

Senator NUNN. Did Dr. Mangus receive any promise of stock at that time? Was there any conversation with him about being a stockholder in your company?

Mr. MELLY. No Senator; there was not.

Senator NUNN. Was this stock paid for by Dr. Mangus?

Mr. MELLY. It was paid for. He actually paid more than book value.

Senator NUNN. He bought it at book value?

Mr. MELLY. Above book value.

Senator NUNN. Do you have those figures there?

Mr. MELLY. No; I don't in front of me.

Senator NUNN. Did you charge him what you would have charged any other person for this stock?

Mr. MELLY. The same price that is charged to any other person.

Senator NUNN. Was there any other person who purchased stock along this time?

Mr. MELLY. There were three employees that we provided the stock at this time, at the same price.

Senator NUNN. Did he actually pay money for the stock?

Mr. MELLY. Yes; he has paid.

Senator NUNN. How much money was involved?

Mr. MELLY. Five hundred dollars.

Senator NUNN. What number of shares does he own?

Mr. MELLY. Five hundred shares.

Senator NUNN. What is the total number of shares in your company?

Mr. MELLY. Twenty thousand authorized.

Senator NUNN. He owns 500 out of 20,000 authorized. How many are outstanding.

Mr. MELLY. Ten thousand.

Senator NUNN. He owns 500 out of 10,000 that have been issued. His work is consultant for FMS strictly in Arizona, not in West Virginia?

Mr. MELLY. That is correct.

Senator NUNN. Do you find anything wrong with a person who continues to be on the Evaluation and Advisory Committee for West Virginia or a State with which you have a contract actually being a stockholder in your company?

Mr. MELLY. The contract, there is no evaluation committee any longer; but the contract was awarded, as I said, in November 1974. This request of Dr. Mangus was made sometime after that.

Senator NUNN. You requested his help?

Mr. MELLY. By consulting with FMS?

Senator NUNN. Did he become a consultant before he became a stockholder or did he become a stockholder before he became a consultant?

Mr. MELLY. At the same time, same agreement.

Senator NUNN. March of 1976?

Mr. MELLY. Yes.

Senator NUNN. Approximately 16, 17 months after you received the contract?

Mr. MELLY. Yes.

Senator NUNN. But you are still working on that contract?

Mr. MELLY. Yes.

Senator NUNN. He does have a role in working with you on that West Virginia contract, does he not?

Mr. MELLY. Yes; he does.

Senator NUNN. I am trying to get exactly what that role is. What does he do? Does he have the responsibility of deciding how much you are paid or whether you perform the contract? What is his role?

Mr. MELLY. We work together in trying to design the system that meets his requirements, what kind of reports he wants from the system, what kind of information he wants on the claims submitted by providers. He has nothing to do with the financial aspects of the contract.

Senator NUNN. Does he have any responsibility to determine whether you have satisfactorily performed the contract?

Mr. MELLY. I am not really sure. I am sure the decision would be made at a higher level than his; but I am sure he probably would have some input on it.

Senator NUNN. He would have some input in evaluating your performance?

Mr. MELLY. At the completion of the contract, yes.

Senator NUNN. When will that contract be completed?

Mr. MELLY. We expect it to be completed sometime in the first quarter of next year.

Senator NUNN. Do you know whether Dr. Mangus asked any higher authority in West Virginia whether he could become a stockholder in your company?

Mr. MELLY. I assume he asked the question at the same time he asked if he could become a consultant.

Senator NUNN. You are not sure about that?

Mr. MELLY. He said he was going to check with the Commissioner and make sure he had approval.

Senator NUNN. Who is the Commissioner?

Mr. MELLY. Thomas T-i-n-d-e-r.

Senator NUNN. He is the Commissioner of Health in West Virginia?

Mr. MELLY. Commissioner of the Department of Welfare.

Senator NUNN. Do you know if Dr. Mangus checked with him about the consulting relationship?

Mr. MELLY. He did check with him, yes.

Senator NUNN. You assume he checked with him about the stockholding, but you are positive?

Mr. MELLY. I have no direct knowledge of that.

Senator, in my discussion with Dr. Mangus, putting him on acting as a consultant with FMS, he indicated to me he would check with the Commissioner.

Senator NUNN. You are saying he indicated he would. Did he indicate he did, later?

Mr. MELLY. Yes; he did. He checked and was cleared with the Commissioner.

Senator NUNN. About the consulting relationship?

Mr. MELLY. He just referred to it as "it."

Senator NUNN. You don't know whether he was talking about consulting or being or stockholder or both?

Mr. MELLY. No; I did not.

Senator NUNN. Do you have anything in writing on that subject?

Mr. MELLY. Yes; I do.

Senator NUNN. What would be the writing that you have? Do you have a letter?

Mr. MELLY. I have a transmittal letter and an agreement between Dr. Mangus and FMS.

Senator NUNN. One on the consulting relationship?

Mr. MELLY. And also the stock.

Senator NUNN. Could you furnish those to us for the record? The stock would be a separate letter?

Mr. MELLY. It was all in the transmittal letter with the agreement. The stock and the per diem pay is in there.

Senator NUNN. Has the stock actually been issued? He has a stock certificate?

Mr. MELLY. Yes; he has.

Senator NUNN. Did you consult with any attorneys about this or did you have any doubts about whether to believe it?

Mr. MELLY. I had no doubts it was legal.

Senator NUNN. Do you have any doubts now it is legal?

Mr. MELLY. I can't speak for the legality of the situation.

Senator NUNN. I am not asking you to be a lawyer. To the best of your knowledge, you don't know of any rule or regulation in HEW or the State of West Virginia that would prohibit such a relationship?

Mr. MELLY. Not to my knowledge. I might just mention that I was in a competitive situation with a number of companies that were successful. In a competitive proposal, to us they were including in their proposals other State employees, not of the State we were proposing to go to.

Senator NUNN. Back up on that. You said you are familiar with what?

Mr. MELLY. That it is, I think, fairly common practice and I know of at least one instance where State employees are included as consultants to other States in proposals.

Senator NUNN. You think that is a fairly common practice in the overall computer and medicaid field?

Mr. MELLY. I believe so, yes.

Senator NUNN. Do you have any other particular instances where that is occurring that you know about?

Mr. MELLY. I have other consultants, but they are not State employees.

Senator NUNN. You don't have any other State employees that are consultants for you except—

Mr. MELLY. Dr. Mangus.

Senator NUNN. Do you know of other companies that have State employees as consultants?

Mr. MELLY. I am referring to a proposal. I don't know whether these were State employees that were put in the proposal by this company that said if this company was awarded a contract, they would use these State employees.

Senator NUNN. Do you know the company?

Mr. MELLY. I don't remember the name of the company.

Senator NUNN. Let me make sure this is clear. If the company was successful in the bid, the State employees would then become consultants. Is that right?

Mr. MELLY. I believe so.

Senator NUNN. Was that bid within the State? Were they bidding within that State or was it in another State?

Mr. MELLY. It was in another State.

Senator NUNN. There was an arrangement. If they were successful in this, they would become consultants?

Mr. MELLY. I believe so.

Senator NUNN. What would the consultant do after the bid was already successful?

Mr. MELLY. This is another proposal. It was not our proposal, so I don't know what the relationship was between this other company.

Senator NUNN. You don't think there is anything unique about this relationship with Mr. Mangus?

Mr. MELLY. Absolutely not. I think Dr. Mangus is a tremendous physician and has been a great deal of help in educating us as we went through installing MMIS. I don't believe there is any conflict of interest.

Senator NUNN. Do you think there is any conflict of interest with him being a stockholder in the company over which he has some degree of jurisdiction in his role as a State employee?

Mr. MELLY. I don't believe so, Senator.

Senator NUNN. Senator Percy?

Senator PERCY. No further questions.

Mr. FELDMAN. Senator, could I just state that Mr. Melly and his attorneys, Mr. O'Connell and Mr. Bonner, have been of great assistance to us in helping to sort out this matter which is, as you can tell from the record, a very complex matter. Much documentation is required. The involvement of many people has to be scrutinized and examined.

I would like to state for the record on behalf of myself, my staff, and, I believe, minority staff who has worked on it, our appreciation for the assistance Mr. Melly and his counsel has given us. They have come forward. They have been forthright with us, we believe. They have given us valuable information. I think they have given us insight into the program and how it operates and without this kind of valuable assistance, I think our job would have been much more difficult, if not impossible.

Senator NUNN. Certainly everything the staff has informed me about their relationship has been that you have attempted to be completely frank and candid with them. We appreciate very much your cooperation.

Our purpose here is a legislative purpose, as you heard earlier. There is an Inspector General's bill to set up units in HEW that would investigate fraud and inefficiency. I understand Senator Percy is more up to date than I. It passed the Senate last night. Another bill, hopefully, will pass in the House. We have a keen interest in it.

I have also introduced legislation to split up HEW. I happen to think the institution is too large for any human being to run. I think it is going to have to be split up for the purpose of having better management and so forth.

We do very much appreciate your being here today, I know it is not a pleasant experience for you; but we thank you and your counsel.

Mr. MELLY. Thank you, Senator.

Senator NUNN. At this point, I want to insert in the record a letter dated September 28 from Senator Edmund Muskie, chairman of the Budget Committee in the Senate. He expressed a keen interest in this overall investigation relating to the budget.

The Budget Committee this year assumes there will be \$100 million in savings achieved through "new initiatives in fraud and abuse control" in HEW. So this is a very large item in the budget assumption.

Senator Muskie's letter will be admitted for the record, without objection.

[The document referred to was marked "Exhibit No. 19" for reference and follows:]

EXHIBIT No. 19

U.S. SENATE,
COMMITTEE ON THE BUDGET,
Washington, D.C., September 28, 1976.

Hon. SAM NUNN,
Chairman, Permanent Subcommittee on Investigations, Russell Senate Office
Building, Washington, D.C.

DEAR SAM: I was very pleased to learn of your Government Operations Committee hearings on fraud and abuse in federally funded health programs. I wish to commend you for your efforts, along with Senator Moss, in taking the lead in seeking effective solutions to the rampant abuses in Medicare and Medicaid.

The fraud and abuse in these programs is a prime example of why Americans are skeptical about efficiency and effectiveness in their government. Last September, Senator Moss and I held joint hearings on fraud and abuse in Medicare and Medicaid as Subcommittee Chairmen of the Special Committee on Aging. At that time Secretary Mathews of HEW estimated the loss from fraud and abuse to be \$750 million. However, it has become abundantly clear that those figures were very low, and that billions of dollars are being wasted at the federal and state levels.

As you know, the Budget Committee on which we both serve placed a high priority on achieving savings by cutting fraud, abuse, and inefficiency in this program. The Second Budget Resolution for fiscal year 1977 recently adopted by Congress assumes a reduction in Medicaid funding of \$100 million achieved through "new initiatives in fraud and abuse control." Your emphasis on steps which can be taken to cut these costs can help assure the prompt passage of H.R. 12961, which provides for a new Office of Federal Fraud and Abuse Control in HEW.

The effort to control cost in the Medicare and Medicaid programs will take time and commitment on the part of the Congress, the Executive Branch, and state government. Your hearings represent an important response to the savings mandated by the Congressional budget. I look forward to working with you, both as a member of the Budget Committee and of the Government Operations Committee, toward eliminating the waste in these programs without sacrificing their quality.

With best wishes, I am

Sincerely,

EDMUND S. MUSKIE.

Senator NUNN. Our next two witnesses will appear together this morning. We have Mr. Richard Ney, a former publishing executive for McCalls. He is president of Richard Ney Associates, Washington, D.C., a health consulting, marketing and public relations firm. In short, he is a lobbyist or an advocate.

He is accompanied by his wife, Cheryl Anderson, vice president of Richard Ney Associates, Washington, D.C. I will ask you both to please stand and raise your right hand for the purpose of taking the oath.

Do you swear the testimony you will give to this subcommittee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. NEY. I do.

Miss ANDERSON. I do.

Senator NUNN. Let the record reflect both answered, "I do."

TESTIMONY OF RICHARD NEY, PRESIDENT, AND CHERYL ANDERSON, VICE PRESIDENT, RICHARD NEY ASSOCIATES, ACCOMPANIED BY PHILIP KELLOGG

Senator NUNN. Mr. Ney, Miss Anderson, I want to first inform you and advise you of your rights and obligations as witnesses before this subcommittee.

First, you have the right not to provide any testimony or information which tends to incriminate you. If you do so testify, anything you say here may be used against you in any other legal proceedings.

Second, you have the right to consult with an attorney prior to answering any question or questions. Third, under the rules of procedure of the Permanent Subcommittee on Investigations, your attorney may be present during your testimony.

In that regard, I believe the record should reflect that you do have an attorney here this morning. Is that right?

Mr. NEY. I do.

Senator NUNN. I will ask the attorney if he would identify himself.

Mr. KELLOGG. For the record, my name is Philip Kellogg.

Senator NUNN. Would you give us your firm name and where you practice?

Mr. KELLOGG. I practice in the District of Columbia, partner in the firm of Kellogg, Williams, & Lyons.

Senator NUNN. Thank you. We are glad to have you this morning.

As I have indicated, in addition to your rights as a witness, you have certain obligations while testifying before this subcommittee. You are sworn to testify truthfully. If you do so testify, you are obligated to provide truthful responses so as not to subject yourselves to the laws and penalties regarding perjury.

I assume that your attorney is representing both of you. Is that correct?

Mr. NEY. That is correct.

Miss ANDERSON. That is correct.

Senator NUNN. Both witnesses answered in the affirmative.

Do you understand the nature and rights and obligations as witnesses before this subcommittee?

Miss ANDERSON. Yes.

Mr. NEY. Yes; we do.

Senator NUNN. I would like to start by asking you, Mr. Ney, when you first met Mr. Charles Cubbler and I will ask the same question of Miss Anderson.

Mr. NEY. I think I met Mr. Charles Cubbler—

Senator NUNN. If you want to consult with your attorney at any time, if the attorney desires to advise the witness before any question, you are perfectly free to do so. I want to make that clear.

Mr. KELLOGG. I simply wanted to inquire, Mr. Chairman, is the question now being directed to Mr. Ney?

Senator NUNN. The question is now being directed to Mr. Ney, and I was informing Miss Anderson that I would ask her the same question.

Mr. NEY. About 5 years ago when I started business in Washington, I changed careers midstream because of a very stringent domestic situation. I went from the publishing business into the consulting business.

At that time, in talking around Washington, I found that the health community, the health industry, as I used to call it, had very weak representation. I was advised at the time by a friend of mine, a prominent physician, Dr. Amos Johnson, that the best person who could inform me and give me a general tutorial understanding of the health care delivery system as practiced in the United States generally was a man by the name of Charles Cubbler. He was an HEW person, he was at SRS on Dr. Johnson's—

Senator NUNN. SRS?

Mr. NEY. Social Rehabilitation Services.

Senator NUNN. Thank you, sir.

Mr. NEY. So I made arrangements to meet with Mr. Cubbler eventually, weekends, and so on, and in effect he performed over a period of a year what I would call a tutorial service.

Senator NUNN. For you personally?

Mr. NEY. For me personally, I paid for that service eventually when I started to make some money. That is how I met him. That is what he did for me.

Senator NUNN. Did you have an arrangement to pay him for the services from the beginning?

Mr. NEY. No; I would say that he worked with me really at the suggestion of Dr. Johnson whom he knew well, respected well. Dr. Johnson was a very prominent physician, now deceased.

Senator NUNN. Dr. Johnson?

Mr. NEY. Amos Johnson.

Senator NUNN. He is a private physician?

Mr. NEY. He was a practicing physician, formerly the president of the American Academy of Family Physicians. He would be on anyone's list of the most important physicians in America at that time.

Senator NUNN. He was not an employee of the Federal Government?

Mr. NEY. No. He was from North Carolina; Garland, N.C.

So I would say that Mr. Cubbler sort of took me under his wings, so to speak, in a tutorial sense, as a favor to Dr. Johnson. If you were to look at the credentials of Mr. Cubbler, you would see that he has done a great deal—his vitae is very impressive. He has done a lot of visiting professor work. He has done all kinds of things which would qualify him for this job.

Senator NUNN. At the time you first met him, the time you had this relationship, consulting relationship, was he an employee of HEW?

Mr. NEY. Yes; he was.

Senator NUNN. Do you know what his job was at that time?

Mr. NEY. No. I would say it is sort of hard to keep on top of the jobs in HEW. They move them around quite often.

Senator NUNN. I would concur with that.

Mr. NEY. So that is how it stands. I just don't know what his title was.

Senator NUNN. Miss Anderson, would you answer the same question. When did you first meet Charles Cubbler?

Miss ANDERSON. To the best of my recollection, I met him early in 1974.

Senator NUNN. At that time, what were you doing?

Miss ANDERSON. I was employed by Richard Ney Associates.

Senator NUNN. You and Mr. Ney are husband and wife. Is that correct?

Miss ANDERSON. We were not at that time.

Senator NUNN. When were you married?

Miss ANDERSON. Independence Day, 1975.

Senator NUNN. 1975?

Mr. NEY. July 4.

Senator NUNN. Good way to celebrate July 4. At this time, I believe you still work in Richard Ney Associates and you are an officer of the company?

Miss ANDERSON. Yes.

Senator NUNN. Is this an incorporated company?

Miss ANDERSON. Yes.

Senator NUNN. What is your position in the company?

Miss ANDERSON. I am currently vice president.

Senator NUNN. Mr. Ney, you are president?

Mr. NEY. Yes.

Senator NUNN. Where is your company located?

Mr. NEY. 1120 Connecticut Ave., N.W., Suite 1010, Washington, D.C.

Senator NUNN. At the time you met Mr. Cubbler, were you employed by Richard Ney Associates?

Miss ANDERSON. Yes.

Senator NUNN. What was your job then?

Miss ANDERSON. At that time, I was administrative assistant to Mr. Ney.

Senator NUNN. What were the circumstances when you first met Mr. Cubbler?

Miss ANDERSON. What were the circumstances? I quite honestly don't recall that. It would have been, I don't know, at a meeting perhaps, a luncheon meeting or something. I may have met him when Mr. Melly was in town one time. I really have no honest recollection of the circumstances of the meeting.

Senator NUNN. Did he tutor you also as he did Mr. Ney?

Miss ANDERSON. Yes; after I started, after I had met him, Mr. Ney knew that I needed further expansion in the health area. We

had hoped that I would grow with the company and Mr. Cubbler would come over on evenings and assist me.

Senator NUNN. He would come—

Miss ANDERSON. To the office.

Senator NUNN. You were both there at the same time, it was a joint session?

Miss ANDERSON. Yes.

Senator NUNN. Did other employees of your company participate?

Miss ANDERSON. No.

Senator NUNN. Records in the possession of the subcommittee, Mr. Ney, indicate that you made payments to Mr. Cubbler totaling some \$1,150. Is that the approximate amount that you paid him over your period of association with him?

Mr. NEY. Yes, it is.

Senator NUNN. Was this all in one check or was it over a period of time?

Mr. NEY. I think it was in the form of three or four checks specifically.

Senator NUNN. How were those checks made out?

Mr. NEY. Addressed to D. C. Chambless.

Senator NUNN. Did you know who D. C. Chambless was?

Mr. NEY. D. C. Chambless was his wife.

Senator NUNN. Did she participate in any of these sessions?

Mr. NEY. She did in the beginning, but not toward the end.

Senator NUNN. Did she have expertise in this area?

Mr. NEY. She discussed things in a way which would indicate a familiarity, certainly greater than what I do. Obviously, the conversation and the leadership was dominated by Cubbler.

Senator NUNN. Did she work for any government agency?

Mr. NEY. I have no knowledge of that.

Senator NUNN. Miss Anderson, did you know Mr. Cubbler was an employee of HEW at the time he was consulting or tutoring?

Miss ANDERSON. Yes; I did.

Senator NUNN. Approximately how many times did these tutoring services take place?

Miss ANDERSON. I would say we probably spent a total of 40 to 60 hours spread out maybe from 6 until 10 p.m. in the evening.

Senator NUNN. Over what time frame? What period of time was this?

Miss ANDERSON. This would be from, I would estimate mid-1974 towards the end of 1975.

Senator NUNN. Mr. Ney, did you have any fee arrangement? Was there a per-hour rate or was this discussed with Mr. Cubbler?

Mr. NEY. No; it was never discussed. It was suggested only by Dr. Johnson, that when I got on my feet, that I might somehow compensate Charlie, is the way he put it. There was no expression or specified amount from the beginning or at the end.

Senator NUNN. Mr. Cubbler never asked you to pay him any particular amount?

Mr. NEY. No; he did not.

Senator NUNN. He never submitted a bill to you?

Mr. NEY. He submitted a bill which coincided with the amount I elected to give him at the time. That was for our accounting records.

Senator NUNN. Did he initiate the bill?

Mr. NEY. I requested it. I said send me a bill for this amount for our records.

Senator NUNN. You had decided at that stage, before he sent the bill, what you were going to pay him?

Mr. NEY. Yes.

Senator NUNN. You told him what that amount was?

Mr. NEY. Yes.

Senator NUNN. Did you have a method of computing that fee?

Mr. NEY. I would say more a feel than anything else. I feel actually that he gave me—in my own just approximation now—I would say over 100 hours during the year and a half or 2-year period.

Senator NUNN. Do you know whether he had a similar consulting arrangement with other people?

Mr. NEY. I do not. I think it might have been a special favor for me because of Dr. Johnson.

Senator NUNN. Do you have a record of that bill? Do you have a copy of that bill?

Mr. NEY. Yes; I submitted it to the subcommittee.

Senator NUNN. Do we have a copy that we could make a part of the record at this point? The bill that Mr. Cubbler submitted to Mr. Ney? We will make that a part of the record and give it the correct exhibit number.

[The documents referred to were marked "Exhibit No. 20" for reference and may be found in the files of the subcommittee.]

Senator NUNN. I would like to have the witness identify them. I will ask you to look at the bills and give us the dates on them, if there are dates, and describe what they are and the amounts for the record.

Mr. NEY. There are specifically, I believe four.

Senator NUNN. Four separate bills?

Mr. NEY. Four separate bills, the first dated August 8th, 1973; the amount which was paid November 23 was \$300; November 3rd. Excuse me. There is a bill dated November 3rd, 1973. At the bottom of it, it says \$300, paid, check No. 778; check No. 824, final \$300. So for that one bill, there were two \$300 payments.

Senator NUNN. Thank you, sir. Mr. Ney, attached to these statements are cancelled checks. You have volunteered these materials to the subcommittee, which we appreciate. I would like for you to verify for us, that these are the copies of the material that you provided us.

[At this point Senator Percy withdrew from the hearing room.]

Senator NUNN. Could you identify that entire folder as being true and accurate copies of what you submitted?

Mr. NEY. I do.

Senator NUNN. That will become part of our exhibits.

Mr. NEY. It is the final bill, I think, it is December 17, 1974, in the amount of \$250.

Senator NUNN. At the time you had the first bill, was that August 8, 1973 for \$300? Is that the first one?

Mr. NEY. Yes.

Senator NUNN. August 8?

Mr. NEY. Yes; \$300.

Senator NUNN. At the bottom of that bill is, I believe, a notation that says "subsequent bills for \$600, due," is that right?

Mr. NEY. You are right.

Senator NUNN. Is that your handwriting?

Mr. NEY. No.

Miss ANDERSON. That is my handwriting.

Senator NUNN. That indicates there was some agreement at that stage to pay a total of \$900?

Miss ANDERSON. That is correct.

Senator NUNN. How was that figure arrived at?

Miss ANDERSON. I have no idea.

Mr. NEY. May I volunteer? I would say I assumed at that time that I had accumulated an obligation to this man in the amount of \$900 and that I could at that time pay him \$300, that I would pay him the balance of \$600 when I could.

Senator NUNN. Based on your ability to pay and so forth?

Mr. NEY. Correct.

Senator NUNN. We have a vote on at this time. I think this would be the best time to interrupt the hearings. It will take approximately 10 minutes. We will have a recess and come back in about 10 minutes.

[Member present at time of recess: Senator Nunn.]

[Brief recess.]

[Member of the subcommittee present at the time of reconvening: Senator Nunn.]

Senator NUNN. Mr. Ney, we have gone over, I believe, the first statement of August 8, 1973, and that is for \$300 for "professional and technical services" provided during the month of July 1973. That was the bill on which there was a notation, "subsequent bills for \$600 due." You paid this statement on November 23, 1973, with check No. 731 for \$300. Is that correct?

Mr. NEY. I do not have the exhibit in front of me.

Senator NUNN. Would you take a look at it? My information is that that statement was paid on November 23, 1973, with check No. 731 for \$300. I ask you if that is correct?

Mr. NEY. Yes; it is, Senator.

Senator NUNN. There is a second statement paid November 3, 1973, for \$600, for "technical services rendered during the months of August, September and October 1973."

The notation at the bottom of the invoice and accompanying check showed that you paid this statement in two installments of \$300 each. Is that correct?

Mr. NEY. That is correct.

Senator NUNN. One check for \$300 was drafted on December 31, 1973, and the second installment of \$300 was drafted January 29, 1974. Is that correct?

Mr. NEY. That is correct.

Senator NUNN. The notation on the statement perhaps in your handwriting was that the January payment was the "final payment" indicating that the total pre-agreed upon amount was \$900 as indicated by the notation on the bottom of the August 8, 1973 statement.

Miss ANDERSON. That is my notation.

Senator NUNN. Is that basically correct?

Miss ANDERSON. Yes; that is correct.

Senator NUNN. Then 11 months later on December 20, 1974, D. C. Chambless submitted another statement. This one is for \$250 for "professional and technical services rendered during the month November 1974." Is that correct?

Mr. NEY. That is correct.

Senator NUNN. Please tell us, was the January 29, 1974 check the final payment for tutorial services? In other words, what I am trying to establish—

Mr. NEY. No. Let me clarify. Regardless of the terminology used on these statements, the total represents my feeling of what I was obligated to pay this man for what he had done; tutoring me. It happened to fall over those periods as it was convenient for me to pay. It has no reference to anything else.

Senator NUNN. The extra \$250 that was paid in November 1974, I will ask you the question: Did that have anything to do with Mr. Cubbler's reviewing the West Virginia contract or any other contract?

Mr. NEY. Absolutely not.

Senator NUNN. Is that also your impression?

Miss ANDERSON. The original \$900, I handled the budgeting for the company. Mr. Ney would have told me to budget in \$900, whatever or however I did it for D. C. Chambless whom I understood to be Mr. Cubbler's wife.

I was budgeting that year with the assumption that there would be \$900 to be paid and I had to work it out as best I could with my financial situation. That is the purpose for the final.

Senator NUNN. What I am trying to grasp is if that was supposedly the amount to be paid, when did you decide to pay the extra \$250 and what was that for?

Mr. NEY. Sir, if I may, I think that in all fairness the notation of final has to do with a statement that calls for \$600. I would interpret this notation to indicate that the first payment of \$300 was made and then the final of \$300, meaning the balance due on that statement of \$300. So that the final had to do with that statement, and not for a situation.

Senator NUNN. Did you get another bill for \$250?

Mr. NEY. Yes, sir.

Senator NUNN. After the \$900 was paid?

Mr. NEY. Yes.

Senator NUNN. Is that in that group of bills?

Mr. NEY. Yes. That follows.

Senator NUNN. Does that have any notation on it?

Mr. NEY. Only that it was paid, check number dated December 17, 1974. That, in my opinion, completed my obligation to Mr. Cubbler for the tutorial services he rendered.

Senator NUNN. What is the date of the bill for the extra \$250?

Mr. NEY. December 20, 1974.

Senator NUNN. Does that say what it was for?

Mr. NEY. It says for professional and technical services rendered to your company during the months of November and so on, which is a fallacious terminology, in my opinion.

Senator NUNN. During the month of November 1974?

Mr. NEY. Yes.

Senator NUNN. When was the last tutorial services rendered?

Mr. NEY. I would say prior to that time is substantially correct.

Senator NUNN. So that billing would not have been correct according to your interpretation? There were no services rendered during November of 1974 of a tutorial nature?

Mr. NEY. No; absolutely not.

Senator NUNN. Do you know why it would be billed in that particular vein? Was that an agreement?

Mr. NEY. No. I was better able to pay it at that time than before and as opposed to starting up in business. It was a very small scale, a start-up company. But it was not related to any activity other than the tutorial services.

Senator NUNN. Did you actually call Mr. Cubbler and say I am not able to pay you another \$250? Do you want to send me a bill?

Mr. NEY. Something like that, I would say, is probably the way it comes out.

Senator NUNN. Do you recall specifically?

Mr. NEY. Not specifically. I would say it was within that frame.

Senator NUNN. Do you recall, Miss Anderson, anything about that?

Miss ANDERSON. It would be in that frame.

Senator NUNN. Then your testimony is that this \$250 and November bill, November 1974, paid December 1974, had nothing to do with the West Virginia contract?

Mr. NEY. Not at all.

Senator NUNN. The West Virginia contract with FMS started on November 6, 1974, and Mr. Melly said you told him that you had Mr. Cubbler review the FMS proposal. Is that statement by Mr. Melly correct?

Mr. NEY. I don't think I heard that statement.

Senator NUNN. Perhaps he didn't say it this morning. Perhaps that was in the staff report. I am not sure whether he said it this morning or not. I will just ask you the question. Did you ask Mr. Cubbler to review the West Virginia contract?

Mr. NEY. The West Virginia contract? I would say no.

Senator NUNN. You don't recall that?

Mr. NEY. Do you mean the proposal or the contracts?

Senator NUNN. The proposal.

Mr. NEY. The RFP?

Senator NUNN. The RFP? Do you recall whether you asked Mr. Cubbler to review that?

Mr. NEY. I don't have any recollection of that, per se.

Senator NUNN. It is the proposal we are talking about which is the response from FMS to the RFP. Did you ask Mr. Cubbler to review that proposal?

Mr. NEY. No. I did not.

Senator NUNN. Miss Anderson, do you recall whether you asked him to review the proposal?

Miss ANDERSON. No. I don't recall asking him to review it.

Senator NUNN. Would you say categorically you did not or you just don't recall?

Miss ANDERSON. I would say I did not.

Mr. NEY. I don't recall.

Senator NUNN. Mr. Ney?

Mr. NEY. I do not recall.

Senator NUNN. Is it possible that you did, then?

Mr. NEY. My best recollection is that I did not.

Senator NUNN. Thank you, sir.

Mr. Ney, have you retained any other Governmental employees to tutor you or your clients?

Mr. NEY. I am sorry?

Senator NUNN. Have you retained other Federal Government employees to tutor you or your clients?

Mr. NEY. Never.

Senator NUNN. Mr. Cubbler is the only one?

Mr. NEY. He is the only one.

Senator NUNN. Miss Anderson, have you ever retained any other Federal Government employees to assist you or your clients on a remunerative basis?

Miss ANDERSON. Never.

Senator NUNN. Mr. Cubbler—

Miss ANDERSON. I never suggested anyone talk to Mr. Cubbler to retain him.

Senator NUNN. You never did?

Miss ANDERSON. Never did.

Senator NUNN. Mr. Ney, would you describe for us the circumstances of your recommendation to FMS, which was then known as Fry Associates, to Ed Flowers when he was director of the West Virginia Department of Public Welfare? I will repeat the question. Would you describe for us the circumstances of you recommending FMS, then known as Fry Associates, to Ed Flowers when he was director of the West Virginia Department of Public Welfare?

Mr. NEY. It was here in Washington that Commissioner Flowers and an assistant and I were having lunch one day. When he asked me if I had any computer clients, I said that we did not. I said we had been looking into this field for 1½ years. It was a field dominated by very large companies, EDS, HAS, Optimum Systems, and so on, and that while there were many computer companies that wanted to get into this field, that I was finding it very difficult to locate a company that had the necessary combination of requisite things, commitment by the board of directors, financial stability, manpower resources, awareness of the medical part of an MMIS health plan, that there were many systems companies who were excellent or good enough to put the man on the Moon, but at the same time, they did not understand how to work in this particular field and that I had been looking into this.

I had in mind a few companies that I would think about, would discuss it with them and would get back to him.

Senator NUNN. Did you represent Fry Associates at the time Mr. Flowers first asked you for a recommendation?

Mr. NEY. No; I did not.

Senator NUNN. Did you represent Fry Associates when you gave that name to Mr. Flowers?

Mr. NEY. Yes.

Senator NUNN. What time frame was that?

Mr. NEY. A matter of weeks, perhaps 2 or 3.

Senator NUNN. What kind of conversation did you have with Fry Associates to induce them to retain your firm?

Mr. NEY. They had come to me some time before that. Frank Melly went from Cambridge over to Fry Associates, whatever it is. One time he called me here in Washington. He said he was doing very well with a company that he had. He wished that he could get his company interested in this health care field and the future that it offered.

He had no specific thing in mind. He wanted me to meet the president of that firm, Mr. Hadley Ford, which I later did.

Some months passed during which they discussed whether they would accurately pursue development of the health care business.

So, when this situation came about, from Mr. Flowers' point of view, I called Frank and told him of the conversation.

Senator NUNN. Frank being?

Mr. NEY. Mr. Melly, told him of the interest which was a generalized interest. There was no commitment ongoing. I viewed that as a test question to Mr. Melly as to whether his firm had these necessary requisite ingredients, the financial stability, the manpower resources, a commitment that would lead to things down the road, and so forth.

He took that under advisement and discussed it with his principals and came back and then retained us. Said yes, let's do this on a 6-month basis.

Senator NUNN. How much was that retainer fee, approximately?

Mr. NEY. I think it was \$3,000 a month for 6 months.

Senator NUNN. Three thousand for 6 months?

Mr. NEY. Three thousand per month, for 6 months.

Senator NUNN. When did this retainer contract expire?

Miss ANDERSON. I think it was a short-term contract because Fry was a little unsettled. I think it was a 3-month contract.

Senator NUNN. Three-month contract for \$3,000?

Miss ANDERSON. Yes.

Senator NUNN. Did FMS retain you primarily to assist it in West Virginia?

Mr. NEY. No; I would have to say you have to understand, Senator, that FMS—first of all, with Fry, Fry was owned by ARA, which is a very big food servicing company. How they got into this consulting business, I don't know. They decided to divest themselves of it. Mr. Melly was the head of one of the five or six divisions; the division that was most successful. Somehow he acquired those clients from Fry.

So he set up his own company, FMS, reflecting, therefore, his belief and his commitment that there was a need and opportunity for the kind of things he could do or bring about in this field.

So he did not retain us for a particular State, any single State obviously.

Senator NUNN. More of a general arrangement?

Mr. NEY. It had to be. He was committing himself, as you know, he is an international businessman. He has had extensive experience.

Senator NUNN. You are speaking of Mr. Melly?

Mr. NEY. I am speaking of Mr. Melly. When a man starts his own business, he has to think pretty hard about it. So this was not a hip shooting, let's try for some one State kind of thing. Not at all.

Senator NUNN. When was the date for the filing of the West Virginia proposal? Do you recall that?

Mr. NEY. I believe it was toward the end of September, something like September 20, 21.

Senator NUNN. We have September 22, 1974. Would that be approximately correct?

Mr. NEY. Yes; I would say that is approximately correct.

Senator NUNN. Had Mr. Melly been sending you portions of the proposal as he prepared them during the summer of 1974?

Mr. NEY. Some portions, yes.

Senator NUNN. That was during the time you were retained?

Mr. NEY. Yes.

Senator NUNN. Were you making editorial suggestions and changes for Mr. Melly on the proposal?

Mr. NEY. I was making those connected with the area which I knew something about which would be how the physician community might view it. As you may know, one of the greatest problems here is that physicians regard computer people as computer hacks and the computer people regard the physicians as someone under community relations. There is a tremendous mistrust between the two groups.

Senator NUNN. I believe you went to New York on about Labor Day of 1974. Is that correct?

Mr. NEY. That is correct.

Senator NUNN. What was the purpose of that trip?

Mr. NEY. The purpose of that trip, from my point of view, which I made with Miss Anderson, who was then a single person, we were unmarried—the purpose of that trip from my point of view was to get Mr. Melly on the stick, so to speak, and to get him moving in the development of the proposal which, from the few sections that had been shown to me, the medical nature, I thought would not be strong enough to win.

Senator NUNN. You thought the proposal was deficient at that stage?

Mr. NEY. The elements of the proposal that I had access to were sent to me. I was working with physician groups at the time, and I didn't have to have any special knowledge to be able to read this and say it was too-systems oriented and without enough emphasis on the provider relationships importance and how it was going to be brought about. You can't talk about something like that in one or two paragraphs and have people think you communicated it.

So it was in that connection and it was in connection with the late payment of the bill.

Senator NUNN. Did you point out deficiencies in the proposal to Mr. Melly?

Mr. NEY. Definitely.

Senator NUNN. I believe you also had the discussion with the contractual relationship—

Mr. NEY. Excuse me.

Senator NUNN. Go right ahead.

Mr. NEY. Counsel properly pointed out to me that we are blending two things here. One is the September 4 meeting and did I go up there? Then the second thing is my reaction to certain parts of the proposal. They were not simultaneously done. I went up there on Labor Day weekend with Miss Anderson to say to this man in effect, shape up and get this proposal straight. Are you serious about and are you putting yourself and your company on the block here to do it, if so you want to win. Which he wasn't doing.

He wasn't there. That is the point. He wasn't there.

Senator NUNN. That was the purpose of the trip but he wasn't there?

Mr. NEY. He wasn't there. He called in and said he could not come down, which was a pretty outrageous thing to me, having taken Labor Day to drive up there and all of this sort of thing and no one is interested enough to come down. I was pretty outraged by it, frankly.

Senator NUNN. Did anybody meet with you?

Mr. NEY. No.

Senator NUNN. So you made a fruitless trip?

Mr. NEY. Fruitless trip, we bore the expense ourselves, it is in our corporate records under business development, period.

My point at that time was these people had to get with this thing and do a good job in order to win and if they did a good job, I was sure they could win because they had the technical capability. That was the key thing. He is a smart person. He could learn the medical side.

My question was do I resign this account right now. I was so angry about it that I didn't trust my own cool judgment, and so Miss Anderson went to New York by plane the next day.

Senator NUNN. The next day?

Mr. NEY. That is correct?

Miss ANDERSON. That is correct.

Senator NUNN. What was the purpose of her trip up?

Miss ANDERSON. My purpose of the trip was to establish what future RNA and FMS were going to have together. It was essentially to renegotiate the contract. We had entered into a contractual relationship with Mr. Melly in February on a 6-month basis at a reduced fee when Fry Management dissolved or whatever happened to it.

There were two factions within that group and they both had asked us to represent them. We selected FMS at a reduced fee because we felt that Mr. Melly had the capability to perform better than did this other group which had worked with him.

This is an important point, I know. We discussed this with your staff and counsel advised that we had better research this a bit. So we looked in our records.

In August the contract was essentially up for some type of resolution. Mr. Melly had been out of touch very much at the time in

August, very uncommunicative. He had sent us a late fee payment and when we received it, it was an unsigned check. So we couldn't use it.

It was at the end of our fiscal year. I had fiscal year transactions to handle and no check, no fee.

When I went up on the 4th—I went up with Mr. Ney on Labor Day and we did not meet with Mr. Melly the following Tuesday. I flew back up on the 4th for the purpose, from my perspective, of essentially determining whether or not this relationship was going to continue.

Senator NUNN. With your company?

Miss ANDERSON. With our company, whether or not there would be representation of FMS beyond that time.

Senator NUNN. Did you meet with Mr. Melly that day?

Miss ANDERSON. That day I met with Mr. Melly.

Senator NUNN. You discussed, I assume, the fee and your contract with him?

Miss ANDERSON. Yes.

Senator NUNN. Did you renegotiate the contract or reaffirm the contract?

Miss ANDERSON. We decided to continue, right.

Mr. NEY. Excuse me. May I interpose, Senator, to say that, when Miss Anderson went up that time, she had full authority from me to sever that relationship on the spot if in her judgment they were not going to get chanked up and moving as quickly as we thought they should.

Senator NUNN. What was the result of that? Did you in effect renegotiate the contract?

Miss ANDERSON. In effect, we did. During this meeting we talked about West Virginia which was the most immediate prospect that we had in front of us. Mr. Melly said that he wanted to and he would get the proposal in. During that meeting, I talked primarily about the provider—in regard to the proposal—it would be in regard to the provider relation section because that is really the only thing I would have any knowledge of.

I am not a technical person, strictly a generalist. I had had experience in working with physicians and I knew the importance of this. This would be the only thing that I had any degree of competence on. I was quite nervous about meeting with a man of Mr. Melly's stature.

[At this point Senator Percy entered the hearing room.]

Senator NUNN. Did that meeting result in a renewal of the contract, confirmed by letter of September 5th, 1974? I will ask the Clerk to show the letter to you. You can go ahead and answer the question. Then we will ask you to look at the letter.

Miss ANDERSON. Mr. Melly felt that he needed the West Virginia contract to get his company started and if they won in West Virginia, then we would continue our relationship. He would be able to continue to pay us. Of course, I wanted, both Mr. Ney and I wanted, the fee to be up to what we had declined 6 months prior.

Senator NUNN. Is that the letter you are referring to, that agreement dated September 5th, 1974?

Miss ANDERSON. Right.

Senator NUNN. We will ask that that be a part of the record as exhibit 21.

[The document referred to was marked "Exhibit No. 21" for reference and may be found in the files of the subcommittee.]

Senator NUNN. Did Mr. Melly ask you how you could correct the deficiencies in the short time left before the proposal was due, Miss Anderson?

Miss ANDERSON. We had discussed that. Mr. Ney, primarily in Mr. Melly's name, had approached several physicians in the State of West Virginia to see if they would be the State medical adviser.

The purpose for this is that we always counsel our clients when submitting proposals to make sure that it is tuned into the local problems and to the local objectives in order to be not only responsive to what is perhaps provided, but to have an awareness of the problems that are not or cannot be stated in an RFP.

Quite obviously, if we were successful in getting a physician, he would review the provider relation section. We were not successful. We did not know if we would be successful. We were not.

At that time, I don't know—at that time I could conceivably have suggested to Mr. Melly to talk to Mr. Cubbler regarding someone who would be capable of helping him in a short period of time.

Senator NUNN. Do you recall whether you did or didn't? You think it is possible?

Miss ANDERSON. I think it is possible.

Senator NUNN. Mr. Ney, before that time, had you ever discussed with Mr. Melly the possibility of consulting with Mr. Cubbler?

Mr. NEY. No; I think that my own reaction to this is that I think Miss Anderson may have suggested someone like Cubbler as a reference point, just as I could turn to you, Senator, if I may, and say if I want to do something in Atlanta or Georgia, and so on, do you think the C&S Bank could give me some advice in a certain area.

You would say yes or no, or why don't you try this one. It is only in that connection, in my opinion.

Senator NUNN. At that stage did either of you talk to Mr. Cubbler about assisting in this particular area?

Mr. NEY. No.

Miss ANDERSON. I may have told Mr. Cubbler of my conversation with Mr. Melly. If Mr. Melly were going to call Mr. Cubbler, I am sure I probably would have alerted him.

Senator NUNN. Alerted Mr. Cubbler after your conversation?

Miss ANDERSON. After the conversation.

Senator NUNN. At that stage had Mr. Cubbler been shown a copy of the draft proposal when you first mentioned his name to Mr. Melly?

Miss ANDERSON. Not to my knowledge.

Senator NUNN. Is that also your knowledge?

Mr. NEY. Not to my knowledge.

Senator NUNN. So the conversation with Mr. Melly preceded any kind of conversation with Mr. Cubbler by either of you relating to this particular proposal?

Miss ANDERSON. I might also add I was not even aware until this morning that Mr. Cubbler had any type of session with Mr. Melly

prior to the September 5 date or September 4 meeting that I had with Mr. Melly. I did not know that until today.

Senator NUNN. You did not know? In other words, Mr. Melly had a meeting with Mr. Cubbler before you ever suggested the name of Mr. Cubbler?

Miss ANDERSON. That is correct.

Mr. NEY. That is correct.

Senator NUNN. How would Mr. Melly have known about Mr. Cubbler? Do you know?

Mr. NEY. He said this morning he had met him at the Cambridge Computer Co. some years ago.

Senator NUNN. Did you know this?

Mr. NEY. Yes; I think I did know that.

Senator NUNN. You knew Mr. Cubbler and Mr. Melly were already acquaintances?

Mr. NEY. Yes; when Mr. Melly came to Washington, if I would take him as any new client in through SRS, through the Bureau of Information Systems, I would have introduced Mr. Melly to a whole succession of people, some five or six division heads.

Senator NUNN. Miss Anderson, did you tell Mr. Melly in that meeting, I believe September 4th or 5th?

Miss ANDERSON. The meeting was held September 4.

Senator NUNN. Did you tell Mr. Melly at that meeting that Mr. Cubbler could help him correct the problems in the proposal?

Miss ANDERSON. No, sir; I told him that Mr. Cubbler could probably refer someone to him to—I am not saying that. I would not tell Mr. Melly, I never told Mr. Melly to, at any time retain Mr. Cubbler for any purpose whatsoever; not at that time, nor at any other time.

Senator NUNN. Thank you. That is a very clear position. Do you want to make a statement on that?

Mr. NEY. I concur with that.

Senator NUNN. That Miss Anderson did not tell Mr. Melly to retain Mr. Cubbler or did not advise him to?

Mr. NEY. I think the only thing that might have happened is he might have said, she might have said, "Why don't you talk to Charlie?" as to who you might find, who is available, that kind of thing.

Senator NUNN. We have established very clearly Miss Anderson's role, I think, in this.

What was your role in terms of advising Mr. Melly to talk to Mr. Cubbler?

Mr. NEY. I would say it was more than that and perhaps even less. It was not specific. I never advised him to retain Charlie Cubbler. I did not know until the last month or so that Mr. Cubbler had been retained and paid. I knew that Cubbler had been assisting on weekends on moonlighting and it was my understanding that his expenses were being paid, period.

Senator NUNN. You did not understand he was being paid a consulting fee?

Mr. NEY. Absolutely not.

Senator NUNN. Until when?

Mr. NEY. A month, 2 months.

Senator NUNN. How did that come to your attention?

Mr. NEY. What?

Senator NUNN. How did that knowledge come to your attention, that Mr. Cubbler had been paid a consulting fee?

Mr. NEY. Through the course of discussion with my counsel, involving this investigation.

Senator NUNN. Miss Anderson, when did you first know Mr. Cubbler had been paid a consulting fee?

Miss ANDERSON. It has been within the last month to six weeks. I heard it through Mr. Ney.

Senator NUNN. Did you also understand he was being paid expenses but not consulting fees?

Miss ANDERSON. I think I—I would understand. I would assume he was being paid expenses. I was never involved in any financial discussion on what financially was happening between Mr. Melly and Mr. Cubbler.

Senator NUNN. Miss Anderson, did you tell Mr. Melly that D. C. Chambless would assist him officially but that Charles Cubbler would assist him unofficially?

Miss ANDERSON. I have no knowledge of saying that.

Senator NUNN. Mr. Ney, did you ever make that statement to Mr. Cubbler or anything resembling that?

Mr. NEY. No; I did not say that.

Senator PERCY. Mr. Chairman, I wonder if I could ask—because of urgent work on the floor I must leave—a few general questions to Mr. Ney and Miss Anderson.

Senator NUNN. Go ahead.

Senator PERCY. I would be interested in your general feeling as to why a company such as yours is needed in Washington or elsewhere, to help people, contractors, work with HEW. What is there about, let's say, HEW in this case, that they can't be contacted directly? Is it the bureaucracy that is too complicated for a businessman?

What sort of services that you perform can't be done directly by sales personnel of a company or contractor?

Mr. NEY. I think, to be very candid with the Senator, if I may, I think the services that we perform are related to helping a person unfamiliar with Washington.

Suppose they come in to see you. Instead of storming into your office with a lot of emotion and a long list of things and four officers of the corporation come in, they want to do thus and so and thus and so.

You may have to send your AA out to make a lot of calls and interface for these people from Chicago or any other place. People such as us, I think serve the purpose of an interface, so to speak. This is no reflection on the bureaucracy or HEW or the Congress.

Senator PERCY. I want to differentiate between services available. Every bureau has an information service. Every constituent has a Senator and Congressman.

I have a number of people, both in Illinois and down here, working to help people get through the bureaucracy, explain how this Government functions. They get that free from us.

Why do they have to pay you for it?

Mr. NEY. Because I think of the nature of the bureaucrat the world over. It is a global thing. It just isn't here and it isn't just HEW. They are self-protective, hold onto their own things, resist change and things of this sort.

People such as ourselves, and there are others in this business, whether they are law firms who are really lobbying or not, people such as ourselves are really catalysts, contributors.

We have to work with them and take maybe 8 hours of emotion-charged concern that the officers and association may have or corporation, and reduce it to 2 pages with every comma in place. We can then go to you and/or to someone in the bureaucracy and say these people have a concern. We have worked with them. We have reduced it to what we think everyone agrees to. It is a very, hopefully, precise presentation of the problem.

So that you or the person involved with the bureaucrat can focus in on this.

Senator PERCY. Let's take a case. Let's say I have a constituent, a company in Illinois that comes down and says I would like to do business with HEW. We don't have a Washington representative, but we have a salesman that can travel down here. We would like to know who it is we see in this particular area.

It is not uncommon for someone on my staff to call up and say Senator Percy's office is calling, we have a constituent that would like to come over and call on you, can they see you?

I can't recall a time when we could not call up and get an appointment. When Mr. Ney calls up, president of Richard Ney and Associates, saying, "I have a client that I would like to have an appointment made for," why is that more influential than a Senator or Congressman making a normal courtesy call, opening up doors for people?

In other words, there is a big anti-Washington feeling in this country. I want to figure out why you can't get at this bureaucracy through normal channels. The normal channel to me is the elected representative. We are fairly responsive to our constituents because they send us down here.

Mr. NEY. I would say if the corporations were to close all of their Washington offices, why, you people on the Hill wouldn't have the staff, no matter whether you have grown 3 times in the past 5 years or whatever. Even so, the points of contact are so tremendous.

Senator PERCY. How do you establish these points of contact? How do you go about it? We don't do anything. We don't entertain anyone, we don't take them out for dinner at night. We just call them up cold; look them up in the directory.

What added features do you offer that you can have an open door for some of your clients?

Mr. NEY. I don't have an open door as I think of a door. In the course of building a business I may have built some credibility here in Washington. I don't bring people in who can't deliver on what they say or that I represent them to say; and who have a commitment of the resources and so on. So the time is not wasted. I think that is just being a professional.

So I am not a door opener or influence peddler or anything of that sort, and I would resent any implication of that.

Senator PERCY. In the field of health care, Mr. Ney, could you tell us who in Washington and who in West Virginia, for instance, you know well that you could call up and make a perfectly legitimate request that they see a client, look at a proposal or listen to some sort of proposition? Could you give us the names of the people with whom you have established a relationship here in Washington, or is the list so long you would have to submit it?

Mr. NEY. I would first ask you, Senator, to consider that you are asking me to list the names of people that I have developed relationships with.

Senator PERCY. Let me put it this way: I don't want to be personal about it. Do you have close working relationships with people in government, in, let's say, West Virginia and in Washington, and do you depend upon those relationships to be the contracts for the customers that you represent?

Mr. NEY. I would ask you to delete the word "close" because it could have unfavorable implications.

Senator PERCY. Good relationship.

Mr. NEY. I would say there are mutual respects held between—

Senator PERCY. You can pick up the phone, call them, and they at least know you?

Mr. NEY. Correct, and I can do that.

Senator PERCY. Let's just assume that IRS looks upon entertainment as a perfectly legitimate business cost.

To what extent do you rely upon entertainment as a means of getting to know people so that you can call them up on the phone and reach them?

Mr. NEY. I think I would like to define entertainment in this case. I think if you said conference, slash, entertainment, which consisted of a lunch somewhere, I don't mean at the Sans Souci, I mean at the Monocle, Statler-Hilton, a lunch or dinner.

Senator PERCY. Or MacDonald's.

Mr. NEY. Beg your pardon?

Senator PERCY. Or MacDonald's?

Mr. NEY. Or MacDonald's or Luigi's downtown. I would say the reason for that is as in any business, when I was in business in New York or when you were in business in Chicago, you can always have a more productive conversation with someone with lack of interruption, lack of telephone interruption.

In all of my business life I have done business over lunch. I don't know what it is not to.

Senator PERCY. Are your expense accounts kept in your office in such a fashion that you can detail who you have entertained, what the cost was? Do you generally keep receipts?

Mr. NEY. Yes.

Senator PERCY. Do you do it by credit cards so you have records?

Mr. NEY. Yes; we have been in business 5 years and have not been audited to date.

Senator PERCY. That plays a fairly important role in maintaining contacts?

Mr. NEY. A critical role.

Senator PERCY. How about gratuities and gifts? Has your company engaged in or have you ever taken as a deduction for busi-

ness purposes any gift or any gratuities of any kind to anyone in the Federal service?

Mr. NEX. I would say that a couple of years ago I sent out a number of Christmas gifts, I think from the American Express catalog, of some paperweights or something of that sort, each of which may have had an average value of \$20 or \$25, something like that, to a number of people.

Senator PERCY. Each of them \$125?

Mr. NEX. \$25. I think last year it was a \$4.50 book from the Smithsonian Institute. It is a remembrance and a gesture.

Senator PERCY. So that you have never at any time in your business experience here operating your company made a gift then in excess of \$25 to any individual who works for the Federal Government?

Mr. NEX. Miss Anderson has reminded me that those gifts were not \$25. They were some \$40?

Miss ANDERSON. \$40 to \$50.

Senator PERCY. It makes a big difference, you know. Are they \$49.49? The legal limit is \$50.

Mr. NEX. It was a very attractive piece of sculpture.

Senator PERCY. I will rephrase. There was no gift that you ever gave that was in excess of \$50 to any Federal employee?

Mr. NEX. Correct.

Senator PERCY. Do you happen to know whether gifts and gratuities are an important part of your business? Do you feel they influence people or facilitate your keeping close contact with them?

Mr. NEX. Senator, I do not believe that they are necessary. I never have believed in that.

I would say, if I may, that we have some pride, and I have said we have built our business without the use of booze, broads, or bribes. I don't think that that is a necessary thing at all.

Senator NUNN. What are those three again? [Laughter.]

Mr. NEX. We have built our business without the use of booze, broads, or bribes. We are very proud of that.

Senator PERCY. The three B's.

Mr. NEX. The three B's. That is the way I say it. People in this town know it.

Senator PERCY. So to your knowledge, in Washington, contributions, gratuities, or gifts, are not an important part of influencing people?

Mr. NEX. I think it can always be used in any kind of business, Senator, as you know. I think those who use it most, in any business I am speaking of, are those who are the least professional or they are in kind of a tight competitive situation dealing with specific items of identical nature.

When you are in things involving the delivery of human services, health care, you have another variable here. It is not possible to quantify this the way you can the Defense Department weapons systems development and so on.

Senator PERCY. Do you feel it has been a good thing for us to limit the political contributions and require public disclosure of those?

Mr. NEX. I do.

Senator PERCY. Has that in the past been a way of influencing people?

Mr. NEY. I don't know. I can only speak for myself. We operate pretty much as loners in our field. So I can't speak for others. I have never been asked, by the way, to come up with anything.

Senator PERCY. I appreciate very much you both being here, Miss Anderson, we appreciate your testimony. Thank you, Mr. Ney.

[At this point Senator Percy withdrew from the hearing room.]

Senator NUNN. I have a series of questions here. We have other witnesses. But we are going to have to take a recess. I am running about an hour late for a meeting that I must go to.

But I hope we can get through with your testimony here in the next few minutes.

Mr. Ney, did you know that Cubbler was paid some \$2,000 by Melly for what Mr. Melly says was rewriting the West Virginia proposal?

Mr. NEY. I did not.

Senator NUNN. Miss Anderson, did you know that?

Miss ANDERSON. I did not know that.

Senator NUNN. Whom did you think was doing the rewriting? Did you know Mr. Cubbler, Mr. Charles Cubbler, wasn't doing the rewriting of the proposal?

Mr. NEY. I knew Mr. Cubbler was involved, was working with Mr. Melly on a moonlighting basis, but it was my understanding that he was receiving expense money only.

Senator NUNN. Miss Anderson, did you realize he was rewriting the proposal?

Miss ANDERSON. I realized that he was editing the provider relations section of the proposal.

Senator NUNN. Did you ever have occasion to pick up copies of certain documents from Mr. Cubbler to deliver them to Mr. Melly?

Miss ANDERSON. Yes, I did; on one occasion, a couple of weeks after the September 4 meeting, Mr. Melly called me and requested that I pick up an envelope from Mr. Cubbler and send it to him in New York.

Senator NUNN. You did so?

Miss ANDERSON. Yes, I did.

Senator NUNN. Where did you pick that envelope up?

Miss ANDERSON. It would have been at the SRS building.

Senator NUNN. That is a Government building, HEW building?

Miss ANDERSON. Yes.

Senator NUNN. Did you get it directly from Mr. Cubbler?

Miss ANDERSON. I think it was probably sitting on a desk with my name on it. I don't recall having any encounter with Mr. Cubbler at all. I wouldn't have had any reason to. It was strictly running an errand from my point of view.

Senator NUNN. Mr. Ney, did you have a good many meetings with Mr. Cubbler over lunch?

Mr. NEY. Yes.

Senator NUNN. Over what period of time?

Mr. NEY. I would say until the last 6 months or so.

Senator NUNN. Until the last 6 months or so?

Mr. NEY. Yes.

Senator NUNN. Over the whole time you have been in business here?

Mr. NEY. Yes; pretty much.

Senator NUNN. How many years is that?

Mr. NEY. Five years.

Senator NUNN. What kind of meetings were those? Were they related to Mr. Melly?

Mr. NEY. They were related to the health business. Mr. Cubbler is a great gossip.

Senator NUNN. A great what?

Mr. NEY. Gossip, as some other people are in Washington.

Senator NUNN. I have heard that rumor. [Laughter.]

Mr. NEY. People in our business have to meet and work with all kinds of people. Our business is to obtain information, listen to what people are saying, to distill the nonsense and the baloney from what might be real and check it out. This is a part, anyway of our business.

Senator NUNN. Did you bill FMS for a good many of these luncheon meetings with Mr. Cubbler?

Mr. NEY. Yes.

Senator NUNN. Do you have any idea how much these expenses would come to over the period of your contract with FMS?

Mr. NEY. I think we made a rough calculation of that at one time.

Senator NUNN. Give me an estimate. I think we have the details of this.

Mr. NEY. Perhaps \$1,300 in total, conference, entertainment over a period of 4½ years. \$1,000 over a period of 4 years; 4½ years. Remember, I was there, too.

Senator NUNN. So it would be two people at this meeting?

Mr. NEY. It could have been more.

Senator NUNN. Any other Federal officials?

Mr. NEY. It could have been.

Senator NUNN. Do you have any recollection of the names?

Mr. NEY. You mean with Cubbler at the same time?

Senator NUNN. Yes; with Mr. Cubbler.

Mr. NEY. I don't recall any specifically. There might well have been. These were not clandestine is what I am trying to emphasize.

Senator NUNN. I am not implying that.

Did you know Mr. Cubbler was being furnished an automobile by FMS?

Mr. NEY. Not until last Saturday.

Senator NUNN. How?

Mr. NEY. When my counsel told me.

Senator NUNN. Miss Anderson, do you know Mr. Cubbler was being furnished an automobile?

Miss ANDERSON. I heard it the same time, this past Saturday when counsel told us.

Senator NUNN. Did Mr. Cubbler ever have the opportunity to ask you to keep his name off the expense account vouchers?

Mr. NEY. I don't recall that as such; no.

Senator NUNN. Did you ever change any expense account vouchers by deleting Mr. Cubbler's name?

Mr. NEY. We did as discussed by Mr. Melly's rough recitation of it.

Senator NUNN. Who asked you to do that?

Mr. NEY. I think Mr. Melly asked Miss Anderson.

Senator NUNN. Miss Anderson, you perhaps can testify about this. Tell us the circumstances of that, who made the request, and what you did.

Miss ANDERSON. Mr. Melly telephoned one day and asked that I eliminate all SRS names from expense vouchers.

Senator NUNN. All SRS, meaning officials employed by SRS?

Miss ANDERSON. Right. I don't know what I said to him at that particular point in time. I eventually did it after a series of phone calls, and his encouraging me to do it.

I couldn't understand why he would make the request because whenever we send out reimbursement bills, we include American Express receipts or whatever, send back up documentation.

I didn't know how he could change those receipts. So I said what good is it going to do? He said he wanted them anyway.

My impression was that he wanted them for an HEW audit. Whether it was GAO, whatever, to me, it was for an audit, for audit purposes.

I didn't know what he could do with them, because if I were audited I would have to have the documentation. I thought that would apply to him as well.

Senator NUNN. Did you make up another set of expense vouchers for Mr. Melly?

Miss ANDERSON. Right.

Senator NUNN. Did you delete the name of Mr. Cubbler from those expense vouchers?

Miss ANDERSON. I deleted all SRS names as instructed.

Senator NUNN. Not just Mr. Cubbler?

Miss ANDERSON. All.

Senator NUNN. Were there a good many of these names, four, five, ten or twelve?

Miss ANDERSON. There would be a number of different names, yes.

Senator NUNN. That had been charged to FMS? This was just your relationship with FMS?

Miss ANDERSON. Yes. It was not unusual for us to talk with people from SRS in behalf of Mr. Melly or in essentially representing Mr. Melly. When we have meetings we charge, whichever client is probably most affected; and in regard to SRS, it generally was Mr. Melly.

Senator NUNN. Were these vouchers that had already been submitted to Melly, FMS and paid to you, reimbursed to you?

Miss ANDERSON. Reimbursed to the firm.

Senator NUNN. You went back and made up a set of vouchers. Is that right?

Miss ANDERSON. That is right.

Senator NUNN. The first set having already been sent to Mr. Melly and FMS?

Miss ANDERSON. Been sent to him and processed.

Senator NUNN. You would have a copy of them?

Miss ANDERSON. Yes. I always kept copies.

Senator NUNN. Did he ask you to destroy your copies?

Miss ANDERSON. Yes, he did.

Senator NUNN. What did you tell him then?

Miss ANDERSON. I did not respond.

Senator NUNN. I say him, Mr. Melly.

Miss ANDERSON. Mr. Melly asked us to destroy our records. I did not respond to that nor did I destroy them.

Senator NUNN. You kept the records?

Miss ANDERSON. I kept a set of records for us.

Senator NUNN. Did he ask you to substitute other names in lieu of Mr. Charles Cubbler?

Miss ANDERSON. He didn't really instruct me how to do it. He said eliminate all SRS names. I didn't know how else I could do it without reinserting another name.

Senator NUNN. Did you insert other names?

Miss ANDERSON. Yes.

Senator NUNN. Whose names did you insert?

Miss ANDERSON. Names selected randomly, generally from the Hill.

Senator NUNN. Meaning Capitol Hill?

Miss ANDERSON. Yes.

Senator NUNN. That means employees here?

Miss ANDERSON. That is correct.

Senator NUNN. Were these particular employees that you knew personally?

Miss ANDERSON. Yes.

Senator NUNN. Were these employees that you had been to lunch with yourself before?

Miss ANDERSON. Yes.

Senator NUNN. You substituted their names on the vouchers and sent those to Mr. Melly. Is that right?

Miss ANDERSON. That is correct.

Senator NUNN. Did you think there was anything wrong with doing this or anything unusual about it?

Miss ANDERSON. I didn't like it. I didn't agree to it. I personally felt that I didn't know what he could do with it, though. I didn't know what harm it would be because of the fact that he had the actual receipts that were not changeable.

I was also concerned about cash flow. So I would fulfill the request.

Senator NUNN. Mr. Cubbler, though, did not directly ask you to do this?

Miss ANDERSON. His name was not brought up at all in this request.

Senator NUNN. It was strictly a general request—

Miss ANDERSON. A general request to eliminate all SRS employees.

Senator NUNN. Did Mr. Melly ask you to destroy any checks that you had paid to Mr. Cubbler?

Miss ANDERSON. No, he did not.

Senator NUNN. Did Mr. Cubbler ask you to destroy any checks that you had paid to D. C. Chambless?

Miss ANDERSON. Yes, he did.

Senator NUNN. When was that?

Miss ANDERSON. That was sometime this past winter. I would approximate January of 1976.

Senator NUNN. Did he give you a reason for that?

Miss ANDERSON. No. He just said that I should do it. Otherwise, he would be in trouble.

Senator NUNN. Did he say what kind of trouble?

Miss ANDERSON. No, he did not.

Senator NUNN. Did you feel that the checks you had given him, were in any way improper?

Miss ANDERSON. No way improper; no way whatsoever.

Senator NUNN. Did you feel you had violated any law, rule or regulation?

Miss ANDERSON. No law whatsoever that I knew of. If there are laws against that as a private person, I am not aware of it.

Senator NUNN. Did Mr. Cubbler indicate in that request to you in January of 1976—

Miss ANDERSON. Approximately January.

Senator NUNN. Approximately January 1976, that there was anything improper about these payments or illegal?

Miss ANDERSON. No. He didn't indicate any illegality about it. I made my own assumption that he had not reported the income to IRS. That was to me the only reason why he would make such a request to me. It was unsubstantiated. He did not indicate one way or the other. For someone to make that type of request of me, I could only from my point of view, think it was something with IRS.

Senator NUNN. Something with Internal Revenue Service?

Miss ANDERSON. Right.

Senator NUNN. Did you comply with his request?

Miss ANDERSON. No; I did not.

Senator NUNN. Did you inform him that you were not?

Miss ANDERSON. I really can't remember because I was so shaken by the whole event that I was literally shaking and I really have no recollection of what I said to him.

Senator NUNN. Was that by telephone conversation?

Miss ANDERSON. No; it was a personal meeting.

Senator NUNN. Where did that take place?

Miss ANDERSON. It would have taken place around HEW, I had perhaps seen him or talked to him. All I know is I drove back to my office and I was literally shaking in the car at the request.

Senator NUNN. He did not tell you at that stage it was illegal?

Miss ANDERSON. No. He never indicated to me that we had done anything illegal.

Senator NUNN. What was your best recollection of his words in making the request?

Miss ANDERSON. I could only remember the effect, Senator. It was to destroy the checks, to get rid of the checks. I don't know if he said lose them or get rid of them or whatever. All I know is he didn't want those checks in my records.

Senator NUNN. Those were the checks made payable to D. C. Chambless?

Miss ANDERSON. That is correct.

Senator NUNN. That were in payment for tutorial services?

Miss ANDERSON. That is correct.

Senator NUNN. Mr. Cubbler never made a request to you about the expense vouchers?

Miss ANDERSON. He never did. As a matter of fact, I was under the impression that Mr. Cubbler or any HEW official name could appear on our expense records.

Senator NUNN. You were under the impression—

Miss ANDERSON. Any HEW official name could appear on our expense records, that it was not illegal for us to take HEW officials out to lunch.

Senator NUNN. Is that also your impression, Mr. Ney?

Mr. NEY. Yes, indeed.

Senator NUNN. There is nothing illegal, unethical or improper about taking HEW officials to lunch?

Mr. NEY. Right.

Senator NUNN. Have either of you substituted names on any other vouchers than for FMS?

Miss ANDERSON. No.

Senator NUNN. Not for any other client?

Miss ANDERSON. Not for any other client.

Senator NUNN. It is the only time you have been requested to?

Miss ANDERSON. That is the only time.

Senator NUNN. When did you actually make the substitution on vouchers?

Miss ANDERSON. With the counsel's aid previously, we established the date to be sometime between March and April.

Senator NUNN. Of 1976?

Miss ANDERSON. Of 1976.

Senator NUNN. Which would have been approximately how long after the request from Mr. Melly?

Miss ANDERSON. It would have been probably within 10 days of his request that I had completed the substitution.

Senator NUNN. You didn't do anything to the copies that you had of the original accurate records?

Miss ANDERSON. No.

Senator NUNN. You kept those in your files?

Miss ANDERSON. Yes.

Senator NUNN. You did not destroy them?

Miss ANDERSON. No.

Senator NUNN. You made up complete new sets as if they were originals?

Miss ANDERSON. That is correct.

Senator NUNN. You substituted other names in lieu of the SRS employees?

Miss ANDERSON. That is correct, the SRS employees—I think there are other HEW employees, just as he had requested me to delete.

Senator NUNN. You did not do this in relationship to any other clients?

Miss ANDERSON. No other clients.

Senator NUNN. This would have been only the billings that you had sent to FMS?

Miss ANDERSON. That is correct.

Senator NUNN. I assume you have charges to other clients?

Miss ANDERSON. That is correct.

Senator NUNN. You didn't make any alteration or substitution?

Miss ANDERSON. None whatsoever.

Senator NUNN. Mr. Ney, is all of this information accurate as far as you know?

Mr. NEY. Yes.

Senator NUNN. Did you know this request had been made by Mr. Melly?

Mr. NEY. Yes. It sounded strange to me. I was concerned about it. It seemed to me to be a strange kind of thing that would have no reality about it because the documentation that goes with these ex-

pense reimbursement forms includes names, the original names. I thought that Mr. Melly was from my point of view engaging in something that he would come to realize would be a foolish, cosmetic attempt and, therefore, he would not use them, but it was a foolish thing on my part to allow it to happen.

Senator NUNN. You did agree to it?

Mr. NEY. I did agree to it.

Senator NUNN. It was a joint decision by you and Miss Anderson?

Mr. NEY. Yes; a foolish one.

Senator NUNN. Let me ask you this hypothetical question: If you had known Mr. Cubbler was being paid by Mr. Melly a consultant fee for reviewing these proposals, would you have felt this was proper?

Mr. NEY. Definitely not.

Senator NUNN. Would you have felt it was a violation of any law?

Mr. NEY. I agree with your opening statement, there are two things: One is the impropriety. The other is the appearance of impropriety. I think that in that connection to have someone who, however remote they may be in the approval process of SRS—I agree with the process the way Mr. Melly described it, it comes up through the State evaluation, the regional office and on down the road, that however, to whatever degree Mr. Cubbler may have had some kind of approval, whether it was 2 percent input, by virtue of the fact that he had that degree or any degree, that person should not be involved.

Senator NUNN. Do you think there is anything wrong with simply paying expenses of HEW employees?

Mr. NEY. No. I don't see anything wrong with that, if legitimate business is discussed.

Senator NUNN. I want to thank both of you very much for being here with us this morning and giving us your frank testimony. I also appreciate your cooperating with the staff.

We feel this is a very important area of legislative concern, not the particular case, but the general scheme of the way things are being run.

We again thank you for your assistance. We also express our appreciation to your attorney for being here this morning.

Mr. NEY. Thank you.

Mr. KELLOG. Thank you.

Senator NUNN. We have three other witnesses that will appear today, Mr. Robert Trombly, president, Delphi Associates, Inc.; Mr. Francis Hawthorne, executive vice president, Delphi Associates; Mr. Dan Duncan, senior vice president, Blue Cross of Idaho.

At this stage I think we will just continue and have these witnesses. I know they have planes to catch. Some of them are out of State. If these three will appear together, we will appreciate it.

Will you please stand? Do you swear the testimony you are giving today will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. TROMBLY. I do.

Mr. HAWTHORNE. I do.

Mr. DUNCAN. I do.

Senator NUNN. Let the record reflect each witness answered in the affirmative.

TESTIMONY OF ROBERT W. TROMBLY, PRESIDENT, DELPHI ASSOCIATES, INC., WAKEFIELD, MASS.; FRANCIS J. HAWTHORNE, EXECUTIVE VICE PRESIDENT, DELPHI ASSOCIATES, INC.; AND DAN L. DUNCAN, SENIOR VICE PRESIDENT, BLUE CROSS OF IDAHO, BOISE, IDAHO

Senator NUNN. Mr. Trombly, are you in the middle?

Mr. TROMBLY. Yes, I am Robert Trombly, president of Delphi Associates, Inc.

Senator NUNN. Where is your home?

Mr. TROMBLY. Lowell, Mass. Our office is in Wakefield, Mass.

Mr. HAWTHORNE. My name is Frank Hawthorne, executive vice president, Delphi, office in Wakefield, Mass. My home is in Marblehead, Mass.

Mr. DUNCAN. My name is Dan L. Duncan, senior vice president, Blue Cross of Idaho. I reside in Boise, Idaho.

Senator NUNN. You gentlemen are separate companies completely. Is that correct?

Mr. TROMBLY. Yes.

Senator NUNN. You have no direct relationship between your companies?

Mr. TROMBLY. No.

Mr. HAWTHORNE. We are subcontractors to Blue Cross.

Mr. TROMBLY. We are co-bidders with Blue Cross of Idaho for the Idaho medicaid claims processing contract to be awarded in the near future.

Senator NUNN. Mr. Trombly, I understand you have a statement. We will submit your entire statement for the record because of the time.

[The statement follows:]

STATEMENT OF ROBERT N. TROMBLY AND FRANCIS J. HAWTHORNE

My name is Robert N. Trombly. I am President of Delphi Associates, Inc. of Wakefield, Massachusetts. In August of 1971, after eight years in the Health Care Data Processing Field, Mr. Francis J. Hawthorne and I founded Delphi in order to specialize in consulting, systems design, programming and development of data processing and Management Information Systems having to do with Health and Welfare Data Processing. This charter is still rigidly adhered to by our corporation.

In defining the charter as strictly as we did, our marketplace was automatically defined for us. For Title XVIII of the Social Security Act of 1965 (Medicare), it would be the Bureau of Health Insurance of the Social Security Administration along with their Fiscal Intermediaries for Part A of Medicare and their Carriers for Part B. For Title XIX of the Social Security Act of 1965 (Medicaid), it would be the Social and Rehabilitation Services of the Department of Health, Education and Welfare, the fifty states and, in some cases, their Fiscal Agents. To be more specific, the market could be identified as follows:

<i>Potential Customer</i>	<i>Application</i>
Bureau of Health Insurance (SSA)	Medicare A & B (Title XVIII)
Social and Rehabilitation Services	{ Medicaid (Title XIX) Medicare—A Medicare—B Medicaid (In some states)
Blue Cross/Blue Shield Plans	
Other Commercial Insurance Companies	
All 50 States	{ Medicaid (In some states) { Other Welfare Systems

We decided, therefore, to concentrate on Blue Cross/Blue Shield Plans and other Commercial Insurance Companies as well as the 50 States in the Union because they represented a potential for the entire breadth of our market. Having spent some combined ten years in the health care industry, we were not naive enough to think it was going to be easy. It was well known in 1971 that certain companies had a virtual stranglehold on the Medicare Part B market as facility managers for most of the Carriers (Blue Shields) in the larger States.

I won't bore the Committee on the degree of monopolization in the industry, but from 1966 to 1971, one company had assumed processing responsibility for over 60% of the Medicare Part B claims volume. Our first few futile attempts at securing business in the Medicare market led us quickly to realize that we had better concentrate in some other area than Medicare.

Shortly after our inception, the Model Medicaid Management Information System (MMIS) was published by Social and Rehabilitation Services (SRS) as a model system for States and/or their Fiscal Agents to follow in acquiring better control of their Medicaid health care dollars. As a small firm with no track record, we found that the lack of business at least enabled us to study this publication in detail. We did so and were convinced that it was a sound blueprint for better control of Medicaid. After becoming thoroughly acquainted with the System (MMIS), we finally got an opportunity to participate in a competitive procurement in the State of New Hampshire, which had requested a requirement analysis for MMIS.

As low bidder, we were awarded the contract and proceeded to evaluate what it would require to implement MMIS in New Hampshire. We successfully completed that contract and were subsequently awarded a similar contract with Blue Cross/Blue Shield of New Hampshire-Vermont to do a requirements analysis for the State of Vermont (Blue Cross/Blue Shield was Fiscal Agent for Vermont Medicaid).

Six months later, a new competitive Request for Proposal (RFP) was issued by the State of New Hampshire to design, develop and implement or otherwise transfer the pilot MMIS from the State of Ohio to the State of New Hampshire's computers. Perhaps it would be well to digress for a moment to discuss the State of Ohio's pilot MMIS. Ohio represented the first attempt to implement an MMIS as outlined in the published General Systems Design. The contractor was a small firm like ours. Both Delphi and this firm bid on the New Hampshire RFP along with other less qualified firms both larger and smaller. As low bidder among the qualified firms, Delphi was awarded the contract. The result was an unparalleled success. The New Hampshire MMIS was successfully installed and the system has been reproduced for general publication in the National Technical Information Service (NTIS).

At that time (1973), the MMIS looked very promising for a young and growing firm such as ours since qualified contractors were but a handful of small firms such as ours.

The Social Security Amendments of 1972 had also given MMIS a big boost. Section 235 of Public Law 92-603 provided for incentives for States to implement MMIS or its equivalent. These incentives came in the form of increased Federal Financial Participation (FFP) at a 90% rate for development of MMIS and at a 75% rate for operation of the system. In order to gain such increased FFP however, the State had to follow the regulation guidelines issued as a result of Section 235. The original drafts of the guidelines as published in the Federal Register provided that to qualify for increased matching, the system must *not* be proprietary and must meet the general specifications of MMIS. To a company like ours, those guidelines were ideal since we had no interest, by charter, in proprietary systems.

It was just after the initial draft of the guidelines had been first published that we became aware suddenly of the tremendous interest in the specifics of the guidelines by at least two giant corporations.

I was personally told by Mr. Richard O. Godmere who was then in charge of the MMIS development group for SRS that there was considerable "political" pressure being applied by these firms to be sure that the language of the Section 235 Guidelines was not too restrictive. It was obvious that the marketplace now appeared lucrative enough for the larger firms to begin considering entry. In any event, the final guidelines provided for Federal approval of each State procurement by the Associate Administrator for Information Systems within SRS.

As we marketed our services amongst the 50 States and sometimes their fiscal agents in Medicaid, we faced three different situations:

- (1) States wished to upgrade their own self administered systems to MMIS quality.

(2) States wished to delegate their own self administered systems to a fiscal agent who would, in turn, upgrade to MMIS quality.

(3) States wished to upgrade and administer systems of MMIS quality which had been previously handled by a Fiscal Agent.

We were able to respond to RFP's in the first and third category but since we did not pretend to be Fiscal Agents, we decided to respond to the RFP's in that category by joining with interested Blue Cross and Blue Shield Firms. Certainly, we reasoned, our track record of technical excellence in MMIS and the Blues knowledge of the state health care situation would provide a high degree of competence offered to a state who wished to have MMIS installed and operated by a Fiscal Agent.

Let me take you back for a moment then, through the history of our bidding experience in MMIS after the State of New Hampshire.

(1) An RFP was issued by the Commonwealth of Kentucky for a contractor to design an MMIS system to upgrade a state administered Medicaid system on state computers. Delphi and others bid on this RFP. Another small firm like ourselves was awarded the contract, and since they bid lower than we did, we feel that the selection was justified.

(2) An RFP was issued by the State of Arkansas for a Fiscal Agent to assume MMIS responsibility for administering a previously state administered program. Delphi supported Blue Cross and Blue Shield of Arkansas. One of the giants I mentioned earlier was awarded the contract but the comparative pricing was so close that we had the feeling that the decision could have gone either way.

(3) The State of Georgia issued an RFP to upgrade to MMIS a State administered system. Delphi, the small company and the larger competitor bid on this. Delphi was awarded the contract, and we were low bidder by a substantial amount. That task is complete now and our track record is even further enhanced by the success in Georgia.

(4) The State of Arizona issued an RFP for a Fiscal Agent to administer its newly legislated Medicaid program. Naturally, the system was to comply with MMIS in order to gain the increased RFP. Delphi supported Blue Cross and Blue Shield of Arizona. The contract was awarded to a company from Virginia which has had considerable success as Fiscal Agent to Virginia. Since their bid was nearly one half of ours, the award to them appeared to be justified.

It should be noted that all during the previous four procurements, the largest company in the nation had not bid as an individual Fiscal Agent, but had attended each of the Bidders Conferences. Similarly, the above states which had issued RFP's for Fiscal Agents had requested Fiscal Agents in the RFP. Both Arizona and Arkansas had been awarded on the basis of either lower price to the successful or equal bidder, or equal price (and at least equal capability). There appeared to be no trend except that equal capability was acknowledged and the lower cost was the deciding factor.

Suddenly, however, a new type of RFP appeared on the scene. This "new" RFP was issued by the State of Washington. It requested a "facilities manager," rather than a "Fiscal Agent." This was a distinction which we noted and we speculated quite freely on the change in terminology. The "new" RFP emphasized the computer capability rather than the overall program management and our free speculation led us to assume that perhaps the industry's giant would bid on this contract individually for the first time. We were correct.

We would like to share with you certain specific facts regarding the bidding.

Before I do, let me tell you about the so-called "Evaluation Criteria". In practically every procurement the criteria for evaluation of a bidders response usually broke down to three major factors based on a scale of 100%. These three general factors were:

Factor:	Points
Logic and soundness of technical approach.....	35
Quality and Quantity of Resources applied.....	35
Cost.....	30
Total.....	100

It stood to reason then that in late 1975 and early 1976, firms who had excellent track records in MMIS nationally and health care processing locally would probably be rated evenly on the first two criteria and that the final decision point rested upon cost, which was taxpayer dollars either Federal or State. In Washington, Delphi supported Blue Cross of Washing-

ton-Alaska, Inc. and over a three year period, the cost differential between ourselves and the industry's giant was four million dollars. We were lower but the contract went to the giant on the basis (according to the State of Washington) that our implementation would be "chaotic" and that they possessed vast technical superiority.

One individual, who was on the regular payroll of the State of Washington, appeared to be the key man in the evaluation. When we were curious as to the author of the RFP, we were told by the State of Washington that this individual had drafted it. In addition to this individual, a consulting firm was selected to assist in the selection. When the announcement of the selection was made, we were aware that the Office of State Systems Operation under Mr. James Trainor, who reports to the Associate Administrator for Information Systems, Mr. Harold Wienberg, did not feel the selection was justified. We believe that the Committee's investigative staff has drafts of the correspondence which flowed back and forth between Olympia, Washington and Washington, D.C.

Despite all of the protestations, the procurement was approved for increased FFP at a cost of over four million dollars more to the taxpayers.

A few months ago, Blue Cross of Idaho contacted us regarding an RFP issued by the State of Idaho and solicited our support in bidding on the RFP. The State of Idaho was desirous of having a "Facilities Manager" design develop and operate an MMIS system. This use of the same language obviously alarmed us. When we had the opportunity to review the RFP, it turned out to be nearly a carbon copy of the Washington RFP. I say nearly because this had one additional stipulation in it; namely, that the system data entry technique must be done in an on-line mode.

We learned just after the RFP was issued that the State of Idaho had retained a consultant to assist them in the drafting of the RFP and the selection process. That consultant was the same individual who had drafted the Washington RFP.

Once again we entered into the bidding process and this time we were confident that we were assembling the best possible team of resources ever assembled. For example, we had already converted the New Hampshire system to an IBM mode. This system had been certified as totally acceptable and had been funded at the increased FFP for over one year. We offered our most experienced Project Manager whose track record included the successful Georgia and New Hampshire implementations. Blue Cross for its part had the most competitive team of people and facilities which we had ever seen. Our price was 82¢ per processed claim. The giant's price was \$1.25 per processed claim. In a very short time (two weeks), our largest competitor was selected and the only information we have currently is the press release which quoted the individual I have mentioned as saying that our competitor was awarded the contract based upon their excellent track record and the vast quantity of resources which they could bring to bear.

It's obvious to me that legislation or regulations regarding the role of SRS in the approval of contracts involving 90% and 75% of Federal Financial Participation must be strengthened to exercise greater control over the subjective decisions which a state can currently make or else the current farce of competitive bidding should not be required at all. At least, companies would not spend endless time and energy bidding upon contracts when a state was already predisposed.

I personally feel that, if indeed SRS is responsible for monitoring matching funds under Section 235 of Public Law 92-603, then they should be able to assess in advance a group of companies who are roughly equal in capability and experience. It could be a qualified bidders list. This would reduce the bidding process to a competition of cost and would result in lower administrative Medicaid costs. I would be happy to answer any questions at this time.

Senator NUNN. I think we are going to have to bring out a summary of this by questions. Hopefully, we will be able to get a complete summary of your statement.

Mr. Trombly, the record this morning shows there were only two bids for the West Virginia MMIS development. Your company bids

on many of these contracts. Why didn't Delphi bid on the West Virginia contract?

Mr. TROMBLY. In late June of 1974, we heard that the MMIS was going to be let out on an RFP. At that time, we visited the State of West Virginia. We had been previously contacted by West Virginia because of our work on the MMIS development in New Hampshire. We made a sales call to the West Virginia people.

At that time, during the sales call, we were told that it was a situation which was very closed. They mentioned, for example, FMS as being a firm which was entrenched in West Virginia.

Senator NUNN. Who mentioned that?

Mr. TROMBLY. That was Dr. Jim Mangus.

Senator NUNN. What was his position?

Mr. TROMBLY. He was, I believe, director of medical care.

Senator NUNN. In West Virginia?

Mr. TROMBLY. Yes.

Senator NUNN. He said FMS was entrenched in West Virginia?

Mr. TROMBLY. I believe that is what he said. That was a long time ago.

Senator NUNN. Did he advise you not to bid?

Mr. TROMBLY. The way he said it, we decided not to bid.

Senator NUNN. What was his name?

Mr. TROMBLY. Dr. Jim Mangus.

Senator NUNN. Jimmy Mangus?

Mr. TROMBLY. Mangus.

Senator NUNN. M-a-n-g-u-s?

Mr. TROMBLY. g-u-s.

Senator NUNN. The way he said FMS was entrenched led you to believe there would be no reason to bid on that particular contract?

Mr. TROMBLY. That is correct, sir.

Senator NUNN. Did you discuss this with any of your associates?

Mr. TROMBLY. Yes.

Senator NUNN. Mr. Hawthorne?

Mr. HAWTHORNE. We very definitely discussed this situation as partners in the firm. We both started this company together and we make our decisions together. He reported this situation to me. I said, we can't afford the waste of money. We were a little firm at that time. We were not part of the Arthur D. Little organization.

Senator NUNN. You were not what?

Mr. HAWTHORNE. A part of the Arthur D. Little organization at that time. Bob and I were running this firm, established on our own dollars.

Senator NUNN. How much would it have cost you to go through the process of developing a proposal?

Mr. TROMBLY. These proposals ordinarily take anywhere from \$20,000 to \$35,000 from our experience, to prepare. They are very detailed. They are very lengthy. They require an adaptation. First of all, they require deep penetrating analysis of the request for proposal. Then they require quite a bit of technical work to present them and reproduce them, as well as post bid follow-up activity.

Senator NUNN. You got a request for bids from the State of West Virginia?

Mr. TROMBLY. That is right.

Senator NUNN. What was the name of the contract we are talking about?

Mr. HAWTHORNE. Implement medicaid management information system for the State of West Virginia.

Senator NUNN. As I understand it, you personally went to West Virginia, or did you talk on the phone?

Mr. TROMBLY. No, we went to West Virginia before the request for proposal was issued. It would be probably improper to go after the request for proposal was issued.

Senator NUNN. You had a conversation with how many different officials?

Mr. TROMBLY. Three people in all. There was Dr. Mangus, a lady by the name of Helen Condrey, C-o-n-d-r-e-y; another gentleman by the name of Ward Nicklin.

Senator NUNN. This was approximately what time frame?

Mr. TROMBLY. Back on my records, I believe it was June 24.

Senator NUNN. Of what year?

Mr. TROMBLY. 1974.

Senator NUNN. When you got back you had a discussion and you decided you would not bid?

Mr. TROMBLY. That is correct.

Senator NUNN. In your own words tell us why you decided not to bid?

Mr. TROMBLY. We felt the State was probably predisposed to FMS.

Senator NUNN. What did you base that supposition on?

Mr. TROMBLY. On Dr. Mangus' comments.

Senator NUNN. What was his comment again as you recall it?

Mr. TROMBLY. To the best of my recollection, I would say that the implication given was that FMS had been working with the State and that FMS was quite well entrenched and knew the problems of the State.

Senator NUNN. Were you here this morning when we heard testimony from the FMS official that Mr. Mangus after the award was made got stock in the company?

Mr. TROMBLY. Yes, sir.

Senator NUNN. Were you surprised at this?

Mr. TROMBLY. Yes.

Senator NUNN. Does your company sell or give stock to State officials who are in the position—

Mr. TROMBLY. No, sir. Our stock is wholly owned by Arthur D. Little Systems, Inc., a wholly owned subsidiary of Arthur D. Little, Inc., Cambridge, Mass.

Senator NUNN. Do you feel such a practice is improper?

Mr. TROMBLY. We certainly do.

Senator NUNN. You are doing business in other States with people who make decisions like Dr. Mangus?

Mr. TROMBLY. That is correct.

Senator NUNN. In his capacity, does he have decision making capacity regarding the FMS contract in West Virginia?

Mr. TROMBLY. Did he or does he?

Senator NUNN. Does he?

Mr. TROMBLY. I am really not quite familiar with what the arrangement is at the moment. If he is director of medical care, he

CONTINUED

1 OF 3

could possibly have accepted responsibility for the system. But I have no way of knowing that.

Senator NUNN. You don't have any way of knowing that?

Mr. TROMBLY. No, sir.

Senator NUNN. What about in Washington and Idaho? Your testimony, your written testimony, which is part of the record, indicates concern over the competitive process and awarding of MMIS contracts.

Are you concerned that the company that won the bids in Washington and Idaho are not qualified or are you saying that the low bidder in all cases should be given the contract?

Mr. TROMBLY. We are saying neither. What I am saying is that in 1976, 5 years after the development of the MMIS, there are a number of qualified companies, all capable of installing and implementing an MMIS system.

First of all, we are a systems development organization as opposed to a claims processing and fiscal agent.

So our rationale is that on those RFP's or request for proposals where the State desires a fiscal agent, we ordinarily join with a Blue Cross/Blue Shield organization if they are so interested.

The reasoning behind that is we do have the experience in the development of the MMIS systems. They, in turn, have a good deal of experience in processing health care claims.

Our position on that whole area is that today there are probably in excess of 10, maybe even 15 firms who are fully qualified to install MMIS and it would appear to me as though the contract should be awarded on the basis of the lowest cost.

In both Washington and Idaho, this was not the case.

Senator NUNN. Did you bid in those two States?

Mr. TROMBLY. Yes.

Senator NUNN. Were you low bidder?

Mr. TROMBLY. We bid in concert with the Blue Cross organization in those two States. We were the low bidder in both instances.

In Washington the difference in bids was approximately \$4.5 million; over a 3-year contract. In Idaho, it was in excess of \$500,000.

Senator NUNN. \$500,000?

Mr. TROMBLY. Dollars, yes. In both instances, we were not awarded the contract.

Senator NUNN. Who was awarded those contracts?

Mr. TROMBLY. A company by the name of Electronic Data Systems.

Senator NUNN. They won the contract, in both States?

Mr. TROMBLY. Yes.

Senator NUNN. Even though they were not low bidder?

Mr. TROMBLY. That is correct.

Senator NUNN. What reasons were you given about this by State officials?

Mr. TROMBLY. Very vague reasons. Let me change that. The initial reasons were that the company that won the bid had very vast technical superiority and a vast number of resources which could be applied to the bid.

We were not privileged to receive any of the information on how the Washington proposal was evaluated actually. In the Idaho situation, it might be well if Mr. Duncan said a word about that, but we got the evaluation document.

Senator NUNN. If you want to make a statement on that please proceed?

Mr. TROMBLY. I will follow it through. I will say this: We were handed a series of point scores, grades, levels and for various levels various things. Just as a very quick illustration, I won't bore the committee with all the details of it, but the technical evaluation was made in such a way that, for example, in the item called technical design, we were given zero points and the competitor that won was given 16.

I must tell the committee we were proposing to transfer the federally designed and federally sponsored MMIS which had been developed in New Hampshire, and it was just incredible to us that a State or other State consultants could arrive at the decision that the technical design was worth zero, this being after many, many dollars, I am sure, paid by the Federal Government to design the system.

Senator NUNN. Why was that puzzling to you?

Mr. TROMBLY. It is puzzling to me because I personally feel, first of all, that the Federal design as employed in both Ohio and New Hampshire is excellent and does a good job, is an excellent illustration in the State of New Hampshire which has been paying claims for 3 years now and has been certified for 1 year.

The State of New Hampshire, incidentally, processes twice the size in volume of claims as the State of Idaho.

Senator NUNN. Who do you fault for that procedure, not by name? Whose responsibility is that?

Mr. TROMBLY. I am afraid personally, that there has been too much of a mystique built up around the technical evaluation with not enough consideration given for the cost. An example is that ordinarily of 100 points given for a contractor's evaluation, 75 of those points—excuse me, 70 of those points are given for the technical aspects and only 30 for the cost.

An illustration there would be in Idaho, although our price, our price from Blue Cross and Delphi was 82 cents per claim, the winning bidder was going to charge \$1.25 per claim. The difference in evaluation point spread on cost only awarded to us was only 35 out of 120, or 8.5 out of 100 points.

Senator NUNN. That means that over a 3-year period it will cost the State of Idaho, how much, \$4.5 million?

Mr. TROMBLY. No: That \$500,000 differentiation was for a 30-month period in Idaho. In Washington, the differentiation was \$4.5 million over a 3-year period.

Senator NUNN. In Washington, the differentiation between the low bid and the company who received the contract was \$4.5 million over a 3-year period?

Mr. TROMBLY. That is right.

Senator NUNN. In Idaho, the difference between the low bidder and the company receiving the contract was \$500,000 over a 30-month period?

Mr. TROMBLY. That is correct.

Senator NUNN. Documents placed in the record of the hearings this morning showed that HEW asked the State of Washington when the dispute arose over its award to ask the Blue/Delphi venture to review an option added in the competitor's bid which was not included in your bid.

HEW wanted your group to be offered the opportunity to include that option so each bid, yours and your competitor's, could be judged on an equal basis.

Could you explain how you responded to HEW's request?

Mr. TROMBLY. We never were aware of what this option was, sir. It was never offered to us.

Senator NUNN. Washington never got in touch with you about that proposal?

Mr. TROMBLY. That is right.

Senator NUNN. When did you first learn about that?

Mr. TROMBLY. I learned about that, I believe from the senior vice president, at Washington Blue Cross sometime after the session was held which was called a debriefing.

The debriefing session is the loser's session, where in fact the losing bidder goes and is told why he didn't win.

Senator NUNN. Was there any explanation given to you as to why this option was not passed on to you?

Mr. TROMBLY. No, sir.

Senator NUNN. He just simply informed you of it?

Mr. TROMBLY. They merely informed Mr. Francis, from Seattle, Wash., that there had been another option. I wasn't there.

Senator NUNN. What information did you have concerning HEW's efforts to get bidders to make a last and final offer in an effort to establish a firm conclusion of evaluation?

Mr. TROMBLY. I was aware of a letter from Mr. Wienberg to I believe Mr. Charles Morris, Secretary of Human Resources in Washington, to urge the bidders to have a last and final or to make a best and final offer. We never were requested to do that, however.

Senator NUNN. That was in the case of Washington, State of Washington?

Mr. TROMBLY. Yes.

Senator NUNN. Has anything similar to that happened in Idaho?

Mr. TROMBLY. Not yet. The reason I say not yet is that in Idaho, the selection merely has been made. I don't believe there has been any Federal approval or signed contract.

Senator NUNN. Would you conclude from that that HEW is putting out the requirements that are not being followed by HEW?

Mr. TROMBLY. I would have to say that it seemed to me that the spirit of section 235 when it was passed in the first place was to encourage competition and naturally the prime objective being the good management of a medicaid program.

I cannot explain why Washington was awarded to a bidder with that much of a price differentiation. I just can't understand it.

Senator NUNN. Have you won some awards?

Mr. TROMBLY. Yes. Incidentally, the awards that we have won have been instances where we have been the low bidder. We have lost some, too, when we bid higher than others. We always felt that was very appropriate.

Senator NUNN. What States?

Mr. TROMBLY. We originally implemented New Hampshire, which was transferred from the State of Ohio. We were low bidder on that job amongst those qualified.

In the State of Georgia, we were also the low bidder and have recently successfully finished the MMIS implementation in Georgia.

Senator NUNN. You did the work up in Georgia?

Mr. TROMBLY. That is correct.

Senator NUNN. Was that in combination with Blue Cross?

Mr. TROMBLY. No, strictly assistance development because the State of Georgia does its own processing.

Senator NUNN. Were you the low bidder there?

Mr. TROMBLY. Yes, as far as we know.

Senator NUNN. Mr. Duncan, following the announcement by the State of Idaho, you asked for a debriefing by the State on the selection process.

Can you tell us what you learned in the debriefing about the evaluation process?

Mr. DUNCAN. Yes. We called for a debriefing because we wanted to hear the reasons why some half a million dollars was left on the table and that another organization was selected to do this task.

We secured at this debriefing a document which I will be glad to leave here, if that is appropriate, which gives the opinions of the consulting firm which was employed to give advice to the State as it relates to the selection of the appropriate organization.

Senator NUNN. Who were the consultants?

Mr. DUNCAN. The firm by the name of Haskins & Sells C.P.A. firm, were utilized in this capacity.

Senator NUNN. Is there anything unusual about that evaluation?

Mr. DUNCAN. In the first place, I feel the criteria, the way it is established is extremely open to suggestion, you might even say. The word is subjective.

I guess it is a matter of the price of course is clearly indicated in the proposals. That is easy to compare. When you start to conclude how much difference there might be between one organization's proposal and another, and attempt to give some dollar values to that and to make such a comparison, it becomes very difficult maneuvering.

It is my personal opinion that these specifications make it very easy for anyone to vote in favor of an organization that may not be the lowest bidder in terms of price.

Senator NUNN. Do you think there is some kind of intentional conspiracy or simply bad management and advice by a consulting firm?

Mr. DUNCAN. I think in this particular instance the advice by the consulting firm in no way was fair. But I do think the criteria is so subjective in nature that I can see reasons why this is occurring.

Senator NUNN. Was there anything in this evaluation or in the debriefing that led you to believe there had been any kind of collusion between the winning bidder and anyone in State Government?

Mr. DUNCAN. I can say this: that it is written here in documentation that the organization that did the consulting quoted one of the other bidders as it related to that bidder's opinion of whether we were prepared to do the job or not.

Senator NUNN. You mean the other bidder was giving, in this statement made a comment about your qualifications?

Mr. DUNCAN. In this statement, the consultants quote another bidder as to our capabilities.

Senator NUNN. Is that highly unusual?

Mr. DUNCAN. I would think it is indeed.

Senator NUNN. Were you ever asked to evaluate the other bidders as to whether they were qualified?

Mr. DUNCAN. We certainly were not.

Senator NUNN. We understand you are disputing this contract award. Is that correct?

Mr. DUNCAN. We definitely are.

Senator NUNN. Please explain if this award reflects a violation of any State, Federal law or regulation in your opinion?

Mr. DUNCAN. Of course I am not an attorney. This has all happened in the last few days. Our attorneys are now trying to completely study all aspects and we have advised the Department of Administration of the State of Idaho that we propose to proceed with whatever are the appropriate proceedings.

We are asking for some form of a hearing. We feel fairness was not netted out here and that the taxpayers are left with the burden as a result of the decision.

Senator NUNN. Were you going to process all of the claims in Boise?

Mr. DUNCAN. Yes, we were. That is correct.

Senator NUNN. Mr. Duncan, your bill was 82 cents a claim over a 30-month period, whereas, the winning bidder was \$1.25 per claim.

I understand the total claims volume over a 30-month period for Idaho medicaid beneficiaries was expected to be one and a quarter million claims.

If this bid was applied to claim processing for the State of Idaho in a comprehensive national health program, how much would the gross dollar difference be per year using your MMIS bid and the winning bid?

Mr. DUNCAN. That would be a fantastic financial differentiation. First, there are about 25,000 recipients within the State of Idaho under medicaid. We have a population base of 850,000 and that ratio is approximately 1 to 35.

So really what we are saying is that if the medicaid benefits were provided to all of the population of the State of Idaho, and it was done on the basis of these cost differentiations, that the additional dollars that would be paid out at the \$1.25 level would be somewhere in the general vicinity of about \$17 million in the small State of Idaho for the 30-month period.

Senator NUNN. So what we are talking about is that if these same procedures are used, assuming there is a national health insurance program sometime in the future and if they do not go with the low bid, by qualified people, then we are talking about literally millions and billions of dollars?

Mr. DUNCAN. I am sure when you project it nationwide, we are talking I think obviously up into the billions.

Senator NUNN. Do you consider these kind of contracts the fore-runner of what will happen if there is a national health insurance program passed?

Mr. DUNCAN. I certainly and earnestly hope that they can draw specifications that are clean enough and tight enough so that he who

is the low bidder ends up with the business if he can prove his capabilities to deliver.

Senator NUNN. Do you feel these services will be essential in any kind of national health insurance program that may be passed? The kind of services that you render here following these bids we are talking about?

Mr. DUNCAN. Absolutely. Some way, when it arrives, the claims will have to be processed. That is the heart of the MMIS system.

Someone will have to be hired to do this task.

Senator NUNN. Mr. Hawthorne, we have a vote up now. I am going to try to complete this so all of us can recess. If you can think of other things we need to go over, we will have you come back tomorrow. I understand you will still be here. Will you not?

Mr. HAWTHORNE. That is right.

Senator NUNN. What is your reaction as a businessman to your company's two most recent experiences; Idaho and Washington?

Mr. HAWTHORNE. Until this morning, my general feeling was to get out of the business.

Senator NUNN. To get out of the business?

Mr. HAWTHORNE. There is no sense spending this kind of money to bid. When you take the current regulations as they exist, I think there is room within the current regulations to exercise or enforce fair bidding.

We have seen it in the State of Georgia. For instance, SRS in the State of Georgia held up the awarding of the bid when the State was uncertain as to a technically qualified low bidder.

Senator NUNN. Do you mean SRS at the Federal level held up the State bid?

Mr. HAWTHORNE. That is right.

Senator NUNN. For what reason?

Mr. HAWTHORNE. Georgia said they were not taking the lowest bidder even though the bidder is competent. I know SRS has the authority to hold it up.

Senator NUNN. Georgia was going to award the contract to someone other than your company?

Mr. HAWTHORNE. Yes.

Senator NUNN. Even though it wasn't the low bidder?

Mr. HAWTHORNE. Yes.

Senator NUNN. SRS held it up?

Mr. HAWTHORNE. They certainly did, 9 months.

Senator NUNN. Then the State of Georgia changed their mind and awarded it to you?

Mr. HAWTHORNE. Right; so I think SRS can do it.

The other thing is that in any of these bids there is a lot of technical mumbo-jumbo used, if you want to use those terms, to the non-EDP man. But SRS has on the staff some very qualified, technical personnel to wade through that. We have met them, we have seen them. We have heard them talk at conferences.

Senator NUNN. So what you are saying is SRS is not doing the job they are capable and responsible for doing?

Mr. HAWTHORNE. Right; if they don't do it, then a small company cannot get involved spending money and should go somewhere else where you get a fair shake.

Senator NUNN. What is your opinion of a company who is going to be competing in a bid receiving an advanced planning document?

Mr. HAWTHORNE. I think they gain a distinctive advantage in that you know the time frames that the State is interested in, you know the type of support the State will put up. You have an idea of the price for the value of the contract to be awarded.

Senator NUNN. Do you consider this unethical?

Mr. HAWTHORNE. I don't know whether I could call it unethical. It is very poor business judgment on the part of the State to give it to a contractor at all.

Senator NUNN. Has your company ever received one of these documents before you bid?

Mr. HAWTHORNE. I don't think so. We can't recall.

Mr. TROMBLY. No, sir, not to my knowledge.

Senator NUNN. Would you bid on a contract if you knew another contractor who had the ADP would be bidding?

Mr. TROMBLY. I don't believe we would.

Mr. HAWTHORNE. We would certainly give consideration to not bidding.

Senator NUNN. We appreciate very much your cooperation in being here. If we need your testimony again we will get back in touch with you and call you back. I regret we have to rush. There is a vote on board.

Mr. Duncan's submission will be made a part of the record as number 22.

[The document referred to was marked "Exhibit No. 22" for reference and may be found in the files of the subcommittee.]

Senator NUNN. We will meet in 3302 tomorrow morning and continue these hearings at 9:30.

[Whereupon, at 2:10 p.m. the subcommittee recessed, to reconvene at 9:30 a.m., Thursday, September 30, 1976, in room 3302, Dirksen Senate Office Building.]

[Member of the subcommittee present at time of recess: Senator Nunn.]

MEDICAID MANAGEMENT INFORMATION SYSTEMS (MMIS)

THURSDAY, SEPTEMBER 30, 1976

U.S. SENATE,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met at 9:50 a.m., in room 3302, Dirksen Senate Office Building, under authority of section 5, Senate Resolution 363, agreed to March 1, 1976, Hon. Sam Nunn (acting chairman) presiding.

Members of the subcommittee present: Senator Sam Nunn, Democrat, Georgia; and Senator Charles H. Percy, Republican, Illinois.

Members of the professional staff present: Howard J. Feldman, chief counsel; F. Keith Adkinson, assistant counsel; David P. Vienna, investigator; Walter S. Fialkewicz, detailed employee; Stuart M. Stalter, chief counsel to the minority; Jonathan Cottin, investigator to the minority; Ruth Y. Watt, chief clerk; Jay Constantine, Finance Committee staff; and Val J. Halamandaris, Special Committee on Aging staff.

Senator NUNN. The subcommittee will come to order.

[Member of the subcommittee present at time of convening: Senator Nunn.]

[The letter of authority follows:]

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

Pursuant to Rule 5 of the Rules of Procedure of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, permission is hereby granted for the Chairman, or any member of the Subcommittee as designated by the Chairman, to conduct hearings in public session, without a quorum of two members for administration of oaths and taking of testimony in connection with Medicaid Management Information Systems on Thursday, September 30, 1976.

SAM NUNN,
Acting Chairman.
CHARLES H. PERCY,
Ranking Minority Member.

Senator NUNN. Is Mr. Charles Cubbler in the room, or his attorney?

To begin this hearing today, I want to place in the record a letter dated September 27, 1976, that I sent, as acting Chairman, to Secretary David Mathews, requesting the appearance of several HEW employees—Mr. William Cleaver, Mr. Charles Cubbler, Miss Rosalie Ryan, and Mr. James Trainor. I understand that all of

those people are here except Mr. Charles Cubbler. This letter will be made an exhibit in the record.

[The document referred to was marked "Exhibit No. 23" for reference and follows:]

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C. September 27, 1976.

HON. DAVID MATHEWS,
Secretary of Health, Education and Welfare, Department of Health, Education and Welfare, Washington, D.C.

DEAR MR. SECRETARY: The Senate Permanent Subcommittee on Investigations will hold two days of hearings on Wednesday, September 29, and Thursday, September 30, 1976, on the operations of the Medicaid Management Information systems (MMIS) program, administered by the Office of Information Systems of the Social and Rehabilitation Service (SRS).

It is requested that William Cleaver, Charles Cubbler, Rosalie Ryan and James Trainor, employees of the Office of Information Systems, appear before the Subcommittee on Thursday, September 30, 1976. No prepared statement will be required of these individuals. They will be asked questions about their role in the management and operations of the program.

On the same day, we would also like Harold Wienberg, Associate (SRS) Administrator for Information Systems, to appear before the Subcommittee. Should he desire to read a statement, the Subcommittee rules require that 75 copies be delivered no later than 24 hours before the testimony is to be given.

I am enclosing five copies of the Subcommittee rules which should be provided to each of the individuals. Should your staff have any questions regarding this request, please contact Howard Feldman, Chief Counsel of the Subcommittee, at 224-3721.

I appreciate your cooperation in this matter.

Sincerely,

SAM NUNN, *Acting Chairman.*

Senator NUNN. Also, I might add that it is my understanding that the HEW Secretary, through Mr. Robert Fulton, did request and direct that Mr. Cubbler appear. We will have testimony on that subject this morning.

In addition, I want to make a part of the record a letter addressed to Senator Henry Jackson, Chairman of the Permanent Subcommittee on Investigations, dated September 28, 1976, from Mr. Mitchell Rogovin, and Mr. George Frampton, Jr., representing Mr. Cubbler. This letter speaks for itself. It is a letter requesting that the subcommittee not require Mr. Cubbler to appear in open session.

[The document referred to was marked "Exhibit No. 24" for reference and follows:]

EXHIBIT No. 24

ROGOVIN, STERN & HUGG,
Washington, D.C., September 28, 1976.

HON. HENRY M. JACKSON
Chairman, Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, Washington, D.C.

DEAR MR. CHAIRMAN: The purpose of this letter is urgently to request you and the full Permanent Investigations Subcommittee to reconsider staff counsel's decisions (1) that hearings scheduled for this week concerning the approval of certain Medicaid data-processing contracts, in which charges against individuals will be made that are appropriate for a secret grand jury inquest, will be held in *public* rather than in executive session; and (2) that our client, Mr. Charles A. Cubbler, will be compelled to appear publicly, and held up to public scorn and ridicule, in order to claim his Fifth Amendment privilege despite our representation that he would do so and despite his willingness to do so in executive session. This latter course, in particular, is one that has long been rejected as improper and unethical by both congressional committees and

criminal prosecutors. The practice serves no legislative end, since its purpose is merely to embarrass the witness, and it smacks of an unfairness and vindictiveness with which we do not believe this Subcommittee would want to be associated.

As we understand the plan of the staff, a number of witnesses will be called on Wednesday, September 29, to testify in public session about Mr. Cubbler's activities in connection with approval of certain specific contracts in named states. Mr. Cubbler will be called on Thursday. There is no question that some of the witnesses scheduled to testify Wednesday will give testimony tending to defame, degrade and incriminate Mr. Cubbler. Indeed, staff members themselves have referred to this as a "criminal investigation". According to one HEW official, a staff member has boasted that they intend to trigger criminal prosecutions in more than one state. Despite the staff protestations of interest in "program effectiveness" and the last minute notification to HEW that additional officials may be called, it is perfectly clear that the staff's interest in rushing to hearings now focuses exclusively on individual activities by Mr. Cubbler that are more properly the subject of a grand jury investigation. (Indeed, the immediate oversight rationale for publicizing these charges has disappeared, since HEW has reassigned Mr. Cubbler to a position removed from the process of contract review).

The rules of other congressional committees specifically provide that in cases like this, where the testimony of a witness may tend to "defame, degrade or incriminate" the subject of the hearings, the committee must take its testimony in executive session. See, e.g., Rules of Procedure, House Committee on Standards of Official Conduct, Rule K(5). Your rules also provide for executive sessions, presumably for the same reason—to protect individual rights. The staff now plans for the Subcommittee in effect to conduct a miniature grand jury inquest, *in public*. Since our client has already indicated that he will assert the privilege and wait to defend himself in the more appropriate forum of any resulting criminal investigation, the result of the staff's plan will be to spread defamatory and incriminating allegations on the public record, without any response from the Subcommittee's "target". We strongly believe that in order to prevent irreparable harm to our client's rights, it is both necessary and appropriate—and will serve the Subcommittee's valid oversight purposes—to hold these hearings in executive session and not to release testimony to the public until some resolution is reached of whether criminal charges are to be brought against those involved.

If the Subcommittee rejects our request and determines to permit public hearings on Wednesday, we object vigorously to any requirement that Mr. Cubbler be compelled to appear on Thursday in public session to assert his constitutional rights. As you know, it is unethical conduct for a criminal prosecutor to require the target of a grand jury investigation to appear before the grand jurors and assert his privilege when the target has previously represented that he would do so. ABA Standards On Criminal Justice, The Prosecution Function, Section 3.6(e). Indeed, in this jurisdiction and elsewhere prosecutors are not even allowed to call a *witness* to the stand at trial and make him assert his privilege before the jury because of the potential prejudice that might be done to the defendant's case.

The practice of calling the target of an investigation before the illegal lights to go through the purposeless ritual of actually claiming his privilege is one that has been rejected not only by the bar but by other congressional committees. The Senate Watergate Committee, for instance, adhered closely to the ABA Standards. There is no reason why your Subcommittee should adopt a standard that has been almost universally rejected elsewhere by legislative committees and by prosecutors because it provides inadequate protection for individual rights.

Indeed, to make a witness appear in public to assert his privilege cannot have any imaginable legislative purpose. Its only purpose is to embarrass the witness and hold him up to public shame and ridicule—and to impair or destroy his right to a fair trial should criminal charges ever be lodged against him. At the very least, Mr. Cubbler should be permitted to assert his privilege in executive session on Thursday, if our written representation that he will do so is deemed insufficient.

Sincerely,

MITCHELL ROGOVIN.
GEORGE FRAMPTON, JR.

Senator NUNN. Also, for the record, I think we should note that there was a subpoena issued by this subcommittee to Mr. Cubbler on August 25 for books and records. A copy of that will be made a part of the record.

[The document referred to was marked "Exhibit No. 25" for reference and follows:]

EXHIBIT No. 25

UNITED STATES OF AMERICA

CONGRESS OF THE UNITED STATES

To Mr. Charles A. Cubbler, Department of Health, Education and Welfare, 330 Independence Ave., S.W., Washington, D.C. 20201, Greeting:

Pursuant to lawful authority, YOU ARE HEREBY COMMANDED to appear before the SENATE PERMANENT COMMITTEE ON INVESTIGATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS of the Senate of the United States, forthwith, at their committee room 101 Russell Senate Office Building, Washington, D.C., then and there to testify what you may know relative to the subject matters under consideration by said committee, and produce all materials as set forth in Schedule "A" attached hereto, and made a part hereof.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To Heron lds., to serve and return.

Given under my hand, by order of the committee, this 24th day of August, in the year of our Lord, one thousand nine hundred and seventy-six.

SAM NUNN,

*Acting Chairman, Senate Permanent Subcommittee on Investigations
of the Committee on Government Operations.*

Production of subpoenaed records in Washington, D.C. waived if they are furnished to the Subcommittee representative who served this subpoena upon you.

August 25, 1976, I made service of the within subpoena by person—Walter S. Fialkewicz the within-named Charles Cubbler, at HEW, Room 2048, Washington, D.C., at 1:55 p.m., on the 25th day of August, 1976.

Signed, Walter Fialkewicz

SCHEDULE "A"

1. For the period January 1, 1971, to the present, produce any and all records of transactions, including but not limited to, cancelled checks, monthly statements, deposit receipts and loan statements in your possession custody or control for checking accounts and loans in the names of Charles A. Cubbler, Mrs. Charles A. Cubbler, Doris C. Cubbler and/or Doris C. Chambliss and/or for any banking relationships used by the within-named individuals through any companies, partnerships, corporations or other entities with which these individuals are associated.

2. Produce for the period January 1, 1971, to the present, any and all materials, documents, records in your possession, custody or control relating to:

A. Memorandum of telephone calls or telephone message slips received at the place of your employment at the Department of Health, Education and Welfare.

B. Diaries of daily activities, meetings, and telephone conversations, including, but not limited to, the "Charles Cubbler Time Log."

C. Monthly statements and individual charge receipts from American Express Company, Master Charge, BankAmericard, Diners Club, Carte Blanche as well as any airline, car rental or other credit cards used for travel, but excluding department store charge cards.

D. Leasing of vehicles in the name of Charles A. Cubbler, Doris C. Cubbler, Doris C. Chambliss and/or any companies, partnerships, corporations or other entities with which these individuals are associated.

E. All payments, rental receipts, salaries, wages, fees, gratuities, accounts receivables, honoraria, stipends and travel reimbursements.

F. All requests by Charles A. Cubbler for approval, letters of approval by superiors, and/or memorializations of approvals by superiors for any outside writing, editing, consulting, counselling, tutoring and/or any other services as required by the Standards of Conduct regulations of the Department of Health, Education and Welfare and the terms of contracts entered into by Charles A. Cubbler under the Intergovernmental Personnel Act.

That subpoena has not been complied with. Mr. Cubbler was personally served on August 25.

It is my understanding that counsel was called this morning and was informed that Mr. Cubbler would not appear. I will ask counsel to relate his conversation with Mr. Cubbler's counsel for the record.

Mr. FELDMAN. I was called at approximately 9:05 this morning by Mr. Rogovin, who is counsel for Mr. Cubbler. He told me that he advised his client not to appear before the subcommittee this morning, Mr. Chairman. He said he advised HEW of his advice to his client.

Mr. Rogovin and I and Mr. Statler, chief counsel to the minority, and other committee staff members had previously met with Mr. Rogovin and Mr. Frampton who are attorneys for Mr. Cubbler, at which time they made their arguments about his not having to appear, asking that we take the representation of the attorneys that he would take the fifth amendment or, in the alternative, that our session be held in executive session.

These arguments were, in fact, related to the chairman and the ranking minority member of this subcommittee.

At all times Mr. Rogovin and Mr. Frampton represented to us that they did indeed represent Mr. Cubbler and were making the arguments on Mr. Cubbler's behalf.

Senator NUNN. Thank you. Does minority counsel have anything to add to that?

Mr. STATLER. This morning, in addition to Mr. Rogovin's call to the chief counsel, Mr. Feldman and I met Mr. Frampton outside this hearing room. He informed us that Mr. Cubbler would not be in attendance this morning, that he felt that Mr. Cubbler was not subject to a subpoena to appear here today, since no subpoena had been issued for his personal attendance as opposed to his records notwithstanding the fact that in the meeting with Mr. Feldman and me, the attorney representative said he would be here today.

Finally, Mr. Frampton indicated that he did not feel that he had the authority to accept service of a subpoena on behalf of Mr. Cubbler.

Senator NUNN. Thank you.

I might add that I am under the impression that Mr. Cubbler is already in contempt of this subcommittee because he has failed to comply with the subpoena for books and records. That will be a legal matter to be determined. We did not subpoena him for his appearance this morning, as is our practice with Government witnesses. We expect Government witnesses in the executive branch of Government to testify. I in no way blame Secretary Mathews or any person in HEW for Mr. Cubbler's failure to appear. I think they have acted in good faith. I think it has been made very plain that we expected him to appear; in fact directed him to appear. I think that ought to be plain.

I have asked that counsel prepare another subpoena for Mr. Cubbler which I will sign momentarily and which we will make an effort to serve this morning to him to appear personally tomorrow morning before this subcommittee. It will be up to Mr. Cubbler and his counsel to respond to that.

I also would like to briefly respond to the letter which has been inserted in the record from Mr. Cubbler's counsel stating that he should not be required to appear in open session and stating also in the letter that he would, if he appeared in executive session, take the fifth amendment.

First of all, Mr. Cubbler and his counsel realize that the standard practice of this subcommittee and the Government Operations Committee is to make certain that any witness has every opportunity to exercise their constitutional rights and privileges before this subcommittee.

He has the right to decline to testify on fifth amendment grounds. He has the right to withhold potential incriminating documents, but he does not have the right to obstruct or impede a congressional investigation by requesting individuals to alter or destroy documents which are relevant to our inquiry. We heard that that had been done yesterday.

Mr. Cubbler does naturally have his rights. We want to make certain that if he does appear at any time, he is accorded those rights. I think Congress and this subcommittee also have rights and, more importantly, responsibilities. We have a right and responsibility to get all the facts relating to this investigation without tampering. We have a right to confront a witness who is vital to this process; who is in a key position in HEW; who has influence and who, in his job, has every capability of influencing large amounts of money that affect the taxpayer's interest in this country; and who is alleged at this point by other witnesses to have interfered with the congressional process.

Although counsel for Mr. Cubbler makes an eloquent plea that an appearance will hamper Mr. Cubbler's right, I have been informed that after we received counsel's letter, Mr. Cubbler granted an interview in which he admitted receiving payments but termed them honoraria. This interview, as I understand it, was with UPI. I found it a bit inconsistent for Mr. Cubbler to be granting interviews such as this one which ran on the wire, and at the same time claim to be protected by not appearing in public session.

We will let the legal facts be sorted out, depending on the reaction of Mr. Cubbler's second subpoena and depending on the legal analysis we have to the first subpoena which has not been complied with.

I might also add that there may be some here who recall, I know the staff and other members of the subcommittee will recall, we had a similar situation when we were holding hearings on the guaranteed student loan program. I think that there are cases where executive session is proper for the fifth amendment. There are cases, however, where it is not proper. I felt at that time last fall that we should have a witness appear who had told us in advance he would in all likelihood take the fifth amendment. He did appear. He was

in a key position in the student loan program in the San Francisco Regional Office of HEW.

We gained much information that assisted us in the legislative process at that time. Before he took the fifth amendment, he told us about how the operation worked. He gave us much vital information and, as a matter of legislative record, Congress has passed in the last week a substantial number of amendments to the student loan program that grew out of that very set of hearings.

So there is a legitimate legislative reason to have a witness appear. We are not a court of criminal prosecution. We do not intend to be.

There are other issues that have come up in the course of this investigation which will not be given in executive session. They will be turned over to the Justice Department for its own review to do with them as it sees fit. But in this case, Mr. Cubbler's testimony is essential, in my opinion. There are issues that I believe he could testify to. In fact, though it would depend on his counsel's advice, I believe that his testimony would be of great assistance to this subcommittee. But I think we will be deprived of testimony unless he appears.

So there is a legislative purpose here. We have had numerous allegations that we will hear more about this morning. We have received allegations not only of criminal wrongdoing—at least those allegations indicate there could be criminal liability—but we have had, more importantly, allegations of gross mismanagement. Those are the areas that we want to discuss with Mr. Cubbler and, as I previously indicated, I believe that those areas could be discussed without infringing on any of his constitutional rights.

We will let the record speak for itself and we will proceed in accordance with our responsibilities here in this subcommittee.

I will ask counsel to give additional reasons. I want to make it very plain that the decision to have Mr. Cubbler appear in public session was not made by the staff. It was made by Senator Percy and myself as acting chairman and ranking minority member. We did get staff recommendations. We did get a legal analysis. It was not a matter that we considered in a light manner. We know it is a serious matter. We want to make sure all witnesses are accorded their legal rights. But this decision was made by Senator Percy and myself.

I will ask counsel to go into additional reasons on this, and then we will call our first witness.

Mr. FELDMAN. Senator, I will be brief because we can augment the record later and the record will speak for itself.

In regard to a few points raised in Mr. Rogovin's letter, I would like to say, first of all, that the subcommittee's investigation and these hearings were duly authorized by the subcommittee. It is a legitimate legislative purpose—the examination of the medical management information service program.

Mr. Cubbler is a high-ranking official who received payments. To permit him to avoid public testimony while others testify in public would leave a gap in the record and create speculation as to what his closed session testimony was, if indeed he was permitted to testify in executive session.

Second, it has been the practice of this subcommittee for many years under Senator McClellan, Senator Jackson, and yourself as acting chairman, that an individual must himself exercise his rights, his constitutional rights, and he should do this personally and not by an attorney. The reason is obvious. He can only exercise such rights.

This issue has been discussed as recently as March in subcommittee session and it was the consensus of the committee that this was the proper practice.

Senator NUNN. I might add, his attorneys according to the information I have, take the position that they should be permitted to plead the fifth amendment on his behalf without his personal appearance; but then they took the other position, just a little while ago, that they could not accept service of the subpoena for his personal appearance.

Mr. FELDMAN. I think that inconsistency is important in this case, Mr. Chairman.

It has also been the committee practice to have key witnesses, such as Mr. Cubbler, exercise their rights in public sessions for the reasons that I have cited before. We cannot complete a record, we cannot make legislative recommendations and we cannot make referrals, as required by the subcommittee, unless we have a complete record.

Third, counsel in their letter state, and I quote, "The staff is rushing to hearings," solely to confront Mr. Cubbler. This is erroneous. Staff has been investigating computer service companies in the health care services industries since May 5, 1975.

One reason we have delayed in these hearings is that Mr. Cubbler has not responded to his subpoena. I believe that the detailed staff study which was presented at the beginning of these hearings, outlining the parameters of our investigation, speaks for itself as to whether or not we were rushing to hearings.

Fourth, contrary to counsel's implication in their letter, it is not a standard Senate practice to waive public testimony in such cases.

I would like to refer you to the Senate Special Committee on Aging which held nursing home hearings in February of 1975, under the chairmanship of Senator Moss and with Senator Percy, ranking minority member. In that case, the individuals made the same claim when they were called to testify in public session. And, of course, Senator Nunn has mentioned the most recent example in this subcommittee when he chaired the guaranteed student loan hearings.

Last, I object strenuously to counsel's characterization in his letter that this decision was made by staff counsel. Mr. Rogovin and Mr. Frampton met with Mr. Statler and myself and others in our office. They laid out their proposals and their arguments.

I told Mr. Rogovin and Mr. Frampton, clearly with the endorsement of Mr. Statler—I would let him speak to this—that staff could not make this decision until we checked with the chairman of the committee and the ranking Minority member, which we did.

I then called and told him, Mr. Rogovin, that we had discussed this and the decision had been made.

The staff does not run this committee. The acting chairman and the ranking Minority member give us our direction, and we follow those directions.

There are other arguments that could be made. Mr. Chairman, I just wanted to outline some of the rebuttals to the points in that letter since that letter was put in the record.

[At this point, Senator Percy entered the hearing room.]

Senator NUNN. All these documents that are put in the record should be made available to the press. I think the media is entitled to see the views of the attorney for Mr. Cubbler, as well as our own views.

I think the chief clerk ought to make copies and make them available to the press. The letter is from Mr. Rogovin to Senator Jackson.

I know Senator Percy has just come in. I will ask minority counsel if he would respond with his own views on this particular subject, and if he concurs or disagrees with anything that has been said. We would certainly like to have your views.

Senator PERCY. I would like to comment as to my own views and then certainly we would like to hear from Mr. Statler. I think it extraordinarily important that the witness be here. I join and fully support the chair. This is an absolutely bipartisan matter. We will insist upon the appearance of the witness here. There is no way that these charges and allegations can be answered, except by him.

He has a perfect right, if he wishes, to exercise his constitutional privileges. But I think that he must appear before the subcommittee and we should take whatever measures are necessary to ensure that he is here.

Senator NUNN. Thank you very much, Senator Percy. I just made reference to a similar situation that we had in our hearings last fall on the student loan program, where a particular witness took the fifth amendment. Once he took the fifth amendment, he was not in any way harassed, badgered or embarrassed.

But before he took the fifth amendment, we had an extensive dialogue with him about the management of the program that he was involved with. He talked to us in a frank and candid way and, as a result of that and the testimony of other witnesses, we now have substantial legislative corrections that are becoming law in the student loan program.

So there is a legitimate, legislative purpose—even if the witness is going to take the fifth amendment—to find out, at least to the extent that this counsel advises him, his views on the management of a particular program.

Senator PERCY. This is a matter that can only be answered by Mr. Cubbler. Again I say he will certainly not be harassed. No witness has ever been harassed here. I think his appearance is essential and necessary.

We must find a way to get to the bottom of this problem. The bigger picture that we are all after is to find some way to ensure health care for all American citizens in a rational, reasonable manner. We cannot do it until we can first administer a much smaller program without the kind of pervasive abuse that we have identified in these hearings.

We have allegations of fraud at high levels. Witness after witness has testified before this subcommittee as well as before another committee that I am ranking minority member on, the Senate Select Committee on Aging, about abuses in Medicaid.

We have a situation where allegations have been made against a witness concerning his activities regarding MMIS, and about his relationship with the nursing home industry. The nursing home allegations were dropped, however, he must appear before the subcommittee to answer questions relating to MMIS.

Mr. Cubbler has been transferred to another function. Will the Federal Government continue to keep someone in office when allegations have been made against an individual, he will not appear before a congressional committee with a constitutional obligation to investigate this matter?

I would like very much to hear from counsel, either Mr. Statler or Mr. Cottin, or both.

Mr. STATLER. I confirm everything that the Chairman has said, and everything that the ranking minority member has said. After the discussion that Mr. Feldman and I had with counsel for Mr. Cubbler, the chief counsel discussed it with the chairman. I discussed it with the ranking minority member. They both concurred as to the importance of Mr. Cubbler's attendance. Those were the points made by both of them.

I think that is all I can add to this discussion.

Senator NUNN. We will proceed with the subpoena. We will be directing Mr. Cubbler to appear tomorrow morning, at 10 o'clock. I am going to ask that this subpoena be served as soon as possible. We have been put on notice that counsel will not accept service, so we will serve Mr. Cubbler personally; assuming he can be found.

Mr. FELDMAN. Mr. Chairman, we will notify the United States Marshals and have subcommittee staff also attempt to serve him so that he can appear tomorrow at 10 a.m. Is that correct?

Senator NUNN. Yes.

Senator PERCY. Mr. Chairman, I think it might be interesting to note that the House yesterday agreed to our Senate amendment that you and I introduced to create an Office of Inspector General in the Department of HEW. The bill is now going to the President for signature. I will urge him to sign that bill.

I can't think of anything better than to try to internally, within the Department of HEW, correct its abuses and give it a chance to clean its house.

The naive impression that they have had, that everyone in the health and education field should be treated like angels, rather than human beings is now, I think, dispelled. It is time that these multi-billion dollar programs are subjected to the kind of audit and careful attention that the expenditure of money warrants.

I know of no better way to do it than through an Office of Inspector General.

Senator NUNN. I might add when we started the student loan investigations last fall, there were only about 10 investigators in HEW. The Agricultural Department, with a budget one-tenth that of HEW had 20 times as many investigators as HEW. So we do have a long way to go.

I think this bill will be a major step in the right direction.

I am delighted to hear that the President will sign it or at least you will urge him to sign it. I am sure if you urge him, he will sign it.

Senator PERCY. I find our influence is a little better this session than it has been heretofore.

Senator NUNN. We, in Georgia, don't have as much influence as we did several months ago.

Senator PERCY. May you have increasingly less.

Senator NUNN. I will call Walter Fialkewicz of our committee staff.

Mr. Fialkewicz, let me swear you in.

Mr. FIALKEWICZ. I was sworn in yesterday.

Senator NUNN. Let me do it again.

Do you swear the testimony you are about to give will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. FIALKEWICZ. I do, sir.

Senator NUNN. Why don't you proceed with your statement.

TESTIMONY OF WALTER S. FIALKEWICZ, SUBCOMMITTEE STAFF INVESTIGATOR

Mr. FIALKEWICZ. Mr. Chairman, my name is Walter Fialkewicz, subcommittee staff investigator. During the course of its investigation, subcommittee staff received information on the activities of Charles A. Cubbler. I would respectfully request that the document entitled "Staff Statement on Activities of Charles A. Cubbler" and the accompanying chronology be printed in the record.

Previously witnesses have testified, in detail, of Mr. Cubbler's activities with regard to the West Virginia and Maryland contracts. We also developed information on Mr. Cubbler's activities in Pennsylvania. Accordingly, I would like to begin on page 8 of the staff statement to read from that section captioned "Cubbler in Pennsylvania".

Senator NUNN. We will make the complete statement a part of the record.

[The document referred to follows:]

STAFF STATEMENT ON ACTIVITIES OF CHARLES A. CUBBLER

Introduction

Charles A. Cubbler, between August 8, 1974, and April 21, 1975, was one of three officials responsible for the review and certification of State plans and processes to develop Medicaid Management Information Systems (MMIS). That certification resulted in Federal funding of 90 percent of the system's design, development and installation costs and, in cases where systems were developed and installed, 75 percent of the cost of operations.

During the period Cubbler was directly responsible for these review and approval decisions, he accepted more than \$3,000 that we know of in money and services from FMS Management Services, Inc., which submitted proposals for the development of MMIS systems and won contract awards in the States of West Virginia and Maryland.

Francis J. Melly, president of FMS, told the Subcommittee staff that Cubbler wrote parts of and "edited" FMS's West Virginia proposal and that he simply edited the Maryland proposal. Department of Health, Education and Welfare records show that Cubbler was one of the three key certifying officials at the

time approval of 90 percent Federal funds was granted for the West Virginia contract.

Moreover, these records show that of the three key HEW officials involved in approval of the State contract, he was the only advocate of a \$133,890 supplement to the original \$460,270 contract between the State of West Virginia and FMS. The supplement to the contract was approved at the insistence of Keith Weikel, head of Federal Medicaid programs, with whom Cubbler was dealing directly. Officials and staff of the certifying and approval unit—Office of Information Systems—strenuously objected to the supplemental.

Cubbler was not the only man involved in the decision to award the original contract or to grant the extension.

Cubbler was in a position to know exactly what HEW would want to see in any proposals that would be approved. Indeed, it was his job as a Government employee to tell States what HEW expected. He accepted money for writing and editing a contractor's proposal and then participated in the Federal decision-making process that resulted in the 90 percent funding of the contract.

According to the Civil Service Commission "position description" effective as of March 8, 1974, the Director of the Medicaid Systems Division "is to provide leadership and direction and to carry overall responsibility for developing model management systems and providing technical assistance necessary for increasing effectiveness and efficiency of the Medicaid program at the central office SRS regional office and State agency levels."

In addition, the job description says that the Medicaid Systems Division Director "directs and reviews the analysis of all Medicaid systems fiscal agent and management consultant contracts submitted by the States [and] makes recommendations to OSSO [Office of State Systems Operations] regarding approval for Federal financial participation." [Exhibit 28.]

Federal "standards of conduct" regulations flowing from Federal statutes provide that employees must seek prior written authority from superiors before they can engage in outside consulting, editing and writing. A review of Cubbler's personnel files showed no such authorization [Exhibit 27.]

Cubbler was officially designated Acting Director of the Division of Medicaid Systems on August 8, 1974, (Exhibit 28) by James J. Delaney, Acting Associate Administrator (of the Social and Rehabilitation Service) for Information Systems. But Cubbler was quite familiar with the activities of the office with regard to State plans because he occupied space within the Office of Information Systems, before his August 8, 1974, assignment.

Delaney in a sworn statement (Exhibit 29) to the Subcommittee said:

"Several states were contemplating MMIS systems but were waiting until final regulations flowing from Public Law 92-603. When those regulations were promulgated, we began to receive requests from the states. This was in the Summer of 1974.

"Mr. Cubbler, who became Acting Director of MSD in August was occupying space in our area before that time, and I talked to him almost everyday. A constant subject of our conversations was the State plans to develop MMIS systems.

"From our work together in 1970 and 1971 and through these discussions in the Summer of 1974, Mr. Cubbler was thoroughly familiar with what my office was doing and its attitudes toward state advance planning documents and request for proposals. So when he became an Acting Director, he was well aware of office policies and desires.

"I worked very closely with all my Division Directors. . . . James Trainor . . . was the Director of the Office of State Systems Operations. This office performed technical evaluations of the advance planning documents and the state draft of their request for proposals. This office also examined the winning contractor's proposal for the installation of the MMIS in the State. This examination included both technical and dollar evaluations. However, neither OSSO nor MSD had any responsibility in selection of a contractor to perform the work for a state.

"Mr. Cubbler's division was responsible for counselling and consulting States to help them develop the package that eventually would be submitted to Trainor. Cubbler and his staff, therefore, were responsible for knowing what Trainor would look for in his evaluations. There would be no point in our

sending out consultants to assist the states without making sure that those consultants would communicate exactly what OSSO was looking for.

"There were consultant meetings in my office with Trainor and Cubbler, discussing the various points in state proposals. And when the time came to decide on whether to approve or disapprove—whether to commit 90 percent Federal funding—I would always call in Trainor and his staff man directly involved in the contract, as well as Cubbler and the staff man he had assigned. It was at these meetings . . . that we discussed as a team whether to authorize 90 percent Federal matching."

The West Virginia contract

On June 6, 1974, Delaney's office approved West Virginia's Advance Planning Document (Exhibit 30)—the confidential proposal from the State to HEW that sets forth the intentions of the State with regard to development of an MMIS.

On June 26, 1974, Francis J. Melly, president of FMS, drafted a check to "D.C. Chambless A/C No. 04-031-71-634" for "professional fees" in the amount of \$583.28 (Exhibit 31). D.C. Chambless is the maiden name of Mrs. Charles A. Cubbler, and the account number is for a joint account of Charles A. Cubbler and Doris C. Chambless at an American Security and Trust Company branch in Washington, D.C.

Melly told the Subcommittee staff that this payment was for a seminar on Federal programs and regulations conducted by Cubbler for FMS and staff over a Saturday and Sunday in the Summit Hotel in New York City. Cubbler received \$250 for each day and \$83.28 in expenses.

The Office of Information Systems approved (Exhibit 32) the Request for Proposal (RFP) that West Virginia intended to send to proposed bidders on July 17, 1974. (The HEW files do not contain any communication from West Virginia submitting the RFP for approval.)

Cubbler became the Acting Director of the Division of Medicaid Systems on August 8, 1974, four days before HEW approved a revised RFP. (There is no document in HEW files showing West Virginia's request for approval of a revised RFP.)

West Virginia held a conference for companies expecting to bid on the contract on August 29, 1974, to answer any questions they might have regarding the RFP. These meetings are customary in the competitive process and where MMIS programs are involved, HEW usually is represented by staff from the regional office. Regional office staff were in attendance at this pre-bidders conference, but so was Charles Cubbler. His presence was a surprise, not only to regional office staff, but also to H. Ward Nicklin, a West Virginia Medicaid official, who told the Subcommittee staff that he was "impressed" that such a high official of HEW would attend such a conference.

Subsequently, bids were solicited and on September 20, 1974, to the disappointment of Nicklin, who expected as many as six bids (Exhibit 33) there were only two—the State's own computer agency and FMS.

FMS was selected with a bid lower than that of the State computer agency on September 26, 1974, and FMS accepted the award on October 2, 1974.

Melly on FMS signed another check to D. C. Chambless on October 8, 1974, for \$1,087 (Exhibit 34) and less than a month later, on November 1, 1974, Melly signed a contract with the State of West Virginia to design an MMIS system for \$460,270 of which 90 percent would be funded by the Office of Information Systems for which Cubbler worked.

Melly told the Subcommittee staff that this was the first of two \$1,000 payments, reimbursing Cubbler for writing sections and editing the West Virginia proposals.

FMS was authorized to begin work on the contract on November 6, 1974. A month later, on December 5, 1974, Cubbler reported to his superior, Delaney, that he met "with representatives from West Virginia and their selected contractor for MMIS implementation, Frank Melly Associates" (Exhibit 35). No details of the meeting were given.

But within 30 days, on January 3, 1975, Melly drafted another check to D.C. Chambless for \$1,000 (Exhibit 36). On the stub in his checkbook, Melly wrote that the check was for "West Virginia professional fee" (Exhibit 37).

Within days of the writing of this check, Wayne Faulkner wrote a memo (Exhibit 38) to his supervisor, Cubbler, saying that he had written a draft of

a proposal which would come from West Virginia to the Social and Rehabilitation Service seeking approval for the development of an LTC system. This refers to a system that was proposed to be added to the MMIS development in West Virginia that would enable the evaluation and tracking of utilization of long-term care facilities or nursing homes.

Mely told staff that there was no connection whatsoever between the second \$1,000 payment to Cubbler and Cubbler's advocacy of the addition of the LTC, which was to result in a \$134,000 contract supplement for FMS.

On April 10, a meeting was held between Dr. Jimmy Mangus, Medicaid Medical Director and Helen Condry, Director of the Medicaid Division of Medical Care, both of West Virginia, and Cubbler and staff members.

Arthur Pergam at the time was a senior management advisor to M. Keith Weikel, the Commissioner of the Medical Services Administration. In a sworn statement to the Subcommittee (Exhibit 39), Pergam said:

"Cubbler invited me to the meeting which he chaired in his office. I was amazed at the time that Cubbler invited me to this meeting. During this period of time, he was being quite nice to me. I never had many dealings with him before that and I think I even said to him, 'I can't figure out what you want from me?' I remember feeling that I was being used."

Nonetheless, Pergam thought the addition of an LTC was a reasonable request and he wrote a memorandum for Weikel's signature approving the proposal.

In an April 17, 1975, memorandum (Exhibit 40) from Keith Weikel, the Commissioner of the Medical Services Administration (SRS) to Charles M. Sylvester, the Acting Administrator for Information Systems, Weikel said that he basically approved West Virginia's request for the addition of a long-term care element (LTC) to the existing MMIS development in West Virginia. Cubbler in a memo (Exhibit 41) the same day, April 17, 1975, to Sylvester announces West Virginia's intentions and finds them "commendable."

The decision by Weikel touched off an unusual series of memoranda between Sylvester and high HEW officials because what Weikel had done was authorize the spending of program dollars for a system that was already in development in Utah. The Office of Information Systems was awaiting completion of the Utah LTC system so that evaluation criteria could be developed against which other LTC systems would be developed as judged.

The arguments of the Office of Information Systems and the response are contained in Exhibit 42.

Weikel, in a sworn statement to the Subcommittee, (Exhibit 43) recalled Cubbler talking with him about the project and "he encouraged me to go along with the State's request." Furthermore, Weikel said:

I recall that he implied that certain members of Congress were concerned with the length of time and money involved in the Utah prototype LTC module under development. I clearly recall that he mentioned that Governor Arch Moore . . . personally supported the LTC element for West Virginia.

The reference to the congressional concern with Utah and the interest of the Governor were Cubbler's way of doing business.

Weikel agreed with Pergam that the project was justifiable, but both said that had they known at the time Cubbler was taking money from the MMIS contractor, they would have denied the request.

It should be pointed out, first of all, that Cubbler, the Director of the Division of Medicaid Systems, went around his superior, the Acting Administrator for Information Systems, to Weikel who was outside Cubbler's chain of authority, but who nonetheless can commit HEW to an action.

Secondly, this action was taken despite a staff argument that the project was duplicative of one already underway in Utah.

On June 23, 1975, following final approval of the LTC system by HEW (Exhibit 44), West Virginia and FMS entered into a supplemental agreement for the development of the system for \$133,890.

The Maryland contract

Just prior to the mid-April 1975 debate over the addition of a long-term care element to the West Virginia MMIS contract, James Trainor, on April 3, 1975, sent a memorandum (Exhibit 45) to Cubbler attaching the Advance Planning Document from the State of Maryland. Trainor asked for Cubbler's review and comments.

Cubbler responded in a memorandum of April 18, 1975, (Exhibit 46). Clearly, therefore, Cubbler had inside information on Maryland's intentions.

Effective April 21, 1975, Cubbler was given a new job description (Exhibit 47). A second document dated the same day (Exhibit 48) details him "no later than April 18, 1975, [to] unclassified duties [in the] Division of Medicaid Services."

HEW files on the Maryland contract are sparse. But they show that once the State obtained approval of its advance planning document and its request for proposal, it solicited bids on July 14, 1975, and held a bidder's conference on August 1, 1975.

On September 8, 1975, Melly drafted another \$1,000 check to D.C. Chambless (Exhibit 49) and in the stub of his checkbook he wrote that the check was for the "Maryland proposal." (Exhibit 50).

FMS submitted its proposal along with seven other bidders on September 30, 1975, and was selected unanimously by an evaluation committee to win the contract award on October 3, 1975. The contract was for \$299,800.

CHAMPUS proposal

The Civilian Health and Medical Program for the Uniformed Services (CHAMPUS) began preparing a request for bids on an MMIS about May 1, 1975, under the direction of James J. Delaney, the former head of the Office of Information Systems, who had taken a new job at the Defense Department. The requests were distributed on May 23, 1975. Bids were due in early June and the award was to be announced June 9, 1975. FMS was judged to be the superior of two bidders and with a price of \$101,228.

But on June 27, 1975, CHAMPUS officials decided against awarding the contract. CHAMPUS officials say they put a stop on the contract because they say they felt something was wrong. Subcommittee staff have tried to pin down CHAMPUS officials on a more specific answer, but there are no documents on reasons for the decision.

On June 1, Melly wrote another check to D.C. Chambless for \$1,000 (Exhibit 51) and in the stub of his checkbook, Melly wrote that the check was for "consulting services CHAMPUS proposal." (Exhibit 52).

Melly, in an expression of cooperation with the Subcommittee, volunteered to staff that Cubbler wrote and edited the West Virginia proposal and he said Cubbler edited the Maryland proposal. Melly gave to the Subcommittee staff a copy of the West Virginia proposal which contains handwritten editings that were used to convert the basic West Virginia proposal for use on the CHAMPUS proposal. He said the handwriting is that of Cubbler. Melly said he has no copy of Cubbler's editing comments on the West Virginia and Maryland proposals. Exhibit 53 are samples taken from the document Melly gave the Subcommittee.

Shortly before FMS received the \$141,236 extension of the West Virginia contract and months before the company won the Maryland award, FMS turned over to Cubbler for his own personal use a 1975 Chrysler Cordoba, which the company began leasing on June 1, 1975.

Melly explained to Subcommittee staff that FMS leased cars for its employees at contract site locations, in Charleston, for example. The company was planning on opening a Washington office to service the hoped-for CHAMPUS contract and it knew of Maryland's intentions to seek bids on a proposal. Furthermore, three FMS employees were living in the Washington area. So the car was leased.

Melly said he was in Charleston the day he received word that the car was ready in Washington and he called Cubbler to pick it up for the company. Though the company won the Maryland competition, the CHAMPUS contract fell through and plans for the opening of a Washington office were effectively dropped. Cubbler simply was allowed to keep the car, Melly said.

The car was leased from L.P. Steuart Leasing Company, Washington, D.C., for \$202.52 per month excluding insurance and gas. The lease is for three years and began June 1, 1975, the approximate time Cubbler's use of the car began. That use continued until about September 1, 1976, according to Melly. The lease and attachments appear as Exhibit 54. As of September 1, 1976, FMS obligations on the Cubbler car lease totaled approximately \$3,202.

In addition, FMS has reimbursed Richard Ney Associates, Inc., a Washington, D.C., health public relations consulting company, for approximately \$600.

in meals. Ney has had with Cubbler between March 21, 1974 to September 23, 1975. Ney expense vouchers provided in response to subpoena appear as Exhibit 55.

Other issues raised by FMS relationships

Another area examined by staff was FMS's use of Jimmy Mangus, M.D., as a consultant. Mangus is the Medical Director of the West Virginia Medicaid program and was a member of the original West Virginia MMIS Evaluation Committee. In addition, he was an advocate of the LTC addition to the contract.

FMS is a subcontractor to The Computer Company of Richmond, Virginia, in its contract to develop an MMIS for the State of Arizona. It is in Arizona that Mangus serves as a consultant to Melly.

Melly told the Subcommittee staff that Mangus had the approval of West Virginia authorities to assist FMS in Arizona. Melly said he was impressed with Mangus, who continues to represent the State of West Virginia in working with FMS on the MMIS development there.

During a discussion with staff on this matter, Melly volunteered that Mangus bought 500 shares of stock in FMS for \$500. There are 10,000 FMS shares outstanding. Melly said the stock purchase took place after FMS began work on the West Virginia project.

From the Subcommittee staff's understanding of the financial condition of FMS, Mangus is unlikely to reap any profits from this small acquisition. Furthermore, Melly said that Mangus has submitted no statements to FMS for his work on the Arizona subcontract.

Finally, Melly, when he worked for another company, participated in the writing of the West Virginia Request for Proposal. In order to write it, he had to know State plans and intentions, project cost estimates and other information that could give him a substantial edge in competing.

Cubbler's response to subcommittee inquiry

On August 31, 1976, Walter Bonner and Edward O'Connell, attorneys for Melly, volunteered to the Subcommittee staff that Cubbler called their client and advised him of the Subcommittee inquiry. Subsequently, Subcommittee staff learned this call may have occurred in March 1976. Melly told the Subcommittee staff that Cubbler told him to destroy all checks the company had paid him and that Cubbler directed Melly to change all expense vouchers for entertainment by deleting his, Cubbler's name. Melly did not destroy the checks but he did ask his Washington representative to send in amended expense vouchers.

When the Subcommittee subpoena was served in July on Melly, he surrendered the checks and the actual, unamended expense vouchers. Subsequently, in an expression of good faith and cooperation with the Subcommittee inquiry, Melly, through his attorneys, revealed the Cubbler directives and he provided to the Subcommittee the altered expense vouchers with names substituted for Cubbler's name (Exhibit 56).

Cubbler in Pennsylvania

Charles Cubbler left his position as Executive Secretary of the National Advisory Council on Nursing Home Administration (Social and Rehabilitation Service) on February 22, 1972 to become the Commissioner of Medical Services for the Pennsylvania Medicaid program. He went to the Commonwealth of Pennsylvania on loan from HEW under provisions of the Intergovernmental Personnel Act, an employee exchange program.

The Medicaid program in Pennsylvania had severe problems. For example, pharmacists were waiting as long as six months for reimbursement of services provided to Medicaid beneficiaries. One of Cubbler's assignments was to clean up that situation.

He began preparing a Request for Proposal (RFP) from private industry for a prepaid drug program. An RFP is a document soliciting bids and setting forth exactly what would be required by the State in any contract.

Cubbler was assisted in the preparation of the RFP by William T. Ward, a vice president of Health Application Systems, Inc., the management, computer service and marketing agent for Paid Prescriptions, Inc., the non-profit corporation that eventually won the \$59 million contract award.

The Subcommittee staff found the original handwritten draft of a portion of the RFP in the files of the Commonwealth of Pennsylvania Department of Public Welfare. When a subpoena was served on Health Application Systems, the Subcommittee was given a Xerox copy of the draft found in the Pennsylvania files. The handwritten draft was prepared by William T. Ward, a vice president of Health Application Systems. The original handwritten draft of the portion of the RFP appears as Exhibit 57 and the Xerox copy of the same text given to the Subcommittee by Health Application Systems appears as Exhibit 58.

Staff received signed statements from other interested bidders stating that they did not have a similar invitation from Commissioner Cubbler to assist in the preparation of the RFP. These three statements are Exhibits 59, 60, and 61.

Cubbler also awarded Health Application Systems, Inc., a smaller \$36,000 contract, which was expanded by \$13,000, for a review of hospital utilization.

The Subcommittee obtained, through subpoena of Bergen Brunswig Corporation, copies of letters between an official of a division and Cubbler documenting the collaboration in the writing of the RFP. These documents appear as Exhibit 62.

Beginning on October 6, 1972, Cubbler received the first of seven checks totaling \$2,552.48.

A subpoena was served on Bergen Brunswig Corp., the Los Angeles parent company of Health Application Systems, Inc., for all checks and records of payments to Cubbler or D.C. Chambless. The company, in response, turned over a file of six cancelled checks and one check voucher totaling \$2,552.48.

The checks were to Harry Colby who endorsed some of them to Cubbler, who in turn endorsed them with his wife's maiden name, D.C. Chambless. Other checks were cashed by Colby.

Subcommittee staff interviewed Colby, who said the payments to Cubbler were for consulting. He said the company needed to have regulations interpreted and Cubbler was quite knowledgeable about those regulations.

The Bergen Brunswig attorney told the Subcommittee staff that corporate counsel became aware of the payments shortly after they were made. The attorney said that counsel directed that they be stopped. The attorney told Subcommittee staff that it was wrong to have made the payments, but that they had nothing to do with the contracts. He said the company informed the Pennsylvania Attorney General of the payments and that a memo on the matter was prepared. The Pennsylvania Attorney General's office says it received no such information.

The last of the checks, two for \$300, were each received sometime after May 9, 1973, just days before the State began its evaluation of bids on the \$59 million drug contract. The selection committee, chaired by Cubbler, gave the contract to Paid Prescriptions, which was the low bidder.

Cubbler left his post in the Commonwealth of Pennsylvania and returned to HDW on September 30, 1973.

Later, however, the State Attorney General raised questions about the contract and ruled the contract would be in violation of certain State laws.

The Commonwealth sought bids on the prepaid drug contract once again and for the second time, Paid Prescriptions won. The Company began providing prepaid drug services effective February 1, 1975.

CUBBLER IN PENNSYLVANIA

A CHRONOLOGY

April 1, 1972—Letter from William T. Ward (HAS) to Cubbler with attached revisions and editing comments for proposed contract specifications for Medicaid Prepaid Drug Program Request for Proposal.

April 26, 1972—Memo from William T. Ward to Cubbler requesting latest version of system specifications.

May 2, 1972—Letter from Robert E. Abrams (President of HAS—Paid) to Roger Cutt, Department of Health Evaluation and Welfare SRS—MS re: request made by Wilmer Weintz, Department of Health Care Services of forwarding information concerning HAS program in San Joaquin, plus concepts used in Utilization Review efforts and manual entitled, "Service Drug Program."

June, 1972—Penna Files Report by Cubbler, Commissioner, Medical Programs re: Performance-Type Specifications Contract for XIX Health Insurance Pharmaceutical Benefits for Pennsylvania Medical Assistance Program.

September 1, 1972—Penna Files Award by Cubbler of Pre-discharge Utilization Review Contract for \$36,000 to HAS.

October 6, 1972—Computer Clearing Services Inc., check No. 736 to Harry Colby in the amount of \$752.48 endorsed by Colby but cash given to Cubbler.

November 7, 1972—Computer Clearing Services, Inc. check No. 1021 to Harry Colby in the amount of \$300.00 endorsed by Colby but cash given to Cubbler.

December 14, 1972—Computer Clearing Services, Inc. check No. 1277 to Harry Colby in the amount of \$300.00 endorsed by Colby but cash given to Cubbler.

January 24, 1973—Memo Cubbler to Edward B. Carskadon, Executive Assistant to the Secretary, Pennsylvania Department of Public Welfare, setting forth proposed sequence of actions leading to award of Prepaid Drug Insurance Contract.

January 26, 1973—Computer Clearing Services, Inc., check No. 1913 to Harry Colby in the amount of \$300.00 endorsed by Colby and D. C. Chambless for deposit into the account of Charles A. Cubbler and D. C. Chambless (the maiden name of Mrs. Charles Cubbler) at American Security and Trust, Washington, D.C.

March 3, 1973—Letter from Robert Abrams, President of HAS, to Homer C. Smith, Director, Pennsylvania Bureau of Procurement, Department of Public Welfare, requesting that company be placed on approved list of potential bidders of prepaid drug program, Commonwealth of Pennsylvania.

March 5, 1973—Computer Clearing Services, Inc. check No. 2317 to Harry Colby in the amount of \$300.00 endorsed by Colby and D. C. Chambless for deposit into account of Cubbler and Chambless at American Security and Trust Co., Washington, D.C.

April 5, 1973—Memo from Marx S. Leopold, Pennsylvania Welfare Department General Counsel to Cubbler re: recommendations and changes for proposed RFP (e.g., why Cubbler believes corporate experience in development and operation of prepaid drug insurance programs is an absolute requisite.)

April 10, 1973—HAS check No. 2983 to Harry Colby in the amount of \$300.00 endorsed by Colby and D. C. Chambless for deposit into the account of Cubbler and Chambless at American Security and Trust Company, Washington, D.C.

April 13, 1973—Memo Cubbler to Marx S. Leopold, Esq., General Counsel, Office of Legal Counsel re: rewording of RFP's restrictive terminology from corporate experience being considered an *absolute requisite* to being considered an *important prerequisite* in development and operation of prepaid pharmaceutical insurance programs.

May 7, 1973—Proposals are received.

May 8, 1973—Memo Cubbler to Edward Carskadon, Executive Secretary to the Secretary, Department of Public Welfare re: received schedule for Prepaid Drug Insurance Program and reasons for delays in the schedule.

May 9, 1973—HAS voucher No. 3468 for payment to expense report of May 10, 1973—St. Frances Hospital Marketing in the amount of \$300.00. This check was made payable to Colby who gave cash to Cubbler.

May 21, 1973—Memo from R. B. Canright, Director, Special Programs (Board Secretary) to Selection Board Members re: Their appointment to Board to Select winner of bids for Prepaid Drug Program. Cubbler is chairman.

June 1, 1973—Memo from Cubbler to Helene Wohlgenuth, Secretary of Pennsylvania Public Welfare re: the final report of Selection Board (Prepaid Pharmaceutical Benefits). Paid Prescriptions is selected.

September 30, 1973—Cubbler leaves Pennsylvania and returns to HEW in Washington.

October 11, 1973—Contract awarded.

October 18, 1973—Contract signed.

December 18, 1973—Memo from Pennsylvania Welfare counsel to Marx S. Leopold re: 15 points raised by Attorney General with Paid Pharmaceutical contract.

January 16, 1974—Pennsylvania Attorney General rules contract should not be executed because of failure of Paid to qualify with State regulations and time lapse since release of request for proposal.

January 19, 1974—Paid withdraws because of delay.

January 24, 1974—Check request of Colby from Morris Blatman for consultant fee and expenses for the amount of \$1,100.17 for Florida trip. Blatman was a member of the selection committee.

July 20, 1974—Pennsylvania re-publishes Request for Proposal for Prepaid Drug Program.

August 7, 1974—First of five bid evaluation meeting is held.

September 23, 1974—Paid Prescriptions is selected.

February 1, 1975—Prepaid drug program begins.

Senator NUNN. The first part of your statement deals primarily with matters that were covered yesterday, is that correct, by the other witnesses?

Mr. FIALKEWICZ. That is correct, Mr. Chairman.

Senator NUNN. You are going to start on page 8?

Mr. FIALKEWICZ. That is correct.

Senator NUNN. Fine.

Mr. FIALKEWICZ. Charles Cubbler left his position as executive secretary of the National Advisory Council on Nursing Home Administration (Social and Rehabilitation Service) on February 22, 1972, to become the Commissioner of Medical Services for the Pennsylvania medicaid program. He went to the Commonwealth of Pennsylvania on loan from HEW under provisions of the Intergovernmental Personnel Act, an employee exchange program.

The medicaid program in Pennsylvania had severe problems. For example, pharmacists were waiting as long as 6 months for reimbursement of services provided to medicaid beneficiaries. One of Cubbler's assignments was to clean up that situation.

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The handwritten draft was prepared by William T. Ward, of HAS. The original handwritten draft of the portion of the RFP appears as exhibit 32 and the Xerox copy of the same text given to the subcommittee by Health Application Systems appears as exhibit 32A.

Staff received signed statements from other interested bidders stating that they did not have a similar invitation from Commissioner Cubbler to assist in the preparation of the RFP. These three statements are exhibits 32B, 32C and 32D.

Cubbler also awarded Health Application Systems, Inc., a smaller \$36,000 contract, which was expanded by \$13,000, for a review of hospital utilization.

The subcommittee obtained, through subpoena of Bergen Brunswick Corp., copies of letters between an official of a division and Cubbler documenting the collaboration in the writing of the RFP. These documents appear as exhibit 33.

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Subcommittee staff interviewed Colby, who said the payments to Cubbler were for consulting. He said the company needed to have regulations interpreted and Cubbler was quite knowledgeable about those regulations.

The Bergen Brunswick attorney told the subcommittee staff that corporate counsel became aware of the payments shortly after they were made. The attorney said that counsel directed that they be stopped. The attorney told subcommittee staff that it was wrong to have made the payments, but that they had nothing to do with the contracts.

He said the company informed the Pennsylvania Attorney General of the payments and that a memo on the matter was prepared. The Pennsylvania Attorney General's Office says it received no such information.

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Cubbler left his post in the Commonwealth of Pennsylvania and returned to HEW on September 30, 1973.

Later, however, the State Attorney General raised questions about the contract and ruled the contract would be in violation of certain State laws.

The Commonwealth sought bids in 1974 on the prepaid drug contract once again and for the second time, Paid Prescriptions won. The company began providing prepaid drug services effective February 1, 1975.

Mr. Chairman, I have the exhibits prepared to be put in the record. They go from 26 to 64.

Senator NUNN. What are the numbers of those exhibits?

Mr. FIALKEWICZ. They go from No. 26 to 64.

Senator NUNN. Those will be admitted into the record without objection.

[The documents referred to were marked "Exhibit Nos. 26-64" for reference. Exhibits 26B, 41, 59, 60, and 61 follow. The other exhibits referred to may be found in the files of the subcommittee.]

EXHIBIT No. 26B

JUNE 23, 1976.

Mr. DON I. WORTMAN,
*Acting Administrator, Social and Rehabilitation Services, Department of
 Health, Education and Welfare, Washington, D.C.*

DEAR MR. WORTMAN: The Permanent Subcommittee on Investigations received on June 7, 1976, your response to its request of April 30, 1976, relating to the activities of Charles A. Cubbler of the Office of Information Systems.

The materials you provided show that on February 11, 1972, Mr. Cubbler signed a statement agreeing to the terms and conditions of agreement under which he was assigned to the Commonwealth of Pennsylvania to serve as the Commissioner of Medical Programs. The "Assignment Agreement Under the Interorganizational Personnel Act of 1970" provides under Section VII(H)1. (a) that "Requests for approval of outside work, writing or editing, etc., shall be submitted to the Federal superior, through the appropriate State official, for approval in accordance with HEW regulations and policies."

Please provide the Subcommittee with the following information and materials by July 2, 1976:

1. A copy of HEW regulations and policies and amendments thereto pertaining to standards of conduct and conflict of interest in force from January 1, 1972 to the present.

2. Copies of all requests by Mr. Cubbler for approval of "outside work, writing or editing, etc." as requested by Section VII(H)1.(a) of the IPA Agreement, as well as statements approving or disapproving such requests by Federal superiors during the period Mr. Cubbler was on loan to the Commonwealth of Pennsylvania.

3. Any requests, approvals, memoranda or other materials relating to either Mr. Cubbler's notification that he intends to engage in outside work or approvals of superiors for such outside work.

Thank you once again for your cooperation.

Sincerely yours,

SAM NUNN, *Acting Chairman.*

EXHIBIT No. 41

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
 SOCIAL AND REHABILITATION SERVICE,
 April 17, 1975.

Memorandum To: Mr. Charles M. Sylvester, Acting Associate Administrator for Information Systems.

From: Director, Division of Medicaid Systems.

Subject: West Virginia LTC Quality/Cost System; Division of Medicaid Systems Comments.

West Virginia's plan is to develop an automated information system for inpatient care in long-term care facilities. It has two overall objectives: First, to improve the quality of care delivered by assessing monthly the status of patients in need of long-term care so that their psychological and physical requirements are met in the most effective way possible. Secondly, to develop cost finding methods which can relate reasonable costs to the reimbursement rate.

The first objective is intended to be responsive to Federal requirements for utilization control described in CFR 250.18; and specifically the medical review (MR) and independent professional review (IPR) (CFR 250.23 and 250.24, respectively), and the utilization review (UR) (CFR 250.19). The plan therefore includes, in addition to a monthly update of the patient's profile, computer schedule unannounced visits to nursing homes to assess the patient's need for admission, continued stay, and the patient care services reported and actually provided. The second objective is responsive to the Federal requirement for State cost finding methods to determine a reasonable cost-related reimbursement rate proposed in CFR 250.30 in response to Section 249, P.L. 92-603, effective July 1, 1976. The West Virginia LTC system intends to design a model cost accounting system which will develop standard costs and maximum allowable charges, through investigation, data collection, and cost modeling

simulation techniques. Cost avoidance incentives will be provided to encourage more efficient management practices.

The two objectives are to be interdependent, and are used to reinforce each others goals. MR's, IPR's and UR's will be performed using the State's standards for quality of care. These will be determined during the project. The determination of the reimbursement rate will be used as an incentive to facilities to provide the services and meet these standards; failure to meet them will result in reductions in the rate.

Costs will reflect the quantity of patient care services and skill level required for each patient in a facility. This data will be provided by the monthly Patient Care Profiles which will be audited by the surveys.

We find many features of this system's approach commendable.

The system will be an integral component of West Virginia's MMIS, currently under development. The MMIS is in the design phase and the LTC component can be incorporated into its general design with ease.

The LTC system will be designed and documented so that it can be transferred to other States. This involves far more than the computer system; it will involve the procedures for medical, psychological, and financial review and audit, as well as a cost accounting model and a uniform chart of accounts, fiscal policies, etc.

The LTC system will also be amenable to independent, stand-alone implementation; if a State should desire to do this.

The comprehensive *review procedures* permit a reimbursement rate based on actual costs, systems generated cost controls, and cost related patient care including rehabilitative programs and social activities. This approach is *intended* to resolve the apparent dilemma of the Medicaid goals: high quality of health care and efficient, least-cost approaches which will provide the best care with available resources.

The system's computerized modeling approach to cost accounting policies and patient care evaluation will provide the opportunity for *continued optimization of the system*. Simulation techniques will permit increased flexibility with the least disturbance to the nursing home industry and the Department of Welfare staff.

West Virginia has independently developed prototypes of the data collection instruments, e.g., the financial statement and the Patient Care Profile, and are now using them. This significantly reduces development costs and is reflected in their proposal costs.

C. A. CUBBLER.

EXHIBIT No. 59

CAPITAL BLUE CROSS,
Harrisburg, Pa., August 31, 1976.

U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
Russell Senate Office Building,
Washington, D.C.
(Attention Mr. David Vienna).

GENTLEMEN: This letter will confirm a telephone conversation I had with a member of your staff on Monday, August 30, 1976 at which time I advised him that at no time had the Pennsylvania Blue Cross Plans been invited nor had offered to lend assistance in drafting requests for proposals (RFPs) issued by the Pennsylvania Department of Public Welfare (DPW) for the underwriting/administration of Title XIX pharmaceutical benefits.

I have been and am now chairman of a task force created by the Pennsylvania Blue Cross Plans approximately four years ago for the purpose of responding to various RFPs issued by the DPW. The so-called "drug" program alone has been placed out for bids on three separate occasions and we responded (unsuccessfully) each time—May 1973, September 1974, and most recently February 1976.

At no time prior to the release of the RFPs in question did I or to my knowledge any member of the task force or any other representative of the five Pennsylvania Blue Cross Plans have any conversation with former Commissioner of the Office of Medical Programs, Charles Cubbler, or any of his successors regarding input into the drafting of the RFPs for the drug program. We first saw the RFPs as they were either mailed to prospective bidders or published in the "Pennsylvania Bulletin" which is Pennsylvania's equivalent of the "Federal Register".

If you have any further questions in regard to this matter, please don't hesitate to contact me.

Sincerely,

LEWIS J. LEVIN,
Secretary and Staff Counsel.

EXHIBIT No. 60

CITY TOWERS BUILDING,
Harrisburg, Pa., August 30, 1976.

U.S. SENATE SUBCOMMITTEE ON INVESTIGATIONS,
Russell Senate Office Building,
Washington, D.C.
(Attention: Mr. Walter Fialkewicz).

DEAR MR. FIALKEWICZ: As per our recent telephone conversation, please be advised that during my employment as Regional Director for Tolley International of Pennsylvania I was never contacted by the Commissioner of Health Services of the Commonwealth of Pennsylvania to assist in drafting specifications for an R.F.P. that would be circulated for a Prescription Drug Program under Title XIX.

I trust that this is the information that you desired.

Sincerely yours,

ERNEST J. SESSA.

EXHIBIT No. 61

BENJAMIN E. JAFFE,
Boca Raton, Fla., August 31, 1976.

U.S. SENATE,
Subcommittee on Investigations,
Room 101 Russell Senate Office Building, Washington, D.C.
(Attention: Mr. Fialkewicz).

GENTLEMEN: I was the President of Benjamin E. Jaffe Associates Inc, an Actuarial and Consulting firm headquartered in Philadelphia, Pennsylvania from 1946 until August 10, 1972 when we sold the firm to Tolley International. One of the decisions of our firm was U.P.P., a prepaid prescription program which we developed into the largest one at that time operating in the Commonwealth of Pennsylvania. After the sale of our business to Tolley International, I remained as a consultant for their firm for a period of time in accordance with our contract.

In reply to a question asked of me, I wish to state that I was never consulted by Mr. Charles A. Cubbler, Commissioner or by anyone to assist in drafting the R.F.P. for the Prepaid Drug Program for the Commonwealth of Pennsylvania. To the best of my knowledge no one from the firm of Russell Tolley International or anyone associated with them was to participate or did participate in the drafting or had any input in the R.F.P. for the Prepaid Drug Program for the Commonwealth of Pennsylvania.

Cordially yours,

BENJAMIN E. JAFFE.

Mr. FIALKEWICZ. Mr. Chairman, we also have a sealed exhibit relating to Mr. Cubbler. Counsel is aware of this, if he wishes to put it in the record also.

Senator NUNN. That is the income tax return, is it not?

Mr. FIALKEWICZ. Yes.

Senator NUNN. From Mr. Cubbler?

Mr. FIALKEWICZ. Yes, it is.

Senator NUNN. We will keep that document sealed, and it will be made a part of the record also.

Thank you very much.

Our next witnesses are Mr. William Cleaver, who is the chief computer technician in the office of information systems. His official

title is technical assistant to the director of office of program systems development. Accompanying Mr. Cleaver will be Mrs. Rosalie Ryan, who has spent 24 years in health and information systems programs in the States of Louisiana and Texas. For the past 4 years she has worked in the Department of Health, Education, and Welfare. And for the past 2 years she has worked in the office of information systems where she is a computer systems administrator assigned to MMIS activities in States serviced by the Atlanta and Dallas regional offices of HEW. Also we will have Mr. James Trainor, who is the director of the office of State systems operations, the agency within that office of information systems responsible for the technical evaluation of State MMIS proposals and certification.

As I understand it, Mr. Trainor is responsible for seeing to it that the regulations and guidelines are met and followed with regard to these systems and for recommending to the associate administrator for information systems whether proposals are approved and completed systems are certified. We will hear more about that later.

Are Mr. Cleaver, Ms. Ryan and Mr. Trainor here? If all three of you could come up, we will have you appear together.

TESTIMONY OF WILLIAM CLEAVER, TECHNICAL ASSISTANT TO THE DIRECTOR OF THE OFFICE OF PROGRAM SYSTEMS DEVELOPMENT; ROSALIE RYAN, COMPUTER SYSTEMS ADMINISTRATOR; JAMES TRAINOR, DIRECTOR OF STATE SYSTEMS OPERATIONS; AND BURTON BERKLEY, DEPUTY ASSISTANT GENERAL COUNSEL FOR BUSINESS AND ADMINISTRATIVE LAW

Senator NUNN. We swear in all of our witnesses as a matter of course before this subcommittee. I will ask each of you to raise your right hand. Do you swear the testimony you are about to give this subcommittee will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. CLEAVER. I do.

Ms. RYAN. I do.

Mr. TRAINOR. I do.

Senator NUNN. Ms. Ryan and gentlemen, we have asked the Secretary of the Department of Health, Education, and Welfare to make you available to the hearing to answer any questions of the subcommittee.

The letter to the Secretary requesting your appearance represents a courtesy to the executive branch, in lieu of subpoenas for your appearance. I want it understood that your appearance here today is at the subcommittee's specific request.

The subcommittee is going to ask you questions as part of its jurisdiction to conduct oversight inquiries over the operations of the executive branch. Your full, forthright and honest response to the questions you will be asked is necessary for the subcommittee to develop a complete and objective record of information in this hearing.

Because some of the questions will relate to one of your coworkers, I want to caution you to be specific and careful in the way in which you answer them.

Finally, the ability of the Congress to exercise its executive branch oversight function is in large part dependent upon cooperation of Government employees such as yourselves. Your testimony before this subcommittee should not be perceived, no matter what you say one way or another, as in any way being disloyal to your agency or your fellow employees.

I think that point should be made very clear to you before you testify and, hopefully, it will be made clear to your superiors and the people you work with. Indeed, it is our hope that your testimony will contribute, not only to a better congressional understanding of the issues you face, but also to program improvements which I am certain we all hope can occur.

I will ask Mr. Cleaver some questions first. I believe counsel from HEW is here. You can identify yourself.

Mr. BERKLEY. My name is Burton Berkley. I am Deputy Assistant General Counsel for business and administrative law with the Department of Health, Education, and Welfare. I am here representing these witnesses on behalf of the Department. Before you start questioning—

Senator NUNN. If you want to make any other statement in response to the brief dialog we had here I would be glad for you to do so. Let me get the spelling of your last name.

Mr. BERKLEY. B-e-r-k-l-e-y.

Senator NUNN. And your first name?

Mr. BERKLEY. B-u-r-t-o-n.

Senator NUNN. Thank you.

Mr. FELDMAN. Mr. Chairman, at this point, because there may possibly be a referral on this matter, I was wondering if we could swear in Mr. Berkley since he will, I assume, talk about activities of last night and this morning.

Senator NUNN. Mr. Berkley, will you stand, please. Do you swear the testimony you are about to give before this subcommittee will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. BERKLEY. I do.

Senator NUNN. Thank you, sir. Go ahead. We will be glad to hear from you.

Mr. BERKLEY. Thank you. As the chairman has already stated, after the Secretary received the letter from the committee requesting that we make available certain HEW employees on September 29, 1976, the Administrator of SRS, Mr. Fulton, sent a memorandum or letter to each of the employees named in that letter directing them to appear at the hearing today.

The letter said in each case:

The Secretary has received a letter from acting chairman of the Senate Permanent Subcommittee on Investigations requesting you to appear before the subcommittee on Thursday, September 30.

A copy of that letter has been furnished to you. The Secretary wishes to cooperate in every way with the subcommittee in its investigations. I am therefore directing you, as part of your official duties, to appear before the subcommittee as requested.

Mr. Cubbler had called in sick. I don't know, have these letters been made available?

Senator NUNN. No. I wanted you to identify the letter. Mr. Cubbler got a copy of the letter you just read, is that right?

Mr. BERKLEY. Mr. Cubbler had called in ill yesterday. So SRS sent a special messenger to hand deliver it to him, in addition to which I spoke to Mr. Frampton, who is one of the counsels for Mr. Cubbler, and told him that we were concerned because Mr. Cubbler had indicated his illness and we wanted to make sure that he was going to appear and would get a copy of the letter. Mr. Frampton told me that my telephone call to him would be taken as constructive receipt of the letter by Mr. Cubbler, although I am informed that Mr. Cubbler did in fact get the letter.

Senator NUNN. He accepted the letter on behalf of Mr. Cubbler?

Mr. BERKLEY. Well, it was my information on the telephone.

Senator NUNN. On the telephone?

Mr. BERKLEY. On the telephone.

Senator NUNN. It is interesting that he would not accept our subpoena this morning.

Mr. BERKLEY. Last night we received a copy of the letter which his attorneys directed to the subcommittee indicating that Mr. Cubbler would take the fifth amendment and did not want to appear in open session.

As a result of that, there were some telephone conversation with one of Mr. Cubbler's attorneys last night, and he was informed that the order to appear in the letter from the Administrator, Mr. Fulton, stood, and that we considered it to be part of Mr. Cubbler's official duties to show up here today. We made it clear that in no way was the department telling him that he could not invoke any constitutional or other privileges before this subcommittee, but we felt it was our obligation, having received this letter from the subcommittee, to insure the witnesses' appearance.

This morning, about 8:45, I received a call from Mr. Rogovin, who is also representing Mr. Cubbler. Mr. Rogovin told me that they had prepared a letter to the Secretary in which they were going to respectfully decline the direction of Mr. Fulton to appear before this subcommittee.

I have furnished staff with copies of this letter. This letter was given to me by Mr. Frampton when I arrived here about 9:20 this morning.

Senator NUNN. That letter is dated September 30, 1976, is it not?

Mr. BERKLEY. That is correct.

Senator NUNN. I have a copy of that. That is directed to Mr. William Taft.

Mr. BERKLEY. That is correct.

Senator NUNN. Mr. Taft is the General Counsel for the Department of Health, Education and Welfare, is that right?

Mr. BERKLEY. That is correct.

Senator NUNN. First of all, without objection, copies of each of the letters that Mr. Robert Fulton sent to the particular employees of HEW and requested him to appear will be made part of the record. If you will give those to the chief clerk, we will make copies. We will make the next letter dated September 30, 1967, from the attorneys for Mr. Cubbler to Mr. William Taft, General Counsel of HEW part of the record, without objection.

[The documents referred to were marked "Exhibit Nos. 65 and 66" for reference and follow:]

EXHIBIT No. 65

SEPTEMBER 29, 1976.

Ms. ROSALIE RYAN,
Office of Information Systems.

Appearance as Witness Before the Senate Permanent Subcommittee on Investigations.

The Secretary has received a letter from the Acting Chairman of the Senate Permanent Subcommittee on Investigations requesting you to appear before the Subcommittee on Thursday, September 30. A copy of that letter has been furnished to you.

The Secretary wishes to cooperate in every way with the Subcommittee in its investigations, and I am therefore directing you, as part of your official duties, to appear before the Subcommittee as requested.

ROBERT FULTON.

SEPTEMBER 29, 1976.

Mr. CHARLES CUBBLER,
Office of Information Systems.

Appearance as Witness Before the Senate Permanent Subcommittee on Investigations.

The Secretary has received a letter from the Acting Chairman of the Senate Permanent Subcommittee on Investigations requesting you to appear before the Subcommittee on Thursday, September 30. A copy of that letter has been furnished to you.

The Secretary wishes to cooperate in every way with the Subcommittee in its investigations, and I am therefore directing you, as part of your official duties, to appear before the Subcommittee as requested.

ROBERT FULTON.

SEPTEMBER 29, 1976.

Mr. HAROLD WIENBERG,
Associate Administrator for Information Systems.

Appearance as Witness Before the Senate Permanent Subcommittee on Investigations.

The Secretary has received a letter from the Acting Chairman of the Senate Permanent Subcommittee on Investigations requesting you to appear before the Subcommittee on Thursday, September 30. A copy of that letter has been furnished to you.

The Secretary wishes to cooperate in every way with the Subcommittee in its investigations, and I am therefore directing you, as part of your official duties, to appear before the Subcommittee as requested.

ROBERT FULTON.

SEPTEMBER 29, 1976.

Mr. JAMES TRAINOR,
Office of Information Systems.

Appearance as Witness Before the Senate Permanent Subcommittee on Investigations.

The Secretary has received a letter from the Acting Chairman of the Senate Permanent Subcommittee on Investigations requesting you to appear before the Subcommittee on Thursday, September 30. A copy of that letter has been furnished to you.

The Secretary wishes to cooperate in every way with the Subcommittee in its investigations, and I am therefore directing you, as part of your official duties, to appear before the Subcommittee as requested.

ROBERT FULTON.

SEPTEMBER 29, 1976.

Mr. WILLIAM CLEAVER,
Office of Information Systems.

Appearance as Witness Before the Senate Permanent Subcommittee on Investigations.

The Secretary has received a letter from the Acting Chairman of the Senate Permanent Subcommittee on Investigations requesting you to appear before the Subcommittee on Thursday, September 30. A copy of that letter has been furnished to you.

The Secretary wishes to cooperate in every way with the Subcommittee in its investigations, and I am therefore directing you, as part of your official duties, to appear before the Subcommittee as requested.

ROBERT FULTON.

EXHIBIT No. 66

ROGOVIN, STERN & HUGG,
Washington, D.C., September 30, 1976.

WILLIAM H. TAFT, ESQ.
General Counsel, Department of Health, Education & Welfare,
Washington, D.C.

DEAR MR. TAFT: We represent Mr. Charles A. Cubbler, one of five HEW employees who has been invited by the Senate Permanent Investigations Subcommittee to testify at a Subcommittee hearing this morning, Thursday, September 30. Although the text of the letter inviting the employees to appear mentioned only the Subcommittee's interest in "operations of the MMIS program" the Subcommittee's true interest apparently is to spread on the public record certain allegations concerning our client and others that we believe tend to defame and possibly incriminate Mr. Cubbler. The Subcommittee's press release of September 28 (a copy of the text of which is attached), leaks of Mr. Cubbler's name prior to the hearings to UPI, Station WGMS and possibly other media representatives, and the tenor of yesterday morning's hearings in the presence of klieg lights and television cameras all serve to confirm this conclusion about the Subcommittee's real aim.

We have already protested to the Subcommittee, in writing, that to hear these allegations in public rather than executive session would serve no legitimate oversight function and could result only in prejudicing the rights of Mr. Cubbler and others. However, not only has the Subcommittee ignored our arguments that these allegations against an individual are of the type appropriate for a closed session or a criminal investigation—where allegations are kept confidential unless formal charges are brought—the Subcommittee has also informed us that if Mr. Cubbler chooses to assert his Fifth Amendment right to refuse to testify, he must do so before television cameras in open session.

We cannot accept the Subcommittee's decision to put its own interests in generating publicity about these allegations to take precedence above important individual rights. In particular, the Subcommittee's position that a witness who chooses to exercise his constitutional privilege not to testify must do so in public session before the national news media and film cameras is one that has been almost universally rejected by both criminal prosecutors and other congressional committees; procedural justice like this went out of vogue in the 1950's.

Accordingly, the Subcommittee's position has compelled us to advise Mr. Cubbler that he should respectfully decline their invitation to appear this morning, no subpoena having been issued for his appearance.

We appreciate the fact that the Department has requested Mr. Cubbler to cooperate with the Subcommittee and appear, but under the circumstances we have advised Mr. Cubbler that to comply with that request could result in a substantial threat to his rights.

We respectfully request that members of your staff who accompany the other HEW employees to the Senate Subcommittee hearing this morning communicate our position to the Subcommittee. Furthermore, we ask that the Department join us in protesting to the Subcommittee the course of action it has taken here in dealing with a Departmental employee by insisting on procedures that are judged, elsewhere, to be inadequate to afford minimal protection for individual rights.

Sincerely,

MITCHELL ROGOVIN,
GEORGE T. FRAMPTON, JR.

Mr. BERKLEY. That is correct.

Having made this letter part of the record, do you desire me to read it?

Senator NUNN. I don't think that is necessary.

Mr. BERKLEY. On the basis of this letter and our telephone conversation, which I gather was followed up by Mr. Rogovin's telephone call to Mr. Feldman, we were aware when we came here that Mr. Cubbler would not be appearing. And we thank the chairman for his remark earlier that in no way is the committee going to blame the Department or the Secretary for Mr. Cubbler's failure to be here.

Senator NUNN. Thank you, Mr. Berkley. I will repeat that I don't know of anything else that the Secretary or Mr. Fulton or you or the General Counsel could have done to secure Mr. Cubbler's appearance. Based on the information I have, you have done everything you could do. I think that your course of action has been not only appropriate, but it is appreciated by this subcommittee. Again, I repeat that his failure to appear is in no way attributable to any of his superiors at HEW, as far as I am concerned.

Mr. BERKLEY. Thank you, Mr. Chairman.

Senator NUNN. Do you have anything else, Mr. Berkley?

Senator PERCY. Mr. Chairman, I would like to say that a conclusion that anyone would have come to yesterday from the testimony given was that Mr. Cubbler was called upon for his knowledge and technical expertise. Witnesses said that in their judgment, the services he performed for them were not purchased because of the influence that he could exercise.

Obviously, we would have preferred this morning to question Mr. Cubbler directly about this. Since he has chosen not to testify, I think we should take the next step at this stage and determine what his responsibilities were, what his duties were, how much authority he had, and what kind of a person he was.

For that reason, we very much appreciate your appearance here this morning. I think your testimony is very important.

Mr. Trainor, first, from the testimony that was given yesterday, there was every appearance that Mr. Cubbler had a very responsible position in HEW. In connection with that responsibility, did Mr. Cubbler have to travel very much?

Mr. TRAINOR. Yes; he appeared to travel quite a bit, I understand. I didn't approve of his travel, so I don't know every specific instance that he traveled. But yes, he traveled quite a bit.

Senator PERCY. But he did travel quite a bit?

Mr. TRAINOR. Yes.

Senator PERCY. To your knowledge, was each and every one of these trips authorized in advance by his superiors? Did his superiors always know where he was going and for what purpose? Did they get a report on what he accomplished when he came back?

Mr. TRAINOR. To answer that question, I guess I should refer to a conversation I had with Mr. Charles Sylvester who for sometime was Acting Associate Administrator for Information Systems.

Mr. Sylvester indicated that there was a trip that Mr. Cubbler took and it was, I think, to California, Texas—it was some kind of

a trip through several States—that he did not know in advance of Mr. Cubbler taking that trip. He was the authorization supervisor.

After Mr. Cubbler came back, he questioned him about it and he said that he was not going to authorize the Federal funding for that trip.

As late as I guess 2 or 3 weeks ago, Mr. Sylvester said to me that he did not think that Mr. Cubbler was ever paid for that trip.

Senator PERCY. Were there other trips that he went on that were not authorized in advance for which he was reimbursed?

Mr. TRAINOR. I can't be sure of that. I don't really know about that. He took a great many trips, and that was the only incident that I know specifically from Mr. Sylvester. I got the impression from Mr. Sylvester that he was not exactly able to control Mr. Cubbler's travel—as a general comment.

Senator PERCY. Although Mr. Sylvester was the authorization supervisor, Mr. Cubbler acted on his own and did his own thing?

Mr. TRAINOR. Yes; that is the impression I got.

Senator PERCY. That is the impression you got?

Mr. TRAINOR. Yes.

Senator PERCY. Mr. Trainor or Mrs. Ryan, do you know of any occasions when HEW officials in various regions of the country were surprised to find Mr. Cubbler at meetings where he was not expected and where he said things that might have differed from HEW policy? If he went off and did his own thing, how did he conduct himself when he went? Ordinarily when someone goes on a business trip and goes to a meeting or a conference, it is arranged ahead of time and he doesn't show up as a surprise guest.

When an agency official goes, I presume he is expected to carry out the Department's policy. Could you comment on any knowledge that you have? Mrs. Ryan, do you want to go ahead or Mr. Trainor?

Mr. TRAINOR. Let me. I have a couple of instances that I can think of.

Senator PERCY. All right.

Mr. TRAINOR. In West Virginia at the time of the initial bidders conference relating to the Melly contract that you heard about yesterday, a staff member of mine was appointed by the then Acting Associate Administrator, Mr. Delaney. We have had several Acting Associate Administrators.

Mr. Delaney said to me that he wanted one of my people to be the project officer on this procurement, and that gentleman's name was Copeland Reihl. He also said he wanted the regional office directly involved and he wanted Mr. John Gallagher from the regional office to be involved in that. Each of those individuals were told and they appeared in Charlestown, W. Va. This was to be all the bidders on this contract, which were like 18 bidders, came in and there were questions that they were interested about Federal policy relating to this 90-percent matching. These two gentlemen were very knowledgeable about that so they sat up on the podium with the State people to answer questions from the bidders.

When they arrived there, Mr. Cubbler walked in and Commissioner Flowers, the Welfare Commissioner from West Virginia, asked the individuals what they were doing there. Mr. Cubbler said, "I am the

official representative of the SRS Administrator and Mr. Delaney the Acting Administrator."

Well, this was a shock to both of those individuals. Mr. Cubbler made some comments which I am not perfectly clear on. I don't recall what they were. But these people felt—they were a little bit ajar from what proper policy was and they countered that.

When they came back, both of them individually went to Mr. Delaney and said, "I thought we were supposed to be running this. What was Cubbler doing down there? Delaney seemed very surprised that Cubbler was there.

Senator PERCY. Local HEW people were surprised?

Mr. TRAINOR. One was the Philadelphia regional representative who covers the West Virginia region. The other was an individual on my staff who had responsibility for the issues.

A few days later, presumably Delaney talked to Cubbler about it. A few days later, Cubbler called Reihl into his office and said, "Hey, I wasn't there representing SRS. Governor Arch Moore personally wanted me there as his representative."

Senator PERCY. Governor Arch Moore personally wanted him there?

Mr. TRAINOR. That is what he said.

Senator PERCY. How had he contacted Governor Moore—by telephone or did he get his request from Governor Moore by letter?

Mr. TRAINOR. Senator Percy, I didn't go into any of those things. At the time, I considered this a kind of aberration. Mr. Cubbler was, you know, that was not an unusual kind of activity for Mr. Cubbler to do.

Senator PERCY. In other words, would you say he was an officious bureaucrat? Did he leave you with the feeling that he had authority?

Mr. TRAINOR. Absolutely!

Senator PERCY. Did he have a take-over attitude, as if to say, "I am the guy from Washington who is going to give you the word?"

Mr. TRAINOR. Absolutely! In fact, my responsibility is to approve Federal matching money for information systems equipment and things like that, recommend approval to the associated administrator. Cubbler on many occasions, I have heard from other people, was out telling the State people that he had that authority.

Senator PERCY. In other words, even when he was venturing opinions that went beyond or differed from established HEW policy, he gave the impression that he was a policy maker and a decision maker for HEW?

Mr. TRAINOR. Yes.

Senator PERCY. And did he give that impression to other people?

Mr. TRAINOR. Yes, he did.

Senator PERCY. Ms. Ryan, would you care to comment? I would like comments from any of you on this.

Ms. RYAN. I had a telephone call. On one occasion, I know he was in one of the States in the Dallas region. I had a call from a regional person who asked me why he was down there. I said, "I really don't know." I did not know that he was there. They expressed concern that hopefully it wasn't some commitment of SRS to the State that would then in turn come back up through them to make a decision on, and so forth. We normally, when we go into a State, go through

the regional office and they make the arrangements for us to go in this type of thing. They know we are there.

They don't always go with us, but they call and set it up for us. This was a bit unusual to just go directly in. Well, one of the regional people bumped into him in the hall.

Senator PERCY. That would be normal procedure in corporate life. It is normal procedure in any regional office of our Government agencies, isn't it?

Ms. RYAN. Yes.

Senator PERCY. The regional people are not surprised, unless an auditor shows up. An auditor comes in, and should come in, at any time, unannounced. But an auditor has a very special function. Certainly he is someone coming in to work with or implement policy.

Was there any particular reason why Mr. Cubbler was in Charleston, West Virginia?

Mr. TRAINOR. I was surprised to hear that he was in Charleston, W. Va. I think now I see some reason why he may have been in Charleston, W. Va.

Senator PERCY. What was that last remark?

Mr. TRAINOR. I say I think, after yesterday's hearings, I have some understanding of why he may have been in Charleston, W. Va.

Senator PERCY. I see. Do either of you want to comment at all on this particular point? Mr. Cleaver or Mr. Berkley?

Mr. CLEAVER. I believe you originally asked, Senator, about his travels and were they authorized and paid by the Government. I have no knowledge in that area.

The only thing that I can relate is a conversation we had one evening. We shared office space. He told me that he had been down to his condominium in Ocean City for the weekend and someone from Texas had called him to come down and give them some advice.

My understanding was that the State sent an airplane to get him and that he then went down there and then they brought him back. Now, subject to any inaccuracies of my memory or those statements that I heard, I know that those kinds of trips occurred. They were not at Government expense, to my knowledge.

Senator PERCY. Mr. Berkley, any comment?

Mr. BERKLEY. No; I am here primarily as counsel, Senator. I only met Mr. Cubbler once.

Senator PERCY. Did Mr. Cubbler have line responsibility which made him privy to all documents on which the three of you worked? Did he have line authority that gave him authority to have access to all of the documents on which you worked?

Mr. CLEAVER. During what time period, sir?

Senator PERCY. Pardon?

Mr. CLEAVER. There was a period when he was acting director of the medicaid systems division, which was like from August of 1974 to April of 1975. And he would have had line responsibility there.

Senator PERCY. Was there an HEW memorandum which specifically required that Mr. Cubbler review all information leaving your offices, giving him access to comments on contracts proposed, advance planning documents and other inside information which would be of substantial value to the private corporations, for instance, bidding on HEW contracts?

Mr. CLEAVER. Yes. There was a memorandum issued, I believe, by Mr. Wienberg, spelling out the responsibilities of the members of the office of systems programing and evaluation. Mr. Cubbler's review responsibility was for the office of programs systems development, which I am in.

And that is also the office that the division of medicaid systems is in and also Social Services. So we cut across a broad range of reviews that we might make of advanced planning documents and requests for proposals or bids or anything.

Senator PERCY. Mr. Trainor, do you concur with that?

Mr. TRAINOR. Yes. For a time when Mr. Cubbler was acting director of the division of medicaid systems, he was, I guess, the key person in medicaid systems development activity, the technical person on all of the kinds of systems that we have been talking about, that you have been talking about the last day or so.

Since that time, he has been in this other organization that Mr. Cleaver mentioned. We coordinated with that organization on responses on approvals. Advance planning documents that come in are routed to that organization for review.

Mr. Cubbler does have access within the shop to those documents.

Senator PERCY. Ms. Ryan?

Ms. RYAN. I think I can just say the same thing they have been saying.

Senator PERCY. I wonder if I could ask you, Mr. Berkley, for the memorandum giving Mr. Cubbler access to all the documents so we can insert that in the record.

Mr. BERKLEY. Yes. I don't know if we have it here.

Senator PERCY. I ask unanimous consent that the record be held open for that to be supplied.

Senator NUNN. Without objection.

Senator PERCY. And it can be inserted in the record at this point. [The document to be furnished follows:]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL AND REHABILITATION SERVICE,
April 29, 1976.

Memorandum to: AAIS Staff.

From: Associate Administrator Information Systems.

Subject: Correspondence Prepared for AAIS Signature.

Reference is made to my memorandum "Execution of Staff Advisory Responsibilities" dated January 14, 1976 and list of SPAE responsibilities and special assignments.

The following procedure is necessary to apprise SPAE of all activities for their effective execution of staff advisory responsibilities.

"All correspondence pertaining to AAIS functional activity must be coordinated with the appropriate SPAE staff member before submittal for my signature."

HAROLD F. WIENBERG.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL AND REHABILITATION SERVICE,
January 14, 1976.

Memorandum to: Division/Office Directors.

From: Associate Administrator for Information Systems.

Subject: Execution of Staff Advisory Responsibilities.

The Office of Systems Planning and Evaluation "serves as the principal staff advisor to the Associate Administrator for Information Systems in the planning, evaluation and coordination of Management Information Systems in sup-

port of SRS missions." In this capacity OSPAE becomes involved in a number of projects and activities having direct relationship to the assigned activities of AAIS components.

Accordingly, an identification of major functional responsibilities and special project assignments has been made. The attached list includes the names of the OSPAE personnel, who are designated as focal points for the administration of such projects. In this role, the Office of Systems Planning and Evaluation focal points must be aware of and in constant communication with the Project Officers as well as Office and Division Directors in the planning and developmental activities of their respective projects.

In executing the assigned responsibilities, OSPAE will assure that all existing policies and procedures have been complied with in the accomplishment of our mission.

HAROLD F. WIENBERG.

OFFICE OF SYSTEMS PLANNING AND EVALUATION PROJECTS, PLANNING, EVALUATION AND COORDINATION ASSIGNMENTS

I. OFFICE OF INFORMATION SYSTEMS FUNCTIONAL RESPONSIBILITIES

- A. Program/Project Planning—G. Rogers.
- B. Reporting Plans—C. Cubbler.
- C. Statistical Plans—H. Hirshenberger.
- D. Forward Plans—H. Hirshenberger.
- E. Training Plans—C. Cubbler.
- F. Travel Plans—R. Moss.
- G. Contract Plans—G. Rogers.
- H. Research & Demonstration Project Plans—R. Moss.

II. OFFICE OF INFORMATION SYSTEMS COMPONENT PLANNING AND EVALUATION RESPONSIBILITIES

- Office of Program Systems Development—C. Cubbler.
- Division of Income Maintenance Systems—C. Cubbler.
- Division of Medicaid Systems—C. Cubbler.
- Division of Human Services Systems—C. Cubbler.
- Office of Information Sciences—G. Rogers.
- Division of Forecasting and Data Analysis—G. Rogers.
- Division of Systems Analysis and Design—G. Rogers
- Division of Data Processing—G. Rogers
- National Center for Social Statistics—H. Hirshenberger.
- Office of State Systems Operations—R. Moss.
- Division of Systems Approvals—R. Moss.
- Division of Technical Assistance—R. Moss.

III. SPECIAL ASSIGNMENTS

- A. Information Systems Policy Development and Compliance Monitoring—SPAE Staff.
- B. ADP Plans—G. Rogers.
- C. AAIS Representation and Tracking on Intra and Inter-Agency Groups and non-Federal Participation—SPAE Staff.
- D. Operation Planning Systems—R. Moss.
- E. Reports Management and Clearance and Information Processing Standards—H. Hirshenberger.
- F. Privacy Act Implementation—H. Hirshenberger.
- G. Intergovernmental Systems—SPAE Staff.
- H. Industrial Relations—SPAE Staff.

IV. PROJECT PROGRESS MONITORING AND MONTHLY UPDATE—SPAE STAFF

Senator PERCY. I would like to try to determine what kind of a person Mr. Cubbler was. The testimony given yesterday was that he was hired for his technical expertise and for his intimate knowledge of this field. It would be one thing if he were a scholarly research type

person. A person who steeped himself in knowledge and could sit down quietly and devise documents that could be better prepared for presentation to HEW.

Could you describe whether he is an introvert or an extrovert. Did he minimize his capabilities and his influence or would you consider him a braggart? What kind of person was he, as you saw him and as others would see him?

Ms. RYAN. He definitely was an extrovert.

Senator PERCY. Pardon?

Ms. RYAN. He is definitely an extrovert.

Senator PERCY. He is an extrovert. So am I.

Ms. RYAN. He is friendly and really quite knowledgeable on medicaid. He has worked in Government for sometime, so he understands the regulations. I said that he is very knowledgeable of medicaid issues and the legislations.

He really comes across to people as being very positive and as well informed and in a position where he can be of assistance to them. And he offers this, and they accept it.

Senator PERCY. In a position to be of assistance in a technical sense?

Ms. RYAN. I was thinking more in the technical sense.

Senator PERCY. Did he ever mention his association or friendship with other people, people of influence?

Ms. RYAN. Yes; Charlie knows a lot of people.

Senator PERCY. Pardon?

Ms. RYAN. Yes; he does.

Senator PERCY. Have you ever heard him mention any names? For instance, have any of you ever heard him mention any particular names? Did he drop any names?

Mr. TRAINOR. Yes; I have heard him mention Uncle Wilbur.

Senator PERCY. Pardon?

Mr. TRAINOR. I have heard him mention Uncle Wilbur.

Senator PERCY. Uncle Wilbur? There is only one Uncle Wilbur I know of.

Mr. TRAINOR. I think it is the same one, Senator.

Senator PERCY. Was this Wilbur Mills that he was name dropping?

Mr. TRAINOR. Yes; it was.

Senator PERCY. In what connection did he mention Uncle Wilbur? Was he truly a nephew of his?

Mr. TRAINOR. I am not sure of that, Senator, but he has indicated that Wilbur Mills and he were related. They were related through some grandfather back from the Pennsylvania days where both their families migrated from or something like that. He mentioned a lot of people. He mentioned Senator Byrd.

Senator PERCY. Is this Robert or Harry?

Mr. TRAINOR. Robert.

Senator PERCY. Robert?

Mr. TRAINOR. Yes. And then also people in the community. Well, it seems as though, when you asked the question, how would you characterize him, I was going to ask you if you ever saw The Music Man?

Senator PERCY. Yes. What sort of music did he play?

Mr. TRAINOR. He was kind of an outgoing person. He is an outgoing person and he has a great many apparent friends and people whom he has dealt with in this area for a long time.

Senator PERCY. Are there any other names of influential people that any of you heard him mention? He has mentioned Arch Moore and Wilbur Mills.

Mr. CLEAVER. Sharing the contiguous office space where he does, he tends to work late in the evenings, and I quite often do too. Sometimes we spend some of that time in just sessions. You know, we would talk.

He has mentioned, for example, Mr. Sandberg at one time who was a candidate for the Administrator. He informed me that he was doing special work for Mr. Sandberg—they were old friends, and things like that.

Senator PERCY. Is that Congressman Sandberg?

Mr. CLEAVER. No.

Senator PERCY. Could you identify Mr. Sandberg?

Mr. CLEAVER. I don't know his first name, they call him Buzz. But that is not his real first name. He was the candidate I think perhaps before Mr. Fulton.

Mr. TRAINOR. He was a former deputy welfare commissioner in Florida, I believe.

Mr. CLEAVER. And then in Colorado. At another time Mr. Doug Harland came from the State of Texas to work in the office of regulation review. Mr. Cubbler said on many occasions that he was doing special work for Mr. Harland.

Mr. Harland subsequently went to the White House for similar duties and I understand that Mr. Cubbler continued to see him.

Senator PERCY. He gave you the impression that he was close to people and in contact with people who were doers and movers and had influence?

Mr. TRAINOR. Yes.

Mr. CLEAVER. Yes.

Senator PERCY. How about from the standpoint of what he had done actually with legislation? Had he ever taken credit for laws, Mr. Trainor?

Mr. TRAINOR. Yes. In a discussion once on section 235, Public Law 92-603, he indicated that Wilbur Mills called him up there and he had really written the provision, or words to that effect. He also indicated that he wrote the UC/UR [utilization control and utilization review] regulations, control and utilization regs.

And once he said that when he wrote the nursing home regulations, the way he was successful in getting these regulations through was bringing in the nursing home community and getting them together on what these regulations should be and that is the way he got them through, something like that.

Senator PERCY. Could you expand on that? Counsel would like an expansion, for the record, of section 235.

Mr. TRAINOR. Section 235 is a provision in Public Law 92-603 that provides for 90 percent Federal funding for systems development costs associated with Medicaid claims processing and information retrieval systems and 75 percent Federal matching for the operation of those systems once they are in place.

Senator PERCY. I understand, Mr. Trainor, that you had quite a bit of contact with Mr. Cubbler during the consideration of the West Virginia contract to FMS. Could you characterize his degree of ob-

jectivity in this matter? Did he advocate awarding the supplemental contract to FMS in a way that suggested he was totally objective? Or was he somewhat less than totally objective in the way he advocated it?

Mr. TRAINOR. The advocacy was very vigorous and, at times, acrimonious. The whole West Virginia augmentation contract caused a serious dispute, a serious dispute within the Office of Information Systems. And Mr. Cubbler was the chief advocate for expanding that contract within the organization, and a number of people were opposed to that.

He did a number of things, I think, which contributes to, I would say, achieving the ultimate approval of that effort.

Senator PERCY. Occasionally I advocate a strong position on an issue on the floor, in which I have had some involvement. Almost always—in fact, always—I try to tell my colleagues I have some prior interest in this or possibly even a conflict of interest and put it right on the record so that they know I advocate a position from a certain background of knowledge.

Did Mr. Cubbler, in fairness to him, as he became a vigorous, strong advocate of this supplemental contract, did he make it clear to you or to his superiors that he had a relationship with FMS? Did he put you on notice that he had knowledge and believed deeply and strongly in the award?

Mr. TRAINOR. He never made me aware he was involved in that relationship and I never heard him mention it to anyone else.

Senator PERCY. Did you ever indicate to his superior, Mr. Wienberg, your concern about his less than objective advocacy with respect to FMS?

Mr. TRAINOR. Well, I objected to—Mr. Wienberg was not the supervisor. In fact, Mr. Wienberg was not on board during this whole West Virginia effort. I made to Mr. Sylvester, who was the acting supervisor—

Senator PERCY. Mr. Sylvester was the supervisor then?

Mr. TRAINOR. Yes.

Senator PERCY. And you spoke to him?

Mr. TRAINOR. Yes.

Senator PERCY. Could you tell us exactly what you said to him, just as closely as you can recall?

Mr. TRAINOR. Well, I actually wrote a memo to Mr. Weikel for Mr. Sylvester outlining why this was an inappropriate thing to do in West Virginia. And the reasons were, number one, that we were asking West Virginia to develop criteria which we would then use as national criteria. We didn't have any criteria, it didn't seem to me, that that was proper under the regulations.

In addition to that, it seemed to me that it would give Molly Systems a very special competitive advantage because they would have been the only firm who knew anything about it, having implemented it there, and Cubbler was saying this thing had to be in throughout the country as of July.

Now, that is on the West Virginia issue I thought you were asking.

Senator PERCY. May I ask counsel whether we have a copy of that memorandum in our files.

Senator NUNN. It is in the record.

Senator PERCY: Fine.

Mr. TRAINOR: I thought the other part of the question was that I informed Mr. Wienberg of Mr. Cubbler's—you know, how he operated.

Senator PERCY: His advocacy?

Mr. TRAINOR: Yes. When Mr. Wienberg first came aboard, I did indicate to him that I thought he should be careful to make sure that Mr. Cubbler, was kept under control, because he is inclined to make commitments for you or he is inclined to say things that you may not want to be associated with.

I also mentioned to Mr. Wienberg much later, maybe in March of this year, that Mr. Cubbler was saying that he had approval authority and I thought that he shouldn't be doing that.

Very recently Mr. Sylvester and I both mentioned to Mr. Wienberg that—I forgot what this was in relation to—

Senator PERCY: In other words, he would assert authority and make commitments for which he really did not have the line authority?

Mr. TRAINOR: Yes.

Senator PERCY: He was not reticent about exercising authority, apparently.

Mr. TRAINOR: Yes.

Senator PERCY: How influential was Mr. Cubbler in establishing HEW policy? Were his positions adopted by his superiors? If so, could you give any specific instances of this?

Mr. TRAINOR: Yes. Mr. Cubbler, having come from Pennsylvania, seemed to be very supportive of the concept that we should fragment systems. For example, a system like Paid Prescriptions should be certified as a small piece. And a Pennsylvania APD came in when he was there and he was advocating that we approve the APD with that kind of a fragmented system. I objected to that.

That position then was presented to Mr. Warren Whitted, who was a policy coordinator. And, in fact, that position got articulated in some policy announcements. That is one instance.

Senator PERCY: Would you say that Mr. Cubbler's influence with Mr. Wienberg was quite considerable or insignificant?

Mr. TRAINOR: Well, it is my viewpoint that it was very significant.

Senator PERCY: Was he in his office, for instance, frequently during working hours and even after hours?

Mr. TRAINOR: Yes, he was there frequently.

Senator PERCY: Was he in Mr. Wienberg's office for fairly prolonged discussions of HEW matters, so that you feel it influenced HEW policy?

Mr. TRAINOR: Yes. Also, we were doing something on revising certification procedures and he was then appointed to the committee to revise the certification procedures. Mr. Cubbler, I think, had a very pervasive influence within the Office of Information Systems.

Senator PERCY: I think it is clearly established now by this testimony that Mr. Cubbler is a hard worker.

Mr. TRAINOR: Yes.

Senator PERCY: The question is now in which direction is he working. Is it in fulfillment of his official responsibilities or is he working out of self-interest?

Tell us a little about his working hours. Did he work in his office at HEW after hours? Do you have knowledge that when he was working there after hours he was always working on official HEW matters for which he had assigned responsibility?

Mr. TRAINOR. I know he stayed very late. Mr. Cleaver has an office closer to him than I.

Mr. CLEAVER. As to Mr. Cubbler's working hours, and I would say his output is prodigious, really. He quite often would work until 8 or 9 or 10 p.m. and I quite often would, too. I know that usually in the evening he would be on the telephone for extended periods of time.

And I don't question whether it was business or not business. I have heard him having discussions like giving advice to someone about how something should be structured or whatever. And who was on the other end, I wouldn't know.

Senator PERCY. Would this be the kind of advice, for instance, that we heard about yesterday? Could he have been advising a private contractor?

Mr. CLEAVER. I would say that is certainly possible.

Senator PERCY. He is not, at 8 or 9 o'clock at night talking to regional HEW offices?

Mr. CLEAVER. No.

Senator PERCY. Or Government officials?

Mr. CLEAVER. No; after hours I don't know what the calls were. But for a period of time our telephones were on the same instrument and calls would come in from private industry, from medicaid directors, from around the medical community, from everywhere, because I would take the calls, some of them.

He put in a lot of time.

Senator PERCY. With regard to Mr. Weinberg, is it correct that he was responsible for development and implementation of programs that you were all working on designed to help the States curb fraud and abuse in medicaid.

Mr. TRAINOR. Yes; Mr. Wienberg's responsibilities were wider than that. He is the Associate Administrator. He is above Cubbler and all of us.

Senator PERCY. If it is to be found in any place in HEW, this is the place where we can expect vigilance to be exercised to stamp out the very kind of abuse that various Senate committees have examined.

This is the internal, in-house structure for accomplishing the purpose of exposing and correcting abuse in those programs. Is that correct?

Mr. TRAINOR. Yes; I think that is correct.

Senator PERCY. What was Mr. Wienberg's opinion of the HEW regulations designed to help the States curb fraud and abuse, in your judgment?

Mr. TRAINOR. I am not sure.

Senator PERCY. Let me put this question directly to you, and I would like an answer from each one of you. If you have no knowledge, simply say so.

In your experience with Mr. Wienberg, with the responsibility that I have outlined that he carries, did he indicate, in everything he did, that it was his job and his responsibility and his duty and his intention to carry out the regulations to stamp out abuse in the programs

and to fulfill and carry out the letter, intent, and spirit of these regulations?

Mr. TRAINOR. That is a difficult question. I guess we have had discussions about Federal regulations. We have had discussions about what we are trying to do in developing programs in this medicaid area. I think—perhaps you should ask Mr. Wienberg the question, but it seems as though—

Senator PERCY. We will ask Mr. Wienberg, but I would like to know, firsthand, if you have any knowledge. He has a duty and responsibility to carry out regulations. Did he ever discuss at anytime, directly or indirectly, whether or not he wanted to get around those regulations. Did he say he really didn't believe in them and had no intention of carrying them out?

Mr. TRAINOR. OK, let me—

Senator PERCY. I realize that because you are reporting directly to Mr. Wienberg, this is a very tough question to put to you. But this is an investigation. We are trying to determine whether or not those very people in HEW, charged with the responsibility of correcting abuse, are carrying out their duty and responsibility.

Yesterday, the Congress of the United States determined that we need a much stronger, tougher structure, in HEW and created the office of Inspector General with independent authority and responsibility. But what we are trying to determine is the attitude of those people charged with responsibility for implementing the law.

I can assure you that you will be fully protected for your truthful, honest, candid answers. Mr. Wienberg will be the first one to understand the authority this subcommittee has to investigate this matter and the requirement and obligation you have to answer that question, despite the fact that you have a direct reporting relationship to him.

I appreciate the problem that it presents to you, but with that full explanation and assurance of protection to you, I think we expect a straightforward, candid answer, if you have firsthand knowledge.

We can't always get a witness to testify about what he himself has said if it is derogatory to him. If there has never been any instance in which he said that he didn't intend to carry out the regulations or wanted to get around them, then say so. And I give you that opportunity.

Mr. TRAINOR. Very well, Senator Percy.

Senator PERCY. This is the whole problem of Watergate, the chain of command. When does the buck stop? The buck has to stop some place.

Did he or didn't he?

Mr. TRAINOR. Senator, I will give you an instance that was very painful, I think, in the organization and caused a kind of tremor such as you are suggesting.

We had discussed—and I think it likewise ties back to Cubbler—there was a concept that we should extend 90 percent Federal matching money, which is provided by section 235 for medicaid programs. The idea was that this should be extended beyond medicaid programs to other programs—social services, income maintenance, systems development, and other programs.

Well, we knew that you could only get 50 percent matching for these other programs. Members of my staff in staff discussions on

this issue had mentioned to Mr. Wienberg that that is not permissible under the regulations.

Well, Mr. Wienberg said, "Well, we keep saying that, but show me. You keep saying that, but show me the regulation that says that can't be done."

Well, Mr. Copeland Reihl had written up—he did the research and found the regulation that says you couldn't do that. And in a staff meeting, he wrote it up and I initialed it and sent it to Mr. Wienberg.

In a staff meeting Mr. Reihl presented that paper to Mr. Wienberg. It seemed to upset him very much and he got very angry and he said, "Look, don't show me what the regulations tell me I can't do. Show me ways to circumvent the regulations."

That was, well, it was a kind of decision because it was followed by words like, "Look, I have been telling you people and if you are not listening to the drumbeat, you better think of finding jobs elsewhere."

Senator PERCY. I am glad I pressed you and I want the record to show you answered that reluctantly. But certainly that ought to be on the record. How can you possibly have morale in a department?

This is the kind of problem we have had in Chicago in the past; years ago when you couldn't tell the difference between the cops and the robbers. What kind of law enforcement could you have when the police department was in on some of the fencing that was being done? The resulting demoralization is terrible.

If we have got it here we have got to root it out. And you have an obligation and a duty to say what you said and we have a duty, too, and the Secretary has. Knowing the Secretary, I think he will be the most outraged of all. I can assure you action will be taken to correct that so that you can fulfill your duty.

Is there anything you would like to add, because I would like to give Ms. Ryan a chance also on a specific request to answer that question.

Mr. TRAINOR. I appreciate your support, Senator.

Senator PERCY. You certainly have our support. Ms. Ryan?

Ms. RYAN. There was one instance, Senator, where we were having a discussion and Mr. Wienberg had not been happy with the report that we had given him on a particular issue.

Senator PERCY. Can everyone in the room hear?

Ms. RYAN. He was talking with three of us. Well, you know, he told us that he was not happy. He was not satisfied with the job and implied that, well, he felt like, I think, that we had kind of set him up, that we were about to let him do something that he shouldn't be doing.

You know, very heatedly he said, "Look, I don't want to break the law. I just want to bend it."

Senator PERCY. Is there anything else that either one of you would like to add? I am delighted in these same hearings that Mr. Wienberg will have an opportunity to respond. Were there any other instances you can think of? I am directing you to respond specifically if you know of any other instances involving Mr. Wienberg?

Mr. CLEAVER. Are you addressing the entire group?

Senator PERCY. Yes.

Mr. CLEAVER. I certainly would not want to impugn Mr. Wienberg's motives. There is an administration thrust to relax regulations and I think that is probably across Government, and probably is not bad.

I was present in one meeting where the 90 percent funding was discussed, and my recollection is this: Let us find ways to get the 90 percent funding for other program areas. That is how I recall it.

I guess I would go into concerns more in the area of, you know, the competitive process and all that stuff. But I don't say that there is any, you know, any motive or anything else in that.

I get shaky sometimes about real competition out there in the marketplace. But that has nothing to do with changing the regulations. We have had assignments to rewrite Reg. 250.90, which implements sec. 235 of Pub. L. 92-603 and the Program Regulation Guide that supports that regulation.

And we, in fact, did generate documents suggesting perhaps other ways that those procedures could be carried out. So there is a thrust to relax regulations and there were discussions about ways to get 90 percent in the other programs. Those were of my own knowledge.

Senator PERCY. Mr. Chairman, I would like to sum up where I think we stand on this.

We have a case of Mr. Cubbler, an employee, going out on unauthorized trips, representing himself to have authority that he does not possess, pushing his weight around, even the weight that he doesn't have, to indicate that he can influence decisions. He took a position with respect to a contract as an advocate of a position which was contrary to the judgment of other people in the department.

And then we have Mr. Wienberg, who has the responsibility to develop and implement programs designed to curb the States' fraud and abuse in the medicaid program, simply saying, "I don't want to break the law, I just want to bend it." I think Mr. Wienberg should have the opportunity to explain what he meant by that and how he felt he was carrying out his functions.

Thank you very much, indeed, for your testimony. I appreciate fully how difficult and awkward a position it puts you in. We simply have to get to the bottom of this.

Senator NUNN. I have just a few additional questions.

Thank you very much, Senator Percy.

Mr. Cleaver, you were involved in the staff input on the Washington State decision. I noted very much your interest in the competitive process. In fact, I think that is one of the most important features of this investigation. Do we really have competition? Can we have more competition? That is what the heart of saving money is, if there is going to be any saving.

What are your views of the Washington State bid evaluation process?

Mr. CLEAVER. Well, I was involved in a review of that back in January with a panel of about seven other computer types. My conclusion—now, a review of the evaluation process and the selection—was that the documents which we had to review did not support the selection of the contractor who won in the State of Washington. And we were reviewing now the State's own evaluation documents.

There were meetings after that evaluation where the State came to present and questions were put to the State and they came back.

Senator NUNN. One of the main reasons you did not think that justifiable was because it was not awarded to the low bidder?

Mr. CLEAVER. Not entirely.

Senator NUNN. Why was that?

Mr. CLEAVER. I felt that the actual work performed was not the work specified in the RFP. There was almost no probability that the State could ever take over that system, which I think was an important feature for the request for proposal and the price.

Senator NUNN. Have you had similar experience with other States?

Mr. CLEAVER. Exactly like that? I have talked about the procurement process in other States on paper.

Senator NUNN. What I am getting at, does your division have the authority, when you find a contract that has not been let correctly, for whatever the reasons—whether it is failure to comply with RFP or a failure to get a low bid—does your office have the authority to block that award?

Mr. CLEAVER. No, sir. Our office is in the technical side. The office of State systems operations can probably only recommend that it not be approved.

Senator NUNN. Who is that?

Mr. CLEAVER. That is Mr. Trainor's office.

Senator NUNN. Mr. Trainor, how about responding to that? Assume you have a contract that is not awarded to the low bidder and you think the low bidder is qualified to perform the contract. Assuming that, would you feel you had the authority, your office, to block the award of that, since 90 percent of the funds are Federal?

Mr. TRAINOR. Yes. If I understand the question, I don't think we would say that it is simply not the low bidder. You have a low bidder who was not responsive or something like that, but we do have the authority and have exercised the authority. In fact, I think you heard yesterday—

Senator NUNN. You exercised that authority in Georgia, I understand?

Mr. TRAINOR. Yes; that is correct.

Senator NUNN. And that resulted in the contract going to the low bidder in that case, didn't it?

Mr. TRAINOR. Yes; that is correct. And in the Washington case, I also objected to the selection. My principal objection was that there were \$4 million difference between the low bid, which was excellent, in the initial evaluation and the final selection.

Senator NUNN. When you offered that objection, who did you offer the objection to? I am trying to get to the authority here.

Mr. TRAINOR. Both Mr. Cleaver and I offered that objection to Mr. Wienberg in writing.

Senator NUNN. To whom?

Mr. TRAINOR. Mr. Wienberg.

Senator NUNN. What happened to it after that?

Mr. TRAINOR. The award was made to the high bidder.

Senator NUNN. Did Mr. Wienberg give you a reason for not following through on it?

Mr. TRAINOR. Yes.

Senator NUNN. Or did he follow through? Did he have the authority to stop the award to the high bidder in Washington State?

Mr. TRAINOR. Yes.

Senator NUNN. He has that legal authority?

Mr. TRAINOR. He had the authority not to approve Federal financial participation in that effort.

Senator NUNN. Did he give you an explanation why he did not exercise that authority?

Mr. TRAINOR. Yes.

Senator NUNN. What was that explanation?

Mr. TRAINOR. His explanation was that the program savings that the winning contractor would achieve by implementing the system earlier would make up for the difference in administrative costs. That was one thing.

Senator NUNN. Was that based on any kind of technical analysis? Mr. Cleaver might be able to answer that.

Mr. CLEAVER. One of the things that we did during that process of evaluation was to send a series of questions to the State of Washington. Amongst those questions was one saying, "what would be the program savings for that period of time," or at least that kind of response was elicited in response to the question.

Senator NUNN. What I am getting at is did Mr. Wienberg make his decision on your recommendation? I understand you recommended that that contract not be awarded to the high bidder, is that right?

Mr. CLEAVER. Yes. The entire staff did not concur with that.

Senator NUNN. So Mr. Wienberg overruled the entire staff?

Mr. CLEAVER. His own staff, yes.

Senator NUNN. His own staff? You say the justification that he gave to you, Mr. Trainor, was that by accelerating the contract, the savings would be more to the State than the difference in the bid, is that right?

Mr. TRAINOR. That is right.

Senator NUNN. What was that based on? Did he pull that out of the air? Was it a subjective judgment or was it based on some form?

Mr. TRAINOR. That was based on the estimates of the State as to what the program dollar savings they would achieve by having the system in earlier, notwithstanding that both contractors were required under penalty to implement the system at the same time.

Senator NUNN. Why then did the State think one of them would perform faster than the other one?

Mr. TRAINOR. Well, they made a subjective judgment. I don't know how objective or subjective it is. Strike that.

They made a judgment. And the curious part of that was in the initial evaluation that they made, the low bid was considered excellent. They talked about another system. They talked about ability to implement.

But there then came a second evaluation which injected—well, they changed the whole business of the bid. They changed the weighting factor. They injected a feature of risk into the evalua-

tion criteria and they gave the high bidder very good marks for no risk of meeting the date and the low bidder got no marks for risk and they just made a conclusion at that time that the low bidder would not implement the system in time.

Senator NUNN. Have you had this happen in cases other than Washington State, where you, for any reason, or the staff may have made one recommendation and Mr. Wienberg made another one?

Mr. TRAINOR. Well, yes. I guess the most notable additional case was the Texas case.

Senator NUNN. Why don't you tell us about the Texas case? That was the next question I had.

Mr. TRAINOR. OK. It was dealing with the certification of the Texas system for 75-25 matching as operational under section 235.

Senator NUNN. This 75-25 is not based on development, but the 75-25 is the Federal match for the operational system.

Mr. TRAINOR. That is correct, but keep in mind that once you certify a system for 75, you have retroactive rights. The State has retroactive rights to developmental funds back to January 1971 at the 90-percent rate. So this decision will result in approximately \$2 million of developmental 90-percent matching going to the State of Texas.

Senator NUNN. What was your recommendation in that decision, and why?

Mr. TRAINOR. My recommendation, and the unanimous recommendation of the team, was that the Texas system was not certifiable by our regulations. And it was not certifiable essentially because it was a fragmented system. The system that was being certified was just a piece of the total program and it did not have adequate reporting modules.

Ms. Ryan worked on the certification team. Perhaps she could go into that.

Senator NUNN. Ms. Ryan, why don't you give us your view on that Texas contract.

Ms. RYAN. OK. Last November, there was a policy issuance put out that we could have multiple systems within a State and that they would be eligible for the 75-25 match as long as all of the components of the system met the standards, and that they all fed into one SUR (surveillance and utilization review system).

Senator NUNN. I didn't hear the last part.

Ms. RYAN. And that they all fed into one SUR, which is the reporting and the surveillance.

In other words, yes, it is OK to have one, two, three, four systems out here, so long as each one of them meets the standards. That was a policy interpretation letter that went out, a PIQ policy interpretation question. Before that went out, we had held to the standard that there would be one system. Then this interpretation came down that you could have more within the standards.

Senator NUNN. Where did that come from?

Ms. RYAN. That came from one of the regions. I am sorry, sir, but I can't remember which region.

Senator NUNN. All right.

Ms. RYAN. But the interpretation from SRS and I am sure it was according to—

Mr. TRAINOR. This was the issue I spoke to before, about the fragmentation issue, that Mr. Cubbler was arguing for fragmentation which then went to policy coordination for some kind of decision that went that way.

Senator NUNN. Before we go further on this, I am trying to find who made the decision to change courses so that there could be fragmentation. At what level was that decision made?

Ms. RYAN. That came from SRS.

Mr. TRAINOR. The top level of the organization made that decision.

Senator NUNN. Top level of what organization?

Mr. TRAINOR. SRS. That went through a policy resolution at the SRS level.

Senator NUNN. Is that where the problem started with fragmentation, or do you agree with that?

Ms. RYAN. I don't agree with fragmentation, but that is my opinion.

Senator NUNN. Go ahead and pursue this. What happened after that?

Ms. RYAN. The concern that the team had really was that the system, the part of the system—there are two systems in Texas. There is one in-house and there is one that is handled by an insuring agent.

And the one that is handled by the insuring agent didn't meet the standards. There were also some deficiencies in the State system. The Texas system was not developed as a MMIS. We weren't looking at it to be sure that it did just what the MMIS said but that it was conceptually the equivalent which gave some latitude.

But the team member that worked on the surveillance and utilization and review part felt that there were some serious things about it because it was more of a numerical test than a statistical test.

And again services rendered and so forth. Based on those two things—one, that there were some deficiencies in the reporting modules, and that the insuring agent part of the system didn't meet the standards, we didn't feel it should be certified.

We felt like the whole system should be there. Because you don't know if you are getting pure data in unless you know exactly how it is handled and that it is adequate.

Senator NUNN. So your recommendation was that it not be certified?

Ms. RYAN. That is right.

Senator NUNN. Who received that recommendation?

Ms. RYAN. Mr. Wienberg.

Senator NUNN. Directly to him?

Ms. RYAN. Yes.

Senator NUNN. What happened to it then?

Ms. RYAN. He decided that he would conduct a second evaluation review, which he did. He made the decision that it was all right, which is certainly understandable. We can differ.

Senator NUNN. Did Mr. Cubbler play a role in that?

Ms. RYAN. I don't know.

Senator NUNN. Who did the second evaluation? You did the first evaluation.

Ms. RYAN. Mr. Wienberg, I assume.

Senator NUNN. Does he have somebody else do that, or does he go right back through the same steps you do?

Ms. RYAN. I think you would have to ask him this.

Senator NUNN. You don't really know?

Ms. RYAN. I don't know.

Senator NUNN. I take it you didn't agree with the results of the second evaluation?

Ms. RYAN. No, sir.

Senator NUNN. Mr. Trainor, do you have any other comments on this Texas fragmentation issue? Do you know whether Mr. Cubbler had a role in this?

Mr. TRAINOR. I don't know that, except that the decision was difficult for us to understand, I think. It was the first system that we had approved, which was only a piece of a State's operation without the total service.

Senator NUNN. What do you see as the down-road implications of this fragmentation if this were to be taken as a precedent?

Mr. TRAINOR. I believe the implications are tremendous. What I think this would do is it would open up States to get certifications for bits and pieces of systems all over the country. I think it would permit county systems, and I think we have to remember what the legislative intent of the Senate Finance Committee specified and what section 235 said.

The Senate committee and section 235 said that here is this 90 percent matching money available to you. But this doesn't mean you should have even a single system in every State. What the Senate Finance Committee said was you should get many, multiple States together to do some regionalization on systems development.

Because we don't need a single system for every State. This decision says to me that you can have multiple systems within a given State, of which these systems are running \$200,000 and Texas is asking us \$2 million for that piece of that system.

Senator NUNN. That is the development or—

Mr. TRAINOR. That is the retroactive development money which could go back—

Senator NUNN. So you have \$2 million involved in development. What about operations? How much money do you have involved in that?

Ms. RYAN. I think I remember that it is \$4 million.

Senator NUNN. \$4 million per what?

Ms. RYAN. Per year.

Senator NUNN. \$4 million per year. Do you know how much more money will be spent because there is more than one system? Have you made an analysis of the difference between the cost of a single system and a fragmentary system?

Mr. TRAINOR. No. No one has done any analysis on that. But I think it stands to reason, first of all, there is eligibility involved in each system. So you have to verify eligibility and you need an eligibility file. You have to have multiple eligibility files for all the systems and you have to maintain those files. There is that problem.

There is also a problem of control, once you multiply systems out of—

Senator PERCY. Before you go on to that problem, let me ask for a clarification. As I understand it, if a multiple system is put in, they bring in several contractors. It is still all 90 percent money to each contractor, so long as it is an initial system being put in. Is that right?

Mr. TRAINOR. That is right.

Senator PERCY. Ninety percent Federal Government and 10 percent matching?

Mr. TRAINOR. Yes.

Senator PERCY. Once they are in operation, it is 75 percent Federal Government?

Mr. TRAINOR. That is right.

Senator PERCY. To put in a multiplicity of systems and bring a number of contractors in, then you are obligating yourself for a continuing 75 percent to each contractor for the operation of the system?

Mr. TRAINOR. That is correct, sir.

Senator PERCY. Where one system might do the job, you might have four or five. The States are saddled with 25 percent of the operating costs, and the Federal Government is picking up 75 percent of that cost, for each system?

Mr. TRAINOR. That is correct.

Senator PERCY. When Mr. Wienberg said—and I will try to rephrase the quote—“Don’t tell me what I can’t do, tell me how to circumvent the regulation,” is that accurately portraying what you had indicated he said?

Mr. TRAINOR. Yes; it is.

Senator PERCY. You can substitute the word “law” for regulation, can’t you—because this is a law. This isn’t just an internal regulation. This is section 1903A of the Social Security Act which is amended by Public Law 92-603.

Mr. TRAINOR. Yes.

Senator PERCY. So what he is saying is don’t tell me what I can’t do, tell me how to circumvent the law. He said regulation. But regulation and law are synonyms here. Because this is a law.

Mr. TRAINOR. Yes; it is, Senator.

Senator PERCY. That is right.

Mr. CLEAVER. May I add one point?

Senator PERCY. Yes.

Mr. CLEAVER. The idea about multiple systems, if you pay 90 percent for them, you also have a right of ownership. Therefore a State can pay and the Federal Government can pay that money and let us say they had six different fiscal agents out there, if they want to own the systems and then pay them off, then they pick up these six systems.

It can become ludicrous if you take it way off in the extreme.

Mr. TRAINOR. That is an important point. In the Texas case which you were pursuing, the other piece of the system now has been out to bid and there is a prospective cost for the other piece of the system of \$700 million is.

Senator NUNN. This is what I wanted to ask you. Is this the contract with the State of Texas for \$700 million to provide prepaid physician and hospital services to medicaid beneficiaries?

Mr. TRAINOR. That was the system that was found wanting.

Senator NUNN. That is the one we have just been talking about then?

Mr. TRAINOR. Yes; that is the insured piece of it, and the other piece is an in-house operation.

Senator NUNN. Which one is about to be awarded now?

Mr. TRAINOR. The Blue Cross-Blue Shield operation is going to be terminated and that operation is going to be awarded. EDS was selected for that.

Senator NUNN. What is EDS ?

Mr. TRAINOR. Electronic Data Systems.

Senator NUNN. Did Mr. Cubbler play a role in this? I am a little confused on those systems. Did he play a role in either of these systems in Texas?

Mr. TRAINOR. It is difficult to learn the role. As I started to say before, we were trying to understand the decision. We understood from the regional people that Mr. Cubbler went to Texas to explain what the certification means, which would indicate to me that he must have understood it.

I don't know what more that means. Insofar as the other piece, the new contract to EDS, Mr. Cubbler had that RFP for months within our organization before and without the knowledge of the people in the organization.

Senator NUNN. How do you know that?

Mr. TRAINOR. He mentioned it to somebody.

Mr. CLEAVER. He mentioned it to me, Senator.

Senator NUNN. He mentioned it to you that he had the request for bid from the State of Texas?

Mr. CLEAVER. My recollection is, well, it is in a memo I wrote. It is out for contract at this point.

Senator NUNN. You wrote a memo on this subject?

Mr. CLEAVER. Yes.

Senator NUNN. To whom?

Mr. CLEAVER. Mr. Wienberg.

Senator NUNN. What was the nature of the memorandum?

Mr. CLEAVER. What I was discussing was not RFP but the process within the organization by which we evaluate and recommend, or whatever.

Senator NUNN. Are you complaining about Mr. Cubbler's action in any way?

Mr. CLEAVER. No, sir; I wasn't complaining. I made note of the fact that he was playing a very intimate role where we were being asked to review old documents and they were ready to sign a contract and we were reviewing advanced planning documents.

Senator NUNN. Have you furnished a copy of that to the subcommittee? Has staff a copy of the memo?

Mr. CLEAVER. Yes; I think so. It is an August memo.

Senator NUNN. It has already been made a part of the record.

Mr. CLEAVER. I was simply noting I didn't know Mr. Cubbler's role.

Senator NUNN. Let me ask you a couple of questions. We have other witnesses and certainly I know you have other things to do also. I will start with you, Mr. Cleaver. We are looking, as our over-

all purpose, for what is wrong with medicaid. You are involved in only one part of it. I understand you have a technical role to play.

What recommendations would you make to this subcommittee, if any, about what can be done to change either the management of the system or to improve efficiency? What needs to be changed in the law, if anything? I am going to ask each of you this question.

Mr. CLEAVER. Having been fairly intimately involved in the structuring of 250.90 and the program regulation guide, I have a biased opinion that they are workable procedures. When they talk about a model system, which is the MMIS published by SRS, there are some other concepts that can be put in there where this process can go faster and easier, but still fairly rigorously.

What I sense is an unsureness now of the process itself, what we follow and what we go by and how do we do it and who does what.

Senator NUNN. Is that a management problem rather than a legal problem? Rather than something wrong with law, is that more or less what you are describing as a management uncertainty?

Mr. CLEAVER. No; I don't think there is anything wrong with the law. I think we probably need the benefit of more legal interpretations than we have had; but I would say it is basically a management situation.

Senator NUNN. It is essentially a management problem?

Mr. CLEAVER. Yes.

Senator NUNN. Are you describing a critical problem or a normal kind of problem with this system?

Mr. CLEAVER. I don't think the situation over there is normal.

Senator NUNN. You don't think the situation is normal?

Mr. CLEAVER. No.

Senator NUNN. Does that mean that the management—I don't want to put words in your mouth—but would you characterize the management as being poor or would you characterize management in this area as being mediocre or would you characterize it as being good?

Mr. CLEAVER. There are gaps in the organization which would make management easier if they were filled; but right now my own opinion is, if I had to pick the three that you had, I would say without impugning anyone that it is poor.

Senator NUNN. Poor?

Mr. CLEAVER. Yes.

Senator NUNN. I get confused in the overall organizational chart of HEW. How big a hunk of HEW are you talking about now? Just give me the divisions.

Mr. CLEAVER. I am in the Office of Programs Systems Development. We have like—

Senator NUNN. What area are you talking about that you characterize as poor?

Mr. CLEAVER. I guess I am talking about the structure known as the Office of Information Systems.

Senator NUNN. The Office of Information Systems?

Mr. CLEAVER. Yes.

Senator NUNN. Mr. Trainor, how about you?

Mr. TRAINOR. I heard the testimony of Mr. Trombly yesterday. You heard Mr. Cleaver and I talk about Washington. I am con-

cerned about competition. I believe that, first off, when we started this 235 operation, although there was precious little—let me say this respectfully—interpretation from Congress on this bill for this provision—

Senator NUNN. You don't have to be respectful unless you just choose to. I am a severe critic myself.

Mr. TRAINOR. Thank you, sir.

In the companion pieces of interpretation dealing with medicare in the same bill, Congress was very, very specific about competition—we must encourage competition even if it is a competitive process—and you get an improper price. The Federal Government should look at prices to make sure they are fully fair.

When we initiated the 235 regulations, what was uppermost in our minds was this—here is a pressing national problem. There are a lot of great resources out in the community who could be brought to bear on this problem of computer systems development activity.

What we tried to encourage when I made talks to public welfare associations is we tried to encourage free and open competition on this problem. I believe that situations such as the Washington decision, the approval of a contract that is \$4 million higher than an excellent low bid, creates a cynicism in the country as to what is the sense of bidding on it.

Senator NUNN. We had that exact testimony yesterday where a company that was the low bidder in that particular case just stated—and you have heard that. I think you alluded to the fact that they were about to get out of the business.

Mr. TRAINOR. I believe that is going to happen. I think that it costs a lot of money to put one of those proposals in. If these people continue to drop out, the whole program will be left to the powerful and the corrupt. I think it is a tragedy because this is a major piece of whatever is going to happen in the future in health care.

Senator NUNN. If we did pass some kind of a national health care system, you are talking about literally billions and billions of dollars here that we may have a lack of competition in because of problems occurring right now. Is that correct?

Mr. TRAINOR. Absolutely; absolutely, and I think—what I think is the specifics are clear enough as to what these systems are. I think they can be bid on properly and I think we must continue to encourage competition. I think Mr. Vienna's opening statement, saying that there is a whole lot of effort yet to be done, and a whole lot of States yet to come in, I think we can turn the problem around.

I think it is essential to enforce free and open competition. I think with the revelation of Mr. Cubbler's involvement—another thing, if I may take another moment; I think I had a role saying to the country at large we are going to play fair. You know we are going to do this thing exactly right and you are going to have to submit an RFP and that RFP is going to be approved. We are going to look at your evaluation to see if it is a proper evaluation and we are not going to approve the contract if there is anything funny going on.

Yet, we see that very process having been corrupted from within, with Mr. Cubbler, from the testimony dealing with the RFP's, with the proposals, and the contractors.

In the State of West Virginia, for example, I was distressed that we only got two bids on that. I couldn't understand that 18 companies came in and only two people submitted bids. Now I see why.

Senator NUNN. You heard the testimony yesterday that some of the bidders in West Virginia were discouraged from the very beginning and went back after a trip to West Virginia and decided not to bid on it because they virtually had been told that there was a company that had an inside track.

Mr. TRAINOR. That is right.

Senator NUNN. Things are fitting together in your mind now, is that it?

Mr. TRAINOR. Absolutely; now I see what has been happening. You know, I feel maybe more outraged than other people who had not been saying to the country at large, we are going to be like Caesar's wife on this one—just beyond suspicion. It hasn't turned out that way.

The other thing is—

Senator NUNN. This is a system that is trying to weed corruption out of the medicaid program, isn't that the basic purpose of the MMIS, not just for corruption, but inefficiencies and management problems, and so forth?

Mr. TRAINOR. Program management.

Senator NUNN. Isn't that what we have seen here in 2 days of testimony, the system to weed out corruption itself has been corrupt?

Mr. TRAINOR. That is what it looks very much like. The other main point I think is the fragmentation issue that we talked about. I think that was not the intent of Congress. I think it was clearly the intent of Congress that you should pay attention to the administrative costs. You should keep these systems down to a comprehensive system, let's say a single system to a State; and we shouldn't proliferate the systems. I think we are going way beyond what we should be doing.

Senator NUNN. Thank you, very much.

Ms. Ryan?

Ms. RYAN. I don't know that we especially need legislation. I don't know about national insurance; with the Talmadge bill, of course, we would be carried one step toward that; but, Senator, the States did a pretty good job of administering the programs usually and there are some good people out there. If we can give them clear, consistent direction, then I think that is what needs to be done.

Senator NUNN. I want to say I think we have some good people in HEW, too. I am sure there are many employees in your department who are dedicated and have a very sincere desire to see that the system works in accordance with the will of Congress. You three have been very helpful this morning in coming forward.

Do you have any other observations, Mrs. Ryan?

Ms. RYAN. No.

Senator NUNN. I didn't want to cut you off.

Mr. Trainor?

Mr. TRAINOR. No.

Senator NUNN. Mr. Cleaver?

Mr. CLEAVER. No, sir.

Senator NUNN. I might add, staff tells me that your memorandums were clear and concise and they understand them, which is remarkable.

Mr. CLEAVER. Thank you.

Senator NUNN. You have been extremely helpful. We appreciate it and I will assure you that this subcommittee will be following with interest your careers. You did not come up and say things against any person without being questioned by the committee. You have been very helpful on that. We will be following with interest your continuing careers, I will assure you of that.

Thank you.

[At this point, Senator Percy entered the hearing room.]

Senator NUNN. I want to ask Mr. Trainor one other question before we go because there is something that I think is one of the most serious things I have heard about.

Did you have any knowledge that there were advanced planning documents being given to potential bidders by officials in HEW?

Mr. TRAINOR. Mr. Cubbler came to one of my employees, I guess it is not too many days ago, within the last several weeks, and indicated that he was developing standard advanced planning documents and asked for the advanced planning documents from the States of, I think, Idaho, Pennsylvania, Maryland, and most notably Massachusetts.

My employee, Mr. Frazier, gave him those advanced planning documents. I don't know what happened to these advanced planning documents except that I did hear from a regional representative that one of the vendors in Massachusetts was quoting from the advanced planning documents. I don't know who the vendor was.

Senator NUNN. That is something we didn't hear about yesterday. This may be more pervasive than we originally thought. Do you think it is proper, ethical, or legal to have a potential bidder have an advanced planning document given to him by an HEW official?

Mr. TRAINOR. I think it is totally improper, totally unethical. I can't comment on the legality, but it seems to me potential conflict of interest and a very improper conduct.

Senator NUNN. Thank you, very much. We appreciate your being here.

Senator PERCY. Thank you, very much, indeed.

Minority has requested that a higher Administration official be here and in compliance with that request, Mr. Robert Fulton, Administrator, Social and Rehabilitation Services, Department of HEW, is here.

However, I think in view of the allegations that have been made here, all directed at Mr. Wienberg, not in any way involving his superior, I should think it best to just proceed with Mr. Wienberg now alone. This will separate Mr. Wienberg entirely from the policy questions that we will be putting to Mr. Fulton. It will give Mr. Fulton an opportunity to discuss the hearings today with Secretary Mathews and then be prepared to return tomorrow to discuss the higher policy questions, rather than involve Mr. Fulton with these allegations which are of a lesser importance.

Mr. Fulton can stay and testify if he wishes to. I would really feel it better to separate the two testimonies.

Senator NUNN. I think we should separate the two. I think that is an excellent suggestion. We will proceed with Mr. Wienberg. I would like for Mr. Fulton to remain because I would expect to complete these hearings today, except for Mr. Cubbler. We don't know where he actually will be. I would like to complete them today, even if we stay longer.

I will ask Mr. Fulton to stay. We will call Mr. Wienberg immediately after we go to this vote, which will be about 10 minutes. We will take a brief recess.

[Brief recess.]

[Members present at time of recess: Senators Nunn and Percy.]

Senator NUNN. We will call Mr. Wienberg.

Mr. Wienberg, will you hold up your right hand, please? Do you swear that the testimony you will give will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. WIENBERG. I do.

TESTIMONY OF HAROLD F. WIENBERG, ASSOCIATE ADMINISTRATOR FOR INFORMATION SYSTEMS, SOCIAL AND REHABILITATION SERVICE, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Senator NUNN. Mr. Wienberg, would you start off by giving us your full title and job description?

Mr. WIENBERG. Yes, sir. My name is Harold F. Wienberg. I am associate administrator for information systems of SRS. I have been in that position, joined HEW about a year ago, middle of August sometime, of 1975.

Senator NUNN. That is when you came to HEW?

Mr. WIENBERG. Yes, sir.

Senator NUNN. What did you do before that?

Mr. WIENBERG. The year prior to that I was at the office of the telecommunications policy, Executive Office of the President. Prior to that I was a division vice president of the United Aircraft Corp. for 8 years and running their systems division; and for 2 years prior, I was the assistant general manager of the RW Computer Division in California.

Senator NUNN. Are you Mr. Cubbler's immediate employer or supervisor?

Mr. WIENBERG. I have been since February of 1976. He was transferred on Monday, though, so I am no longer his immediate supervisor.

Senator NUNN. Can you give us a job description of what Mr. Cubbler's title is and what his job description is?

Mr. WIENBERG. What it is or what it was when he worked for me?

Senator NUNN. What it was. Then we will get to what it is now.

Mr. WIENBERG. He was a member of a four-man office, the office of systems planning evaluation, that reports to me. He was a program analyst, or a system program administrator, or some title such as that.

That office, frankly, is sort of a special projects group that helps with the administration by developing work plans for the office of

information systems. They generally coordinate all of the various things that are going on within the organization performing essentially staff functions. They take on special tasks which, from time to time arise.

Senator NUNN. Mr. Cubbler has been transferred in the last few days. Is that right?

Mr. WIENBERG. He has been, I think the official term is "detailed." Yes, sir.

Senator NUNN. Detailed? What is the difference between a transfer and a detail?

Mr. WIENBERG. Transfer means he is permanently transferred and will not return to the job he left. A detail is where the individual is, for a given period of time, removed and put into a different organization with a different function. However, he will return to the organization he left.

Senator NUNN. What is his job at the present time?

Mr. WIENBERG. His job at the present time is with the associate administrator for planning, research, and evaluation, and his particular function—he reports to one of the subordinates there who is in charge of putting together the monthly planning system objectives that we put together for the Under Secretary—has to do with the manner in which we are conducting our operations to satisfy the overall secretarial objectives.

Senator NUNN. Does Mr. Cubbler have any decisionmaking role to play in the contracts in his new position?

Mr. WIENBERG. No, sir; he has not there, nor did he have any when he worked for me.

Senator NUNN. We will get into that in just a minute. You say you know the exact date of his transfer?

Mr. WIENBERG. September 26.

Senator NUNN. Could you give us the reason for his transfer?

Mr. WIENBERG. Yes, sir; I guess it was a week prior to that, the 20th or 21st or 22d, we received word from Dr. Weikel who had been in communication with your investigating staff and at that point, was the first time we learned that there was hard evidence or hard allegations going to be made and supportable against Mr. Cubbler.

So we immediately had a meeting with the Under Secretary, and at that point it was decided to transfer him into a position that would protect the Government as well as protect his rights since we had not yet known of what these allegations were or the extent or scope of them. At that time the Secretary also, I understand, reported this to the Department of Justice and we started our own investigation, headed by John Walsh of OSI, who was at the meeting. He gave us the advice as to what we should do.

Senator NUNN. OSI stands for what?

Mr. WIENBERG. Office of Special Investigations.

Senator NUNN. Is that an investigations office set up for all of HEW?

Mr. WIENBERG. It is an office set up, reporting directly to the Under Secretary and specifically for the purpose of investigation of this sort and also to investigate fraud and abuse activities which are discovered around the country.

Senator NUNN. This committee has a very high regard for Mr. Walsh, one of our former employees, who is in charge of OSI.

Mr. WIENBERG. We share that.

Senator NUNN. Mr. Wienberg, did Charles Cubbler between January of this year and a week ago have access to advance planning documents filed by the States with your office?

Mr. WIENBERG. He had, as every employee has, access to those documents. They are kept in Mr. Trainor's organization after they are received. The files are generally not locked. They are open and are accessible to anybody.

Senator NUNN. Do you have any rules or regulations about the confidentiality of those documents?

Mr. WIENBERG. We have general policies that are stated, unwritten, that certainly those things are governmental property and not to be discussed or disclosed to industry.

Senator NUNN. Do you think it is improper and against Government policy, against the policy of your office for advanced planning documents to be delivered to a potential bidder?

Mr. WIENBERG. I consider it to be, yes, sir. I consider that to be improper.

Senator NUNN. Did you have any knowledge that this was being done by any of your employees, including Mr. Cubbler?

Mr. WIENBERG. I did not, no, sir.

Senator NUNN. What action would you have taken if you had had that knowledge?

Mr. WIENBERG. What I would have done is actually check with our legal counsel and also, again, John Walsh to try to determine what the proper rules, or propriety in terms of disciplinary action might be in such a case.

Senator NUNN. You don't know of any regulation that this breaches?

Mr. WIENBERG. Not offhand.

Senator NUNN. You don't have any confidential tags on any of these documents?

Mr. WIENBERG. They are not so labeled.

Senator NUNN. Do you think maybe there is a need for you to look at your policy again in this regard?

Mr. WIENBERG. I believe so.

Senator NUNN. Do you think there is any misunderstanding among the employees as to the policy that these should not be turned over to bidders?

Mr. WIENBERG. I do not believe so. I think everybody pretty well recognized this to be the normal procedure, to retain them as confidential.

Senator NUNN. Have you ever had any conversation with Mr. Cubbler regarding the access to these advance planning documents?

Mr. WIENBERG. No.

Senator NUNN. Have you ever told him specifically that these are confidential and not to be revealed to anyone else?

Mr. WIENBERG. I have not so personally instructed him, no.

Senator NUNN. Have you ever told anybody in your office that they are not to be given out for public dissemination?

Mr. WIENBERG. No.

Senator NUNN. Where does the policy come from then?

Mr. BERKELEY. I can speak to that, Mr. Chairman. The Department of Health, Education, and Welfare, in accordance with the powers delegated regarding standards of conduct by the Civil Service Commission, has promulgated what we consider to be one of the best standard of conduct regulation among the Executive Departments agencies. Among the things that would be proscribed is the dissemination of any inside information gained as part of the job being disseminated to the public; in other words, turning over such an advance document would be against our regulation.

Each employee, when he first joins HEW, is given a copy of the booklet which has been printed up, called The Standards of Conduct, which contains a reprint of our regulation. The regulation itself is 45 CFR, part 73. I think something like a month after they come on board, employees are expected to certify that they have read and understand the Standards of Conduct.

My office is headed by an Assistant General Counsel who is the Department conduct counselor, and I am the Deputy Department conduct counselor. He and I and the head of our Administrative Law Branch regularly give seminars to different groups of employees within the Department to expound upon the Standards of Conduct. We feel we have a very active program on a departmentwide basis to explain the Department's Standards of Conduct as well as the criminal conflict of interest laws found in title 18, section 201 and following.

Senator NUNN. Thank you, Mr. Berkley.

Mr. Wienberg, a memo placed in the record of the hearing yesterday shows some concern of Mr. Cleaver of your staff, of the officials of the State of Texas. Were you aware of Mr. Cubbler's meetings with the Texas officials?

Mr. WIENBERG. I was aware of some of them, yes.

Senator NUNN. What was your view of those meetings?

Mr. WIENBERG. I authorized him to have a meeting in Texas at the specific written request of the HEW Regional Director in Dallas, of our Dallas region, the request coming from Commissioner Ray Vowell of the Texas Department of Welfare.

Senator NUNN. That request came from your regional official in Texas?

Mr. WIENBERG. That came from Commissioner Vowell of the Texas DPW to our Director of the Dallas Region, telephonically to my assistant, Mr. Sylvester, who alerted me to it. I then called Mr. Floyd Brandon, SRS Regional Commissioner from Dallas, visiting our headquarters at the time, and alerted him to it. We cut orders on Charlie and sent him down to Texas.

Senator NUNN. Mr. Wienberg, do you have any policy as to State governments furnishing transportation or private companies furnishing transportation for HEW officials?

Mr. WIENBERG. I never heard of a specific policy.

Senator NUNN. Do you know of any kind of rule or regulation that would preclude, say, a State sending an airplane to pick up an HEW official?

Mr. WIENBERG. I don't know of any rule; but I never heard of any action like that ever occurring.

Senator NUNN. Do you know of any provision that relates to whether an HEW official can accept expense money for consulting with private enterprise?

Mr. BERKLEY. Yes; under our standards of conduct, which again have been approved by the Civil Service Commission, there is a provision permitting outside activities, including consulting work. However, the provisions are very clear that you have to get advance administrative approval, and that when it comes to consulting work, you cannot consult with someone with whom you have official business.

Senator NUNN. So it would be against your standards of conduct for a person in Mr. Wienberg's office to accept consultant fees and expenses unless there was prior clearance. Is that right?

Mr. BERKLEY. Unless there were prior clearance, that is correct.

Senator NUNN. Is that a violation of rules and regulations or is there any criminal violation involved?

Mr. BERKLEY. There could be a criminal violation involved. Under section 208 of title 18 of the United States Code, it is a crime for an employee of the executive branch to participate personally and substantially in any particular matter in which he, spouse, minor child, organization for whom he is employed or has some sort of official position or an organization for which he is negotiating future employment has a financial interest.

Senator NUNN. Mr. Wienberg, did Mr. Cubbler ever ask you permission or did you have any knowledge that he was doing consulting work?

Mr. WIENBERG. He neither asked permission of me, nor did I have any knowledge he was doing so or have done so.

Senator NUNN. Did you ever have conversation with him about consulting work, either for private companies, State governments or anyone else?

Mr. WIENBERG. No; not at all.

Senator NUNN. He never in any kind of oral conversation asked you, informed you, hinted to you or implied that he was doing this kind of work?

Mr. WIENBERG. No, sir.

Senator NUNN. You had no way of knowing that?

Mr. WIENBERG. No; as a matter of fact, at the request of you, sir, in April, in your April 30 letter to, I guess it was Mr. Wortman who at that time was the Acting Administrator, I pulled all of the material from his official file dealing with his travel and expenses; that sort of thing.

I had the personnel people do that, then I reviewed it, and sent it up to your staff. I did the same thing for the June request pertaining to information about his outside activities.

Senator NUNN. Did you have any conversation with him about that after we made our request?

Mr. WIENBERG. Yes; I did. In fact, I asked him to prepare a statement for me about what his activities were, and this was included in the materials that were forwarded to you.

Senator NUNN. In that statement did he set forth any consulting activities?

Mr. WIENBERG. I don't know, sir. I don't have the statement with me, but I think your staff has it.

Senator NUNN. We will find the statement.

Senator PERCY. Do we have the statement?

In any event, I would ask unanimous consent that the statement be incorporated in the record at this point so that it can be on the record.

Senator NUNN. When you got that statement, I would assume your curiosity had been aroused by our inquiry and I assume you would have read it and particularly if he had done some consulting work, you would have some recognition on it?

Mr. WIENBERG. I did read it. I do have a lot of things in front of me.

Senator NUNN. I will ask the staff to find the statement.

Mr. FELDMAN. We have it. It was made a part of the record.

Senator NUNN. Can you answer the question about whether he at that time informed you that he was doing consulting work?

Mr. WIENBERG. Yes, sir; I asked him to prepare this material for me in terms of the things he particularly had to do with the three States of interest that Mr. Vienna had talked about; namely West Virginia, Arkansas and Texas. He put together the material. I believe I have a copy of it here now.

Senator NUNN. We will make that a part of the record.

My question to you is simply this: Did he in that memorandum inform you that he was doing consulting work?

Mr. WIENBERG. No, sir.

Senator NUNN. Mr. Wienberg, the subcommittee sent to the Social and Rehabilitation Service a request on June 23, 1976, for a number of items, including all materials relating to the development of and contract awards for Management Information Systems in the State of Texas, West Virginia, and Washington.

The subcommittee staff found the files sent in response to the request, particularly the West Virginia files, were missing a number of documents. Indeed, the staff went to your offices and reviewed the materials in your office and intended to put together a complete chronology of the materials.

My question to you is did Mr. Charles Cubbler assemble the materials prepared by your office or did he play a role in sending those materials to our staff?

Mr. WIENBERG. The chronology is as follows: I had the files put together by a member of Mr. Trainor's organization, Mr. Dennison, who is responsible for the region within which West Virginia is located. He put the file together for me. He pulled all of the material relative to the West Virginia activities from the date requested to the current date.

Mr. Cubbler has probably the best organizational memory that we have in the OIS in that he has been there for many, many years and recalls things that have happened and people, what took place, when and where.

At that point, I had him review the file to make certain that it was complete as far as his memory would permit him to do so; and if not, whether or not there were any materials that he felt was obviously missing.

Senator NUNN. Did you ask him whether any materials were missing?

Mr. WIENBERG. I did.

Senator NUNN. What was his answer to that?

Mr. WIENBERG. No; he said he made some notes and he said that he thought all of the material that was pertinent to the thing was there.

Senator NUNN. So he did have access to this material before it was sent to our committee?

Mr. WIENBERG. He reviewed it in my office, yes; but I was not aware of any allegations against him at that time.

Senator NUNN. I want the chief clerk to show you a Xerox copy of the note we found in the West Virginia file sent to the subcommittee in response to this request we have been referring to. The note says, "Suggest replacement of item 23 with a copy of item No. 9 on LTC for continuity of action."

Do you recognize this handwriting, Mr. Wienberg?

Mr. WIENBERG. I do.

Senator NUNN. Whose handwriting is it?

Mr. WIENBERG. That is Mr. Cubbler's handwriting.

Senator NUNN. Thank you, sir.

We have already made this chronology an exhibit dated May 27, 1976. So it doesn't need to be done.

I will ask you to identify this, Mr. Wienberg. This is a memorandum from Mr. Charles Cubbler to you, dated May 27, 1976, and ask you if you could identify that?

Mr. WIENBERG. Yes, sir. Yes; this is the memorandum I referred to earlier.

Senator NUNN. Because of the time, we are going to be at least another 45 minutes with this witness, I will inform Mr. Fulton, if he is still here, that we will ask him to come tomorrow morning at 10. You are welcome to stay, but you probably have other duties.

Mr. WIENBERG. Senator, I had prepared a statement that I would like to present to the committee and have put in the record. It is a description of the MMIS, it is background history and so on.

Senator NUNN. All right. We will submit that for the record.

[The statement follows:]

STATEMENT BY HAROLD F. WIENBERG, ASSOCIATE ADMINISTRATOR FOR INFORMATION SYSTEMS, SOCIAL AND REHABILITATION SERVICE, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Foreword

Since the Senate Permanent Subcommittee on Investigations has expressed an interest in the operations of the Medicaid Management Information System commonly known as MMIS, I would like to present some relevant information describing its background, purpose, needs, and status.

Background

A key to understanding the Medicaid Management Information System (MMIS) lies in the nature and complexity of the Medicaid program itself—in its history and development. I have enclosed a reference paper highlighting related details—but for purposes of this statement will, quickly summarize and note certain critical points.

The Medicaid program was authorized by Title XIX of the Social Security Act, enacted in 1965.

It is a Federal-State program which makes payments to providers of medical services on behalf of eligible patients.

States administer all payments under the program to medical care providers. The Federal Government provides regulatory guides and financial support. Each State tailors its program to its needs, choosing from many options related to eligibility and services.

Combined Federal-State expenditures for medical assistance were \$1.7 billion in Fiscal Year 1966. The comparable expenditure for Fiscal Year 1976 was \$14.7 billion. More than 23 million people are estimated to have received services during Fiscal Year 1976.

Throughout the life of the program the Congress, HEW, and the States have all expressed continuing concern about the rapidly rising Medicaid costs and inadequacies in program management. MMIS is being developed as one of the Federal Government's responses to those concerns.

The management problems that persist include: Fragmentation of operations, lack of information needed for planning and management controls, inefficient claims payment operations, lack of safeguards against improper or duplicate payment, lack of assurance that proper payment is made to qualified providers for authorized service to eligible recipients, and others. Overall, States' understanding of program administration and their ability to carry it out lacks uniformity. As the Medicaid program grew the management control problems quickly multiplied and expanded.

Purpose and brief description

The MMIS is an information storage/retrieval and claims processing system tailored to support efficient management of the medical program.

The Federal Government's roles in MMIS have included the development and refinement of the general conceptual design for the system.

The States are responsible for translating this conceptual design into a detailed system design which fulfills the basic objectives of the system and is tailored to the individual needs of the State involved.

SRS develops procedures for States to follow in developing MMIS systems and provides technical assistance during the various phases of system planning, design, development, test, and implementation. Assistance and technical oversight extends to review and approval of Requests for Proposals and contracts where States elect not to use their own personnel or equipment for MMIS development and implementation.

The MMIS conceptual design includes the following six working areas or subsystems: recipient; provider; claims processing; reference file; surveillance and utilization review and management and administrative reporting. In this conceptual design the first four work as an integrated unit which has the overall objective of processing and paying each eligible provider for every valid claim for a service provided to an eligible recipient. The other two are concerned with the consolidation and organization of data and preparation of reports vital for Medicaid management control.

I wish to emphasize that the MMIS is a system designed for operation by States in administering their Medicaid programs. It is not operated by the Federal Government—it was designed by the Federal Government as the means to assist the States in getting and keeping the program under control—to more efficiently manage their operations and to improve the quality of care.

Brief history

The genesis of the MMIS begins with the June 1970 Report of the Task Force on Medicaid and Related Programs empanelled by DHEW and chaired by Mr. Walter McNurney, President, Blue Cross Association.

The Task Force recommended that DHEW develop a model system to aid States in the administration of the Medicaid program and further recommended that 90 percent Federal funding be made available for the installation of such systems.

Following the recommendation of the Task Force SRS initiated in-house systems studies leading to the development of the Conceptual System Design. Consultec, Incorporated was awarded a contract in March 1971 to finalize this design. The system documentation was published in August 1971 as the first phase of this contract. A prototype installation of the system was begun September 1971 as the second phase of this contract in the State of Ohio.

In October 1972 Section 235, P.L. 92-603 was enacted which provided higher level Federal matching for design, development, installation and operation of mechanized claims processing and information retrieval systems that the Secretary determines are likely to provide more efficient, economical and effective administration of the State Medicaid program. The Federal matching level established was 90 percent for design, development and installation and 75 percent for operations in contrast to the 50 percent Federal match authorized for other aspects of Medicaid administration.

SRS published the implementing regulation, 45 CFR 250.90, on May 20, 1974 and a related Program Regulation Guide on June 10, 1974.

These regulations incorporated the MMIS overall conceptual design as the DHEW Standard for 90 percent and 75 percent matching under Section 235, P.L. 92-603.

They provided procedures for prior SRS approval of systems development activity and required competitive procurement for contracting for such activities.

The Program Regulation Guide provided general criteria that the system should meet.

It also outlined the processes through which the higher level matching was to be obtained. These included:

(a) Submission and approval of an Advance Planning Document, Request for Proposal, and Contract. Each of these items, with supporting documentation, is required to be reviewed by Regional Office staff before submission to the Office of the Associate Administrator for Information Systems. Regional comments are expected to include reasons and recommendations for approval/disapproval. ADPs, RFPs, and Contracts are routed through the following AAIS organizations for concurrent review before formulating a position on approval/disapproval:

1. *Office of Program Systems Development*—to assure the technical systems approach satisfies programmatic needs.

2. *Office of State Systems Operations*—to assure that State's management approach is feasible and that all Federal and State Procurement Regulations are adhered to.

Comments developed by the Regional Offices and OPSD are coordinated within OSSO and a consolidated recommendation for approval/disapproval is provided to AAIS.

Decisions on approval/disapproval are made by AAIS and rendered to Regional Commissioners for notification to State agencies.

(b) After implementation of the MMIS, States are required to notify SRS in writing of the date the system was implemented, asserting that the system is operational and meets the established criteria and requesting that SRS perform a certification review.

(c) Upon receipt of a request for certification, SRS obtains copies of all pertinent systems documentation for review prior to an on-site examination of the system. If review of documentation by OPSD and OSSO does not reveal a potential system deficiency a certification team is constituted and an on-site review is scheduled. A certification team consists of representation from OPSD and OSSO in AAIS, and the Medical Services Administration. Typically, AAIS staff are concerned with the technical capabilities of the system, while MSA staff deal with utilization of system output by State staff, appropriateness of State staffing, provider relations, training, etc.

(d) After completion of an on-site review, OSSO consolidates the team members' reports on their assigned areas of review and develops a recommendation to AAIS on certifications for increased Federal funding for operations (75%). Regional Commissioners are advised of decisions on certifications and notify the States.

A larger set of contracts concerned with fiscal agents, health care project grant centers, and providers reimbursed on a prepaid capitation basis are regulated by 45 CFR 249.82 dated May 9, 1975.

Contracts in this category presently fall under the approval authority of the Regional Commissioners.

Enclosure II notes the status of the few which seemed to be of particular interest to the investigating staff.

*Status**Certified*

Eleven States are presently certified for the 75% FFP operational funding allowed by Section 235 of P.L. 92-603. These States, the involved contractors and subcontractors, and the dates of certification approval and effective dates are as follows:

State	Contractor/subcontractor	Certification date	Effective date
Arkansas	Health Application Systems, Inc.	Apr. 6, 1976	Jan. 1, 1976
California	Blue Cross/Blue Shield; subcontractor—Electronic Data Systems ¹	July 29, 1976	(1)
Hawaii	Blue Cross/Blue Shield	Mar. 31, 1976	July 29, 1976
Michigan	Consultec, Inc., for S/DR Subsystem	Nov. 3, 1975	Jan. 1, 1976
Minnesota	Operations Research, Inc.	Jan. 5, 1976	July 30, 1975
Montana	Dikewood Corp.	July 1, 1975	Sept. 29, 1975
New Hampshire	Delphi/Keane Associates, Joint Venture	May 29, 1975	July 1, 1975
New Mexico	Dikewood Corp.	May 13, 1976	June 30, 1973
Ohio	Consultec, Inc. (system developed by contractor and converted by staff)	Apr. 22, 1976	Oct. 1, 1975
Texas	None	Dec. 15, 1975	June 1975
Utah	Consultec, Inc.		Oct. 1, 1975

¹ California has passed a certification review and is eligible to receive 75 pct FFP operational funding, as soon as they meet the legal mandate to issue EOB's to each recipient.

In development

Twenty-three States are in various stages of implementing MMIS, ranging from States just submitting APDs to States awaiting certification of operational systems. The status of each is displayed in Attachment I.

Under consideration

Twenty States and Territories are in various stages of deciding on their interest in and approach to MMIS. These States and the present status of each are shown in Attachment II.

Pending certifications

Of those States implementing MMIS, nine are expected to be certified in the next six months, and an additional six within the next twelve months. The status of each are shown in Attachment III.

Enclosed is a list of all State MMIS contractors with recorded amounts for each.

ATTACHMENT I

State	ADP	RFP	Contractor/subcontractor
Arizona	OK	OK	The Computer Co.; subcontractor, FMS Management Services, Inc.
Georgia	OK	OK	Delphi, Inc.
Kentucky	OK	OK	Consultec, Inc.
Indiana	OK	OK	Blue Cross/Blue Shield; subcontractor, Consultec, Inc.
Maine	OK	OK	Health Application Systems, Inc.
Maryland	OK	OK	FMS Management Services, Inc.
West Virginia	OK	OK	Do.
Washington	OK	OK	Electronic Data Systems.
Massachusetts	OK	OK	
Pennsylvania	OK	OK	
Connecticut	OK		
Illinois	OK		
Kansas	OK		
Missouri	OK		
New York	OK		
Idaho	OK	OK	Electronic Data Systems ¹
Nebraska	OK		In House.
Virginia	IN		
Colorado	IN		
Alaska	IN		
Oklahoma	OK		Do.
Louisiana	OK		Do.
Florida	OK		Do.

¹ Idaho has selected Electroni. Data Systems as the Idaho MMIS contractor. SRS has not yet received official notice of this selection or a request for approval by the State. Upon receipt of the recommendation from the Regional Commissioner, SRS will review and evaluate the State's selection and the request for approval.

ATTACHMENT II

North Carolina.....	Contemplating a new fiscal agent.
Rhode Island.....	No interest shown (reason not known).
Vermont.....	No interest shown (reason not known).
New Jersey.....	After eligibility system has been developed State will submit an APD for MMIS.
Puerto Rico.....	Not eligible.
Virgin Islands.....	Not eligible.
District of Columbia.....	Developing an APD.
Delaware.....	No interest shown (reason not known).
Alabama.....	Developing an APD.
Mississippi.....	Developing an APD.
South Carolina.....	Developing an APD.
Tennessee.....	No interest shown (reason not known).
Wisconsin.....	Wisconsin is developing pending completion of its computer network reporting system.
Iowa.....	Developing an APD.
North Dakota.....	Planning development of APD.
South Dakota.....	Planning development of APD.
Wyoming.....	Developing an APD.
Guam.....	Ineligible.
Nevada.....	No interest shown—satisfied with current fiscal agent arrangement.
Oregon.....	Planning development of APD.

ATTACHMENT III

States expected to be certified in next 6 months:

Georgia	North Carolina.
Idaho	Oklahoma.
Indiana	Washington.
Maine	West Virginia.
Nebraska	

States expected to be certified in next 12 months:

Arizona	Florida.
Kentucky	Louisiana.
Maryland	Virginia.

ENCLOSURE I

REFERENCE PAPER ON MMIS—THE MEDICAID MANAGEMENT INFORMATION SYSTEM

FOREWORD

This is a body of relevant information on the Medicaid Management Information System—its purpose—its needs—and its benefits.

The program is Medicaid. The problem is program management and control. The sample solution we have created is the Medicaid Management Information System (MMIS).

The importance of the program, and the cooperation needed to effectively implement the MMIS argue for discussing the program at this time. The better understanding one has of its purpose, the need and the benefits which are derived from an operational MMIS, the greater the likelihood of expeditious implementation and cooperative operation.

The medicaid program

A key to understanding the need for a Medicaid Management Information System (MMIS) lies in the nature and complexity of the Medicaid program itself—in its history and development.

The Medicaid program was authorized by Title XIX of the Social Security Act, enacted in 1965.

It is a Federal-State program which makes payments to providers of medical services on behalf of eligible patients.

The Federal Government provides regulatory guides and financial support. Each State tailors its program to its needs, choosing from many options related to eligibility and services.

Medicaid purchases medical care for two groups of people, the categorically needy and the medically needy. The categorically needy includes: (1) certain

families and children eligible for financial assistance for dependent children, and (2) aged, blind, or disabled persons eligible for SSI benefits and/or State supplemental payments.

The medically needy are persons who (1) meet all of the requirements for eligibility as categorically needy except for having income and resources which exceed the allowed amount of income and resources and (2) have insufficient income and resources to meet the costs of necessary medical and remedial care services.

For categorically needy recipients States must pay for certain basic services. They are: Physicians' services; in-patient and out-patient hospital services; laboratory and X-ray services; services in skilled nursing facilities and home health care services for adults; screening, diagnosis, and treatment of children; and family planning services. States can elect to pay for additional services such as dental care, prescribed drugs, eyeglasses, clinic services, and care in intermediate care facilities for this same group of patients.

If a State includes the medically needy, it must be for either the basic services listed above or for any seven basic or optional services for this group.

The Program of Supplemental Security Income (SSI) for aged, blind, and disabled people with limited income and resources provides basic Federal payments to supplement whatever income may be available from other sources including Social Security Benefits.

States have several options regarding Medicaid eligibility for SSI recipients. They may either limit Medicaid eligibility to individuals who meet standards more restrictive than SSI's if they had such standards in effect on January 1, 1972; extend Medicaid eligibility to all SSI recipients; or extend Medicaid eligibility to individuals who do not receive an SSI payment but receive only a State supplement to that payment. Thus, most, but not all aged, blind, or disabled individuals who receive SSI payments or State supplements are also eligible for Medicaid.

Amendments to the original legislation and growing interest in developing improved methods of health care delivery have added other complexities to the problems of management control. Although limited at present, prepaid per-capita premiums may replace traditional fee-for-service payments as a means of reimbursing providers of care. Cost-sharing, deductibles, and co-payments have been introduced. Cost differentials and prescribed methods of utilization review are required by law.

Program administration is under State control. The many options available result in varied State programs. Consequently, the Medicaid program has 53 variations including no single way of setting reimbursement rates, paying bills or checking eligibility and utilization.

Medicaid started in 1966 with six States participating. Arizona, the only State without a program, is developing one to go into effect during 1976. The District of Columbia, Puerto Rico, Guam, and the Virgin Islands participate as well. Combined Federal-State expenditures for medical assistance were \$1.7 billion in Fiscal Year 1966. The comparable expenditure for Fiscal Year 1976 was \$14.7 billion. More than 24 million people are estimated to have received services during Fiscal Year 1976.

An answer to management control problems

The existence of management control problems is not surprising in a program that continues to grow rapidly and is administered in such a variety of ways. But the fact that difficulties were anticipated and did indeed occur is obviously not a cause for satisfaction. The Congress, H&W and SRS each expressed concern about the rapidly rising Medicaid costs and the inadequacy of program management. Development of the MMIS is the outgrowth of administrative steps taken by SRS in response to that concern.

The management problems that persist include: Fragmentation of operations, lack of information needed for planning and management controls, overlong claims payment operations, lack of safeguards against improper or duplicate payment, lack of assurance that proper payment is made to qualified providers for authorized service to eligible recipients, and others. Overall, States' understanding of program administration and their ability to carry it out lacks uniformity.

SRS considered several options before deciding to develop the MMIS. It thought about sending teams into individual States to help each of them develop individual management information systems. It considered funding individual States to design and develop systems that might thereafter be trans-

ferred to the States. But for various practical reasons related to limited personnel and time, these options were not pursued. Instead, it was decided to develop the MMIS as a model general system concept that would be adaptable in whole or in part by all States and jurisdictions. The system would have easily adaptable features for the special needs of any jurisdiction. Finally, it was decided to develop a model system at the level of general design and follow delivery of the general design with the delivery of aids for the use of the system and its reports.

After design of the system, the Federal role was to be limited to providing technical assistance to individual States as they adapted the generalized system design concept to their needs. At the State level, the process could be carried on in whatever fashion each State elected, i.e., it could use its own agencies or hire contractors to do the job or some mixture of each.

Designing the MMIS

During the conceptual design phase, SRS worked closely with the States to seek their understanding since they would be the ultimate users of the system.

The conceptual design was planned on a modular or subsystem basis for ease of adaptability and implementation. States not planning to install the general system all at once (or not planning to use the whole system) could install segments of it, according to their needs and requirements.

A provider's claim for payment was made the heart of the MMIS, for, at the point of claim, the interests of all the "players" intersect. At this "intersection"—the provider submits a claim to the State agency or its fiscal agent for services rendered to a recipient. Instituted then is a provider file with pertinent information, a recipient file with similar information, and an adjudicated claims file with specific information about services.

The design approach was from the "top down." The information needed by management governs data collected for the data base. Previously, management's efforts depended on whatever available information was collected.

Since one of the studies that triggered development of the MMIS had uncovered problems common to all States, the system was designed as one approach to provide answers to these common problems.

To meet the varying needs of small and large jurisdictions the system was made as simple and efficient as practicable.

The Federal effort was devoted to an analysis of requirements and the development of general conceptual design.

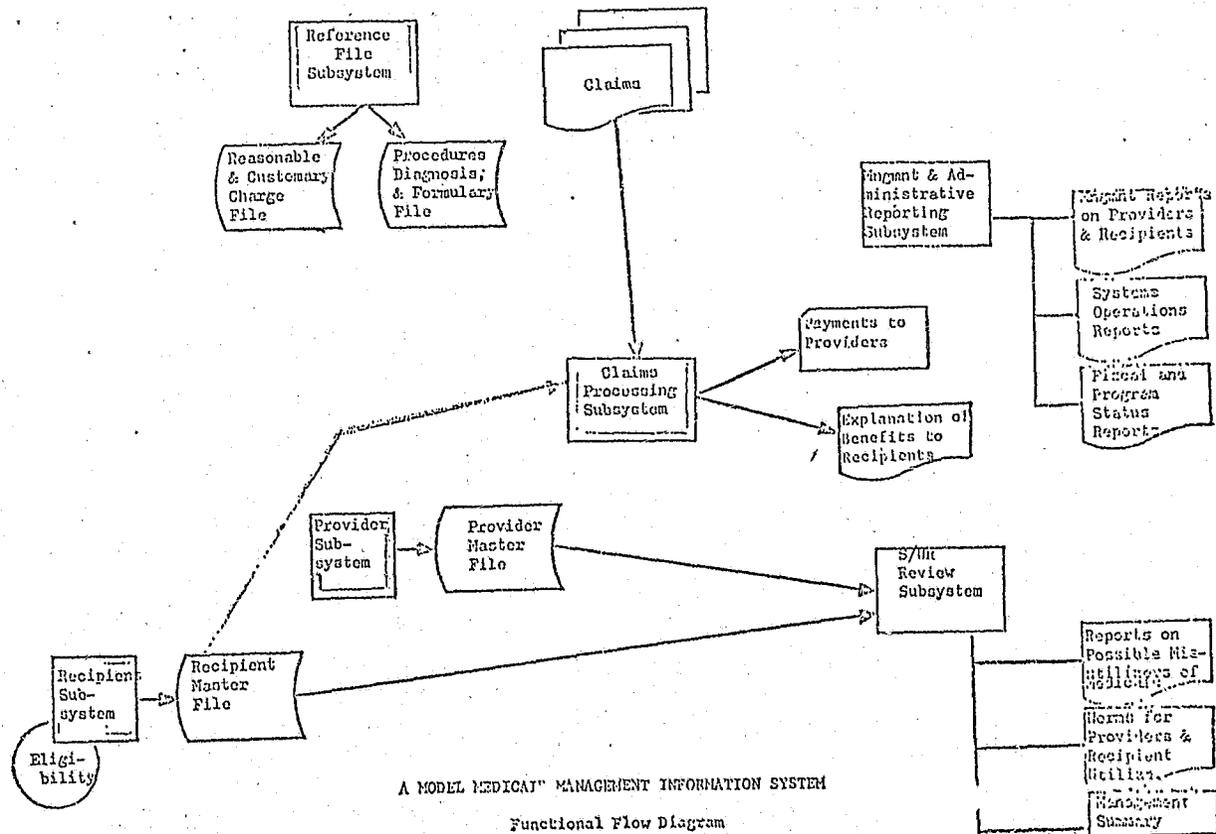
The States are responsible for translating this conceptual design into a detailed system design and related programs which fulfill the basic objectives of the system and are tailored to their individual needs.

Technical assistance is provided by SRS to project management. Specifically, guidance counsel and detailed assistance is provided through each of the various phases of program planning, system design, development, test implementation, assistance and technical oversight extends to all phases of contractual effort where the State prefers not to use its own personnel or equipment for in-house development and implementation.

Within this general framework, the MMIS conceptual design includes the following six working areas or subsystems: recipient; provider; claims processing; reference file; surveillance and utilization review and management and administrative reporting. In this conceptual design the first four work as an integrated unit which has the overall objective of processing and paying each eligible provider for every valid claim for a service provided to an eligible recipient. The other two are concerned with the consolidation of provided data, in terms of organization, and presentation in a useful format.

Use of most of the modules is dependent, to some extent, on the availability of others—or at least on having available the kind of information produced by them in a compatible format. For example: suppose a State finds that the surveillance and utilization review subsystem is ideally suited to solve its particular problems. In order to use it, however, the agency must have a data base to support a subsystem of this type. Unless that data base were available in some other fashion, the agency may find it desirable to adopt the recipient, provider, claims processing, and reference file subsystems to provide the data that the surveillance and utilization review system needs.

The following is a more detailed description of the six general functional areas, their intended use and the benefits that can be expected to accrue from adopting this design concept to the particular needs of each State.



A MODEL MEDICAID MANAGEMENT INFORMATION SYSTEM

Functional Flow Diagram

New subsystems of the conceptual design

Recipient subsystem

The recipient subsystem maintains identification of all Medicaid-eligible recipients, provides the mechanism for frequent and timely updating of all recipient eligibility records, controls data and recipient eligibility (including Medicare Part B "buy-in" processing), and provides a computer file of all eligible recipients that will support claims-processing functions, surveillance and utilization review and management reporting.

This subsystem is the point of entry for the transmission of information about applicants relating to their Medicaid eligibility, certification, and any change in their status. Any transaction—any new or changed data input—is immediately subjected to a series of computer edits to verify the completeness and validity of each item of information.

If any transaction contains errors the computer suspends it into a file until corrective action is taken. The integrity of the Master File is thus insured at all times.

To understand what the Recipient Subsystem does about "buy-in" processing, it is necessary to understand what the buy-in means. Briefly, Part B of Medicare, which covers physicians' services, requires the payment of a premium by the person who wishes to be covered. If a person is eligible for both Medicare and Medicaid, his State's Medicaid agency has the option of buying-in to Medicare on his behalf. If the States does not buy in, it loses Federal matching contributions for the services covered by Medicare's Part B.

The recipient Subsystem identifies buy-in recipients each month and transmits records to the Social Security Administration (which administers the Medicare program). The Subsystem receives buy-in responses from the Social Security Administration, processes monthly billing data from that agency, and brings the Medicaid Eligibility Master File up-to-date to reflect the buy-in status of individual recipients.

This subsystem may also issue, on a monthly basis, identification cards to provide recipients with proof of their eligibility. If possible, these identification cards are printed in conjunction with the issuance of welfare assistance checks.

The provider subsystem

The provider subsystem processes provider applications and enrolls providers in the Medicaid Program when they agree to comply with the program's rules and regulations. It also ensures that only qualified providers are paid for providing services for which they make claims and creates and maintains a computer file of all eligible providers to support the claims processing, surveillance and utilization review and management reporting functions.

Applications for enrollment as qualified providers are submitted to the State agency and the information in the application is immediately entered into the system. Computer control is maintained over all such applications until eligibility is determined.

The applications furnish the basic data needed to create a Provider Master File. Both the original data and later changes are completely edited before this file is updated to prevent introduction of erroneous data. An erroneous transaction will be suspended by the computer until it is corrected.

The Provider Master File may also be the repository for current information on the rates charged by both institutional and individual providers of service. Institutional rates are brought up-to-date whenever an audit or settlement with a particular provider indicates a need for such action. However, "usual and customary" charge ranges that are "reasonable" which apply to more than a single provider are not handled by this subsystem but, rather, by the Reference File Subsystem (described later).

The claims processing subsystem

The Claims Processing Subsystem has five major functions.

To ensure that all claims and all transactions related to claims are put into the system accurately and as soon as possible.

To establish strict system controls so that all transactions are processed completely—and promptly—and that all claim discrepancies are resolved quickly.

To verify the eligibility of both the recipient and the provider and the validity of the information submitted in the claim.

To ensure that correct and timely payment is made to provider.

To create a computer file of adjudicated claims that will support surveillance and utilization review and management reporting.

Every provider, after he has provided service to a recipient, submits his request for payment to the State agency, or to the contractor serving as fiscal agent for that agency. These requests for payment are made through a claims document or an equivalent form that can be read by a machine. When the agency receives a claims document, it assigns it a control number, microfilms it (if volume of claims warrants), screens it for suitability for machine processing and converts it to a machine-readable format if that is acceptable.

Each claim put into the computer system then goes through a series of validation steps. These include editing the claim data, verifying that the provider was authorized to provide the service and was eligible when the service was provided, verifying that the recipient was eligible at that time, checking for the possibility that a third party might be liable to pay for the service in question, and assuring that the claim neither duplicates nor conflicts with a previously processed claim.

If a claim fails to pass any step in the series, it is suspended by the computer to await corrective action.

Computer-prepared listings of exceptions and microfilm files of source documents are made available to claims correction clerks and medical review workers. The worker notes the corrective action to be taken directly on the computer listings and then enters corrections in the system. A claim that has been suspended is thus released from suspense and sent back through the validation steps.

Claims that pass through the validation process are accumulated until the next payment cycle, at which time payments and supporting documents are produced—and historical records generated—for use by the Surveillance and Utilization Review Subsystem and the Management and Administrative Reporting Subsystem.

The Claims Processing Subsystem also performs a number of other functions. For one, it will answer questions submitted about claim and recipient status. It will also generate statements of services received by all recipients or by a selected sample of recipients.

The reference file subsystem

The Reference File Subsystem has three principal functions. It can update various reference files used in claims processing. It provides information about the usual and customary changes of practitioners, and generates a variety of listing of suspended claims.

All requests for listings derived from changes in the computer files of medical procedures, the drug formulary, or medical diagnoses are processed through this subsystem. All additions, deletions, and other changes in these files are subject to error-detection editing. If an error appears, files cannot be updated.

This subsystem also provides the data used for periodic analysis of provider charges. On the basis of these analyses the reasonable and customary charge file is updated. Reasonable charge listings are organized by area and by individual practitioner.

Generation of reports based on the data contained in the file of suspended claims is the subsystem's final major function. Among reports that may be generated are a list of all claims being held in suspense, a list of claims suspended for any one specific error, a list of suspended claims made by a given provider, and so forth.

These four subsystems are direct operations subsystems, because they deal mainly with the business of keeping the program operating in accordance with its rules. The two remaining subsystems provide administrators with information about problems and progress.

The surveillance and utilization review subsystem (SUR)

The Surveillance and Utilization Review Subsystem (SUR) has three main functions.

To develop a comprehensive statistical profile of health-care of delivery patterns and utilization.

To identify instances of suspected fraud or abuse of program by individual recipients, providers, and service organizations.

To provide information that could indicate potential defects in the level of care or the quality of service provided.

The subsystem's main source of information is the data coming out of the Claims Processing Subsystem's file of adjudicated claims. The master files from the Provider and Recipient Subsystems supply certain demographic and identification data on individual providers and recipients.

Within the subsystem all providers and recipients are classified in homogeneous groups according to characteristics. A statistical profile is then developed for each group and for each individual participant. The profiles of individuals are then matched against the profile of the group to which they belong—and any individual profile that is markedly different from the profile for its group is pulled out for review. Any provider or patient whose profile is pulled from the pack is investigated to determine whether misutilization is responsible for the difference. Corrective action can then be taken to correct program abuse.

The subsystem computer carries out all operations necessary to identify exceptions to the norms. During the follow-up investigation, the computer provides access to all claims substantiating data. The administrator using the system can select and print only data that are of potential value in determining whether the program has been abused.

The management and administrative reporting subsystem (MARS)

The Management and Administrative Reporting Subsystem (MARS) has seven principal functions.

To furnish the State agency with information to support management review, evaluation, and decision-making.

To provide management with the financial information necessary to conduct proper fiscal planning and exercise proper control.

To provide management with information needed to help in developing improved policy and regulations.

To monitor claims processing operations, including the status of provider payments.

To analyze provider performance with regard to the extent and adequacy of participation in the program.

To analyze recipient participation by the nature and extent of services rendered.

To provide the data necessary to support Federal reporting requirements.

The information in the reports generated by this subsystem is derived mostly from the data collected in the Recipient, Provider and Claims Processing Subsystems. Key data are routinely extracted from the computer files in these subsystems and consolidated with manual input data outside the system into summary history files. All information produced directly by the Management and Administrative Reporting Subsystem comes from information maintained in these summary history files.

The reports produced by this subsystem are designed to satisfy the need for information in four areas—administration, operations, provider relations and recipient relations. When generated for top management, the reports can display a minimum of detail and include only the summary evaluation and analysis required.

Reports from the other subsystems may include more detail depending on the level of management for which they are intended.

Federal funding for MMIS

The 1972 Amendments to the Social Security Act furnished an additional incentive to States wishing to improve administration of the Medicaid program. Section 235 covering payment to States under Medicaid for installation and operation of claims processing and information retrieval systems provides for payments to include an amount equal to:

(a) 90 percent Federal matching for design, development, and installation of mechanized claims processing and information retrieval systems for more efficient, economical, and effective administration of the program. (These systems must be compatible with those utilized in administration of Title XVIII).

(b) 75 percent Federal matching for systems operations whether such systems are operated directly by the State or by another person under a contract with the State.

(These systems must include provision for prompt written notice to each recipient who is furnished services).

Previously such administrative costs had been matched at a 50% rate.

MSA Program Regulation Guide-31 was issued in June 1974. It contained the criteria for determining Federal financial participation in State payments for mechanized systems. Experience in working with this Guide and with the States through the many difficult phases of systems development and implementation has uncovered a number of areas which require greater flexibility in general, more clarity and definiteness in certain processes and greater scope of coverage. A modified Guide is presently in writing and will be issued in the near future. This is structured to provide States with more freedom in meeting the objectives of the system, provide a basis for considering incremental system certification, and to permit a wider range of option in systems development for emerging new areas of expansion.

Eleven States presently have certified systems in operation with an additional number of States in various phases of systems, planning and development.

We are anxious to have all of the States expedite these developments and work toward operational implementation of these systems to gain management control of the Medicaid Program at the earliest possible time.

Benefits that can accrue to States through proper and effective operation of the MMIS

A. More Effective Medicaid Management

1. *General Benefit*—The SRS MMIS Program gives a State increased operating capability to improve the efficiency and effectiveness of its Medicaid management controls. These controls are critical to a State's ability to effectively regulate the cost, quantity, quality, level, and access to the medical care and services authorized under a State's Medical Assistance Plan.

2. *Cost Control Benefits*—Listed below are some examples of the various kinds of cost controls that can be obtained by a State Medicaid Program through an MMIS:

(a) *Minimum Comments*: The System assures payment by the State of the minimum fee appropriate for specific medical care and services. This includes making calculations for determining "reasonable" charges or "prevailing fees" to be paid to physicians, or calculations of the maximum allowable cost (MAC) or estimated acquisition cost (EAC) for drugs combined with a dispensing fee to put limits on the price paid for prescriptions.

(b) *Unnecessary Utilization*: The System also identifies ranges of service received by recipients which may be duplicative or unnecessary, or which may indicate excessive utilization by certain providers and/or recipients; e.g., excessive ordering of costly injections, drugs, lab studies, and inpatient care facilities. This is accomplished by incorporating professional judgment of peers into computerized review criteria.

(c) *Eligibility and Benefit Verifications*: The MMIS also kicks out disallowances for ineligible recipients, providers, or services not covered under the State's Medicaid program. In this regard, one State reported the built-in editing capabilities of its MMIS resulted in a program savings of 2.27 percent of total program costs due to a systematic reduction or the disallowance of improper provider claims. This was a reduction of more than a \$1,000,000 annual savings to the Medicaid program. Other States have reported similar savings resulting from the built-in edit capabilities of the MMIS. So far, these States have reported program savings amounting to many millions of dollars annually. The F/A savings from Providers alone has been estimated conservatively to run about \$750,000,000 per year. MMIS will provide all necessary information and management controls to handle this problem.

(d) *Alternative Care*: The System also tells the State Medicaid Director where lower cost alternatives can be utilized without lowering the quality of care. This includes nursing home care versus hospital; home health care versus institutional care; inappropriate, duplicative, contra-indicated, and excessive drugs; and duplicate billings for the same services.

(e) *Third Party Liability*: Automatic identification of third party liability. The MMIS offers a State the capability to identify, on an individual basis, a third party's liability for payment for recipient care. After the installation of the MMIS claims processing subsystems, one State reported an annual increase of *eight (8) percent* in the identification of third party coverage. This resulted in an annual cost savings of four (4) million dollars to that particular State.

(f) **Cost Avoidance:** There can also be marked overall program savings through "cost avoidance." This is what happens when providers no longer file potentially fraudulent or marginal claims as a result of it becoming known that specific areas of over-utilization are being identified by computer and the provider held financially accountable. One source, a former State Medicaid Commissioner, claims that "for every dollar returned to the State Treasury as a result of direct claims payment controls, there is an additional two to three dollar bonus in cost avoidance when providers become aware of the degree to which oversight is being exercised by the State's Medical Assistance Unit." He cautions, however, that the end of nine months a State agency should always think of starting over and again review all potential program abusers just to keep the lid on the program.

(g) **Administrative Cost Savings:** Several States operating under the old decentralized county operated concept of administration have realized a marked administrative cost savings through State-wide centralization of their Medicaid administration. This is required to give State-wide implementation of MMIS "economies of scale." One State reported an annual savings of \$2,000,000 in administrative costs alone which resulted from being required to centralize their Medicaid program to implement MMIS efficiently. When one considers the manner in which administrative support for Medicaid is multiplied from county to county because of the high degree of autonomy that exists at the various State and local areas, one can also visualize the extended variety in types of organizations, equipment utilizations, approaches, and degrees of sophistication—all very costly, in terms of the type of duplications the MMIS eliminates.

3. **Benefits from Fixing Responsibility for Decisions and Actions.**—The MMIS provides the Director of the State's Medical Assistance Unit and the Agency Head with a complete set of summary management reports on a timely and regular basis. These summary reports, in turn, are supported by detailed reports which identify specific problem areas, e.g., budget, administrative, operations, provider relations, recipient problems, etc. But to be effective, these reports require expanded Medical Assistance staff to review them, make decisions, and take action. After an MMIS has been in operation only a short time a program administrator is better able to understand the program in terms of having reliable data. By exerting specific program controls over program utilization, the budget, fiscal management, etc., a State Director can reallocate scarce program resources and evaluate the benefits provided from these resources to various recipient and categorical groups. He can direct rational policy changes based on objective analysis of the indicators. This improves his span of control, and he can readily see the effects of policy changes illustrated in hard numerical data. To get maximum effectiveness, out of the MMIS, of course, as adequate State staff is required to follow-up misutilization, over-utilization, fraud, and abuse. Needless to say, *this is where 90% of the States fail to follow through.*

4. **Benefits from MMIS Flexibility.**—The system is flexible in establishing new combinations of utilization controls. In a number of States the MMIS includes additional approaches to utilization review and control. Some of these include: (a) concurrent review of hospital admission and review of continued stay plans; (b) prepayment review of physician ambulatory care; (c) medical review and periodic inspections of long-term care patients and facilities; and (d) the monitoring of Professional Standards Review Organizations (PSRO's).

One of the MMIS's outstanding operating characteristics is the ability to handle ever changing program and fiscal demands as well as new State and Federal requirements. A few recent examples include:

(a) Installation of the Maximum Allowable Cost (MAC) and Estimated Allowable Cost (EAC) for drugs.

(b) Developing profile data for SUR and third party liability reports revealing indicators of possible fraud and abuse.

(c) Compliance information for utilization review and utilization control.

(d) Identification and tracking of EPSDT recipients for informing, arranging and follow-up.

(e) Consolidation of cost accounting requirements for long-term care reimbursement with the assessment of the quality and quantity of care provided.

(f) Production of data for PSRO's for quality assurance studies.

(g) Production of various configurations of sample data in response to research and demonstration studies.

(h) Prompt production of special one-time reports on demand through the use of computerized report writers.

5. *Benefits in Operational Efficiency.*—The MMIS pays claims faster. One State previously took up to nine months to pay hospital claims; its MMIS now pays such claims in twenty-seven days. Other States with three to six to twelve months' delays have experienced new payment cycles of twelve to eighteen days for all types of claims. Some routine claims (such as nursing home care and drugs) can be paid in less than ten days.

State submittals of Advanced Planning Documents for implementation of the MMIS reflect a high degree of expected projected savings—both program and administrative, but mostly program. It will be some months yet before hard dollar savings data can be collected from the States with operating MMIS's.

However, a study¹ conducted by a private firm under contract to SRS concluded that the MMIS can effectively initiate a *total program recurring savings* on the order of approximately 10-14 percent.

B. MMIS Improvement in the Quality and Access to Care

A well-staffed MMIS can exercise a direct, positive influence on the improvement of Medicaid administration. Let's discuss a few techniques to show how this applies.

1. *Quality Control.*—The MMIS quality control effort is designed to assure that Medicaid payments are made *only* for the patients' medical needs, and then only for eligible persons. The MMIS contains subsystems designed to accomplish this function in an automated, efficient, cost-effective, and timely manner. To illustrate:

(a) The MMIS contains all necessary data concerning eligible Medicaid recipients as well as providing controls on all additions, changes, and deletions to the State eligibility file. It also insures integrity of Medicaid eligibility records through selective edits for completeness and accuracy of the data elements.

(b) The MMIS captures all recipient data necessary for review of the utilization of services, claims, payment and reporting functions. This includes medical reviews of all patients *over* the age of 21 in long-term care facilities; and identification, screening, and evaluation of all certified recipients *under* age 21 for need for care.

(c) It contains detailed provider and institutional profiles in formats permitting selective identification of care and treatment patterns that are not within peer tolerance and recommendations; and

(d) It provides capability to a State's Medical Assistance Unit to make judgments relating to the degree rational drug therapy is being provided recipients.

Consequently, States with a fully staffed and properly functioning MMIS should have few adverse Quality Control Findings.

2. *Early and Periodic Screening, Diagnosis and Treatment (EPSDT).*—The MMIS module is designed to permit the State agency to reach out systematically to Medicaid eligibles under 21 years of age and identifies recipients with treatable health problems before they become serious, disabling, or too expensive to handle on a routine basis. To assist Medicaid administration of this effort, a separate MMIS module for EPSDT is being developed which also has the capacity to stand alone. This module supplies information on the population served, expenditures required, as well as a diagnosis and treatment processes. This module is also an important tool in identifying quality of care provided and estimating the need for future care in terms of cost.

3. *Utilization Controls.*—The MMIS, through its Surveillance and Utilization Control, (SUR) Subsystem, does a computerized review of all medical care and services purchased. This permits the State's Medical Assistance Unit to develop and review recipient utilization profiles, provider services profiles, and peer approved exceptions criteria. This consists of a computerized identification of those situations requiring actions by the State Medical Assistance Unit to rectify misutilization practices of recipients, providers, and institutions. The MMIS SUR Subsystem:

(a) Identifies providers and recipients whose activity is not within the peer approved normal range of experience and treatment and automatically produces summary information reports about them.

¹ Bascom Associates 1973.

(b) Covers all categories of medical care and services (physicians, dentists, pharmacies, hospitals, etc.) and all classes of recipients (AFDC, etc.).

(c) Compares patterns of provider practice and recipient utilization. The SUR is an extremely flexible and powerful management tool for State Medicaid administrators. It helps identify patterns of inappropriate care and services. It produces both quantitative and qualitative reports on patterns of medical services purchased by Medicaid.

(d) It shows in substantial detail, actual Medicaid experience including norms, frequency distributions, and comparisons of time periods. This permits systematic and objective surveillance of the program. In addition to identifying situations which depart from the norms, it provides detailed information necessary to establish whether the exceptional situations found can be justified as medically necessary.

The PSRO activity has added a new dimension to the MMIS effectiveness. To illustrate, described below are several of the relationships that have been established to insure quality of care of Medicaid recipients:

(a) For inpatient hospital care where PSRO's must rely heavily on in-house utilization review committee activities, the SUR reports can make a major contribution to successful PSRO actions. They provide a sound statistical basis for establishing State and program specific utilization norms and criteria as well as facilitating comparisons among hospitals. In general, they provide the PSRO with an objective tool with which to measure its effectiveness.

(b) When a PSRO is concerned with other categories of care, SUR reports—with detailed identification of instances of "exceptional" utilization, can be presented to staff for analysis, further investigation, and corrective or remedial actions as necessary.

(c) Should a PSRO prefer to go into a prepayment review, the "Model Treatment" SUR module can be added to the claims processing subsystem. When that is done, post-payment SUR reports can be used to establish norms and measure the effectiveness of the "Model Treatment Plan" approach to utilization review.

C. Identification of Possible Fraud and Abuse

In the areas of possible Fraud and Abuse the MMIS SUR provides the best means of detection when backed up by adequate numbers of personnel in the Medical Assistance Unit.

Assuming that prompt, accurate, and detailed claims processing has taken place, the SUR's primary objective is the organization of this claims data into summary reports on provider and recipient profiles. These reports give the State agency a comprehensive and orderly way of collecting, processing, and examining information, thus generating a very precise audit trail. This guarantees public accountability of the taxpayers' monies by showing exactly who gets what services; when and why they were rendered or received; where and by whom performed; and their cost. Professional medical and technical review of timely data reports by the Medical Assistance Unit of the State agency (and subsequently the Federal Government) permits the exercise of reasonable control over a State's Medicaid program.

When properly utilized, a comprehensive MMIS can assist a State in overcoming serious and costly deficiencies in its administration, operation, and supervision of Medicaid Benefits. The Fraud and Abuse modules of the SUR reporting subsystem of the MMIS gives a State an effective tool to determine whether services were or were not necessary, or even provided. It will also assist in controlling recipient abuse. Careful analysis of the reports data allows the agency staff of the Medical Assistance Unit to initiate contact with providers and recipients for additional data as necessary. The State can establish and maintain methods and criteria for identifying situations in which a question of fraud or abuse may exist. In addition, it can establish a basis for verifying with recipients whether services billed by providers were actually received.

The State Agency Medical Assistance Unit can use the basic SUE reports to make judgments about the quantitative and qualitative adequacy of medical and remedial care and services provided. It can identify instances of error or alleged fraud. It can also assist in the short and long-range planning and evaluation of program effectiveness. Accomplishment of these objectives can be performed with a minimum level of clerical effort and with a maximum level of flexibility with respect to management objectives.

D. *Expediting Legislative Decisions*

One of the most frequent and frustrating problems faced by a Governor's Office is the inability of the Single State Agency for Medicaid to supply accurate and valid information relating to experience and forecasting of Medicaid expenditures to concerned Legislative committees.

Depending on the day of the month, an MMIS Data Base Management Application capability gives a Governor hundreds of combinations of data reports within six to twenty-four hours.

With the ability to get fast accurate information to Legislative Committees, the chances of obtaining favorable consideration by these Committees are increased immeasurably. Considering the size and impact of the Medicaid Program on a State Governor's Office, anything that makes the job easier is a distinct benefit.

E. *Reporting Benefits Due to MMIS*

The annual Federal reporting requirements for Medicaid are unique among social welfare programs. They call for extensive demographic and utilization data to be aggregated and submitted in a format that allows quick and easy accessibility without costly intermediate processing or manipulation. For years, States have struggled with the requirement, usually attempting to produce the data as an afterthought, thus spending considerable time, money, and effort in attempts to unduplicate disorganized files and claims tapes.

The inclusion of one new service in a report will usually trigger whole new computer programs. This has occurred in more than one State where instructions have been misinterpreted and questionable reporting emerges. Sampling is used in large State programs and often States are not aware of sampling errors until long after the data have been collected and compared to known quantities. Often, it is too late to correct deficiencies.

One of MMIS, most tangible benefits is the reporting capability it brings to bear through the Management and Administrative Reporting Subsystems. The system easily provides total universe counts that meet the Federal requirements, and thus the data are not subject to sampling variability and misinterpretation of instructions, because of uniformity of definitions prevail throughout all MMIS programs.

Larger MMIS States such as Michigan and Ohio are able to meet reporting requirements on the universe of recipients, claims and services, as well as smaller MMIS States such as Arkansas and New Mexico. Federal reporting requirements without MMIS have become impossible to meet for some of the larger States such as Massachusetts, Pennsylvania, and New York. As their programs have expanded, their systems have not been able to meet the challenge.

An overall State ability to generate the Federal data in a timely and accurate fashion through MMIS facilitates feedback, so that States will have the capability to make program comparisons with their peers. MMIS reports provide powerful tools for budgeting, forecasting, management, research, legislation and planning. The monthly and quarterly data collected at the Federal level provides input into the Medical component of the CPI and the annual data is used in conjunction with the Medicare program (Title XVII). The Federally required Medicaid reports are being studied as the prototype for National Health Insurance reporting requirements. Therefore, the MMIS Reporting capability becomes more and more important to State Health Departments and HEW as a tool for standardization of National Health Statistical Reports.

F. *Efficient use of State Agency Medical Personnel*

Control of the Medicaid Program depends on effective management. The MMIS provides the mechanical tools by which the Medicaid Program can be managed. But only the tools. It does not include the Medicaid manpower and the skills needed to make maximum use of these tools.

The manpower together with the Medical Care Administration skills must come from the State's Medical Assistance Unit. With an MMIS, a single agency must plan for the review of reports and the taking of action revealed by said reports. In general, this creates a favorable environment for making maximum use of scarce and expensive professional medical manpower.

Summing up

The information presented in this paper is intended to promote understanding of MMIS among non-specialist officials and the public concerned with

strengthening State agency Medicaid management. Consultation and technical assistance in regard to all phases of the MMIS are available from the Office of Information Systems, Social and Rehabilitation Service, Department of Health, Education, and Welfare, 330 C. Street, S.W., Washington, D.C. 20201.

In summary, the list that follows highlights the considerations that were emphasized in designing the MMIS.

Improved service to the eligible needy.

Program accountability.

An optimum degree of automation.

A modular approach to make the system more adaptable and transferable.

Early establishment of control over all transactions.

Provision for furnishing complete audit trails for all transactions.

Flexibility to meet changing requirements and innovations in the delivery of health care services.

Flexibility to meet the needs of States of all sizes, project styles and organizations.

Capability to implement the system within reasonable time limits.

ENCLOSURE II.—STATUS OF CONTRACTS REGULATED BY 45 CFR 250.90

State	Contract amounts	Development contractors
Arizona.....	\$544,747	The Computer Co., FMS Management Services, Inc. (sub.).
Arkansas.....	476,000	Health Applications Systems.
California.....	(1)	Blue Cross/Blue Shield, Electronic Data Systems (sub.).
Georgia.....	407,000	Delphi, Inc.
Hawaii.....	(2)	Blue Cross/Blue Shield.
Indiana.....	987,700	Blue Cross/Blue Shield, Consultec, Inc. (sub.).
Kentucky.....	1,069,800	Consultec, Inc.
Maine.....	111,548	Health Applications Systems.
Maryland.....	299,900	FMS Management Services, Inc.
Michigan.....	251,798	Consultec, Inc., Emory University.
Minnesota.....	475,000	Operations Research, Inc.
Montana.....	\$ 28,250	Dikewood Corp.
New Hampshire.....	509,909	Delphi/Keare Associates.
New Mexico.....	603,000	Dikewood Corp.
Ohio.....	108,113	Emory University,
Utah.....	594,464	Consultec, Inc.
West Virginia.....	389,934	Consultec, Inc.
Washington.....	460,270	FMS Management Services Inc.
Idaho.....	\$ 1,875,000	Electronic Data Systems.
Washington.....	\$ 14,490,000	Do.

¹ No Federal funding under 92-603 being provided since California has declined to issue "Explanation of Benefits."

² System certified. Claim for higher level funding not yet submitted.

³ Per month starting July 1, 1973.

⁴ For 30 mo: Idaho has selected Electronic Data Systems as the Idaho MMIS contractor. SRS has not yet received official notice of this selection or a request for approval by the State. Upon receipt of the recommendation from the Regional Commissioner, SRS will review and evaluate the State's selection and request for approval.

⁵ For 5 yr: Washington will submit an amendment to the Washington/EDS contract for review by SRS.

Systems Developed by State Personnel

State	Estimated cost
Oklahoma.....	\$ 793,500
Louisiana.....	430,350
Michigan *.....	1,200,000
Illinois **.....	1,650,000
Missouri.....	1,230,500
Nebraska.....	1,557,095

*S/UR sub-system developed under contract with Consultec, Inc. for \$251,798.

**S/UR sub-system developed under contract with Consultec, Inc. for \$100,000.

RELATED CONTRACTS

State:	Remarks
New Mexico.....	Has a certified MMIS. Has submitted an APD to redevelop the system. This action has been referred to General Counsel to determine legality of 90% funding for re-write of system.
Texas.....	Has a certified MMIS. Is contemplating a new fiscal agent insuring arrangement with EDS, Inc. Submitted to Regional Office for approval—no decision rendered to date.
Tennessee.....	In process of evaluating RFP for fiscal agent.

45 CFR 249.82 CONTRACTS

State	Contractor	Estimated amount	Term	Date appropriated	Type
Alabama	EDS	\$3,250,000	1 yr (September 1977)	August 1976	Fiscal/agent.
Florida	Paid prescriptions	Adm. \$230,000 mo \$31,000,000	1 yr (June 1977)	June 9, 1976	Prepaid insurance.
North Carolina	HAS	\$200,000,000 estimated	July 1, 1976 to June 30, 1977	Sept. 30, 1976	Fiscal agent.
	EDS	\$28,899,000	1 yr (June 1977)	July 23, 1976	Prepaid.
South Carolina	Blue Cross/Blue Shield	\$1,050,971	3 yr June 1979	June 30, 1976	Fiscal agent.
Mississippi	Blue Cross/Blue Shield	\$2,129,166	Fiscal year 1976, 2 yr	July 1, 1976	Do.
		\$2,227,521	Fiscal year 1977.		
Texas	Blue Cross/Blue Shield			1967 with extensions	Prepaid.
Arkansas	Paid prescriptions (drugs)				Do.

FURTHER TESTIMONY OF HAROLD F. WIENBERG, ASSOCIATE ADMINISTRATOR FOR INFORMATION SYSTEMS, SOCIAL AND REHABILITATION SERVICE, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

I appreciate the opportunity Senator Nunn and the other Members of the Sub-Committee extended to address more explicitly the full circumstances surrounding some of the comments and allegations made earlier today and to present my views of the major points so fundamentally important to effective and proper management of the critical programs for which SRS is responsible.

I shall try to be succinct, however, I seek your indulgence in the event my interest in presenting the full context from which certain specific comments were drawn appears to be lengthy. Certain comments—for whatever reason—were clearly presented out of context and the implications drawn are very misleading. I feel strongly the need for their clarification and, therefore, submit the following information for your consideration.

Regarding A. A. Cubbler—I am appalled at the information disclosed regarding his past activities. My sincere belief and hope is that this is an isolated case and should in no way indict the integrity, honesty, and dedication of the many other SRS employees. Upon reflection there are steps which I can and will take immediately to tighten up the control and accountability of information and the processing procedures by which our records, States' planning data and procurement review steps are handled.

As mentioned in testimony Mr. Cubbler was a walking encyclopedia regarding the field of health care. He was extremely knowledgeable of Medicaid—its interfaces with the programs—as well as the governing Federal/State regulations. In this regard he provided me with information and a viewpoint that I needed—one that was programatically and operationally oriented and not available from others in the Office of Information Systems—to understand the background, clarify the needs and interests of the States and thereby properly assess the likely impact of various actions on the program.

Due to his loquacious nature and capacity for embellishing the facts—discussions frequently consumed greater amounts of time than I would normally allocate.

On occasion he would stop in my office after five o'clock—when most of the other staff promptly depart—to lessen the likelihood of interruption.

At no time, however, during my employment at SRS was he in a position to nor did he advise or influence me in any procurement matter whatsoever.

While testimony attests to his frequent and extensive travel prior to my arrival, by comparison to others Mr. Cubbler's officially approved travel was very limited during the past year. Official trips to Texas did take place at the specific request of Commissioner Raymond W. Vowell. Letters of request and a report of the July trip are submitted as exhibits. [See attachment I.]

Personnel and organization

Upon my arrival in SRS, I found a completely disorganized and demoralized group of Federal employees. I could, in no way, have depended upon the information or issue statements originating within Office of Information Systems (OIS). The employees had essentially divided themselves into a number of differing and quarrelsome groups. Management of employees was virtually nonexistent, and a number of employees had assumed, or had been assigned, leadership roles in contravention of acceptable management and personnel procedures.

Good people, denied either meaningful work or access to the communications systems within the agency, had begun to use their talents and abilities to attack what they viewed as management improprieties and excesses. That this effort was successful to some degree suggests that these employees were accurate in their allegations.

Congressional inquiries had begun, including requests that GAO conduct studies on payments to consultants, and personnel activities.

The Civil Service Commission (CSC) had just completed a study of Personnel practices within SRS that scored the administration of the agency, and in particular the improper practices in the Office of Information Systems.

Personnel authority had been removed from SRS, by CSC, until the agency's personnel system and practices were corrected.

Employees had joined the Union, had filed and won grievances under the Collective Bargaining contract based upon violations of the Civil Service hiring and promotion procedures, and upon reprisal actions against employees.

Each organizational unit was operating independently of the others within OIS, and employees were operating on projects without direction, control, or communication from the Office of the Director.

Employees were demoralized to the point that many employees were actively seeking other employment. The remainder were uncertain as to function, position, or duties.

Those employees who were working were doing so with little direction, and considerable uncertainty about their continuing responsibilities.

Most employees were operating without accurate position descriptions even though they had been employed in OIS for more than 2 years.

The entire agency was undergoing a 100% classification review, ordered by the Civil Service Commission because of these practices, and no one in OIS was certain as to how to properly proceed. As a consequence, many positions were being downgraded, despite the real need for talented, highly qualified expertise requiring "market place" salaries considerably higher than would have been available if extensive downgrading had been accomplished.

The OIS had not achieved a desirable level of credibility within SRS or the Legislative Branch, yet all recognized the need for the Systems leadership we might provide.

Employees had been detailed, without compensation, to higher level positions for as long as two years, but without proper authority or accountability as a consequence of their uncertain tenure status in those positions.

In spite of the primary support roles, the communication and coordination with the SRS Program Bureaus was in disarray and tended to be obstructionistic.

The organization elements of OIS had operated quite autonomously for an extended period and some openly and strongly resented managerial direction and guidance.

In view of this situation, and without belaboring details unnecessarily for the committee, I should like to discuss my thinking and my approach to resolving the problems that faced me with the understanding that there would be no reorganization until the reclassification review was completed:

Interviews were conducted with key staff, including those persons currently holding supervisory and managerial responsibilities, the representatives of Local 41, and employees who seemed to have a solid understanding of the situation. I did this to attempt to discover the reasons for the personnel situation, what had led up to it, and what should be done to resolve this most sensitive area. To me, the employees of an organization such as OIS are its most important resource. If employees are competent, skilled, and dedicated, then management has an effective means of getting the job done. If morale is high, and peripheral considerations (outside the work to be done) are of no great concern to employees, then the task of managing the organization becomes easier, and one can concentrate on the issues of critical importance to the agency. Employees who are secure, in the sense that they know management will provide them with the means and support necessary to do their job, are going to perform more effectively than in any other situation, and they, too, can concentrate on the agency's issues, rather than their own.

Having determined the background of the personnel problems, I then attempted to institute changes in the operation of the agency. I met with SRS Personnel, and worked out a better understanding of OIS Personnel needs with that office. I showed Personnel what functions would be performed, and discussed the needs of the organization in terms of the skill levels and professional qualifications of the employees and supervisors. This resulted in a recasting of the position descriptions for key positions at appropriate grade levels.

Improper details were terminated, but I recommended to Personnel that the maximum possible compensation be retroactively paid to employees who had filled the positions. At the same time, and with the Administrator's concurrence, I began to appoint employees to the supervisory positions for 60 to 120 day details, giving temporary promotions to employees for the term of the detail.

This was done so that, when jobs with promotional opportunity were posted, no employee would have an unfair competitive edge in competing for the positions.

I moved to fill vacancies wherever possible. Some positions at lower grade levels have been filled, but the supervisory and managerial jobs have only

recently been classified (as a result of the 100% position classification requirement) and are still to be posted. I fully expect all of the presently vacant positions to be posted in the very near future.

An "open-door" policy for all employees in the organization was instituted— an employee could bring any work-related problem, from space assignment to pay or promotion, to me, and I would try to resolve it within the agency's rules and guidelines. Many employees have taken me up on this.

Regular meetings were held with the Union, seeking mutually compatible resolutions to the Office's problems, and attempting to resolve complaints before they became grievances. While these continue, the need has been greatly reduced.

Office-wide staff meetings and briefings were initiated to begin opening the communication channels that had previously been nonexistent. Presentations on existing projects are now open to all interested employees to assure that they have the opportunity to find out what is going on.

Functional liaison was established with the program bureaus, to assure that our efforts and planning properly fulfilled the criterion of appropriate and full service to those offices.

Some people were reassigned to positions of equal grade and status, to make better use of their skills and knowledge.

Efforts were begun, and are continuing, to bring together in a good working relationship those groups and individuals who had previously been antagonistic to each other. I have tried, with some success, to break up the "cliques" within the office, and to give to the employees my sense of the mission of the agency, the goals we must all work toward to meet the needs of the poor and helpless, the contribution each can and must make if we are to achieve these goals, and to impress on each member of my staff that they will receive fair and impartial treatment in working for my office.

These efforts are now showing positive returns. It is gratifying to see significant change and marked improvements in the attitudes and morale of all but a few of the employees. The final recruitment of managerial staff will bring the necessary added strength and stability to the organization.

Program management

A project control system was instituted in late 1975 which provides an improved means of program planning, priority setting, progress measurement, and effective resource allocation.

We centralized (from three separate locations reporting to different individuals) the budgeting and expenditure review and control function for better planning and accountability.

A more equitable agency budget allocation has been achieved and a good solid technical program has been initiated. Among the more important new programs underway are:

- A. Design of an automated integrated eligibility system.
- B. System to automate the retrieval process crosschecking of applicable Federal Regulations and State Plans.
- C. Establishment of an Information System Resource Center to facilitate exchange of information with and between States.
- D. Development of a Fraud and Abuse Detection module which can stand alone or be integrated with the MMIS.
- E. Development of a much needed Medicaid Federal Reporting System which can be easily completed with an operating MMIS. (This is being accomplished with the support and assistance of the Medicaid Service Administration—the principal end user.)
- F. Continued development for an EPSDT (Early Periodic Screening Detection and Treatment) information module for MMIS.
- G. A complete review and evaluation of the NCSS (National Center for Social Statistics), its organization and functions, by a multi-disciplinary committee of nationally recognized experts. To insure objectivity in this effort I obtained outside advice and counsel.

Work is underway to strengthen the Information System Support in each of the ten (10) Regional Offices. I must admit to a great deal of OIS staff resistance to the concept of strengthening and augmenting the Regional Information System Staff. There is considerable reluctance to define and delegate functional requirements and tasks for which the Regional Staffs should be responsible.

A more functional organization is planned—one that will reduce the considerable amount of bureaucratic overlap and diffusion of accountability that presently exists.

The operational efficiency can be greatly improved by establishing more specific functional responsibilities and clearer lines of authority within OIS. Now that the position classification process has been completed I have begun work, which will involve Personnel, to best achieve this organizational rearrangement.

MMIS emphasis

Upon assignment to SRS I soon recognized the obvious and vital need for more efficient and effective administration of the Medicaid Program and the fundamentally important role the management information system plays toward achieving that goal. I became concerned with the slow rate of progress toward implementing MMIS upon reviewing the following facts:

1. *October 30, 1972*—Section 235 of Public Law 92-603—authorizing increased FFP to the State for development and implementation of MMIS.
2. *May 20, 1974*—Effective date of 45 CFR 250.90 describing the FFP for mechanized claims processing and information retrieval systems under P.L. 92-603.
3. *June 10, 1974*—Issuance of a Program Regulation Guide—MSA-PRG-31—interpreting 45 CFR 250.90.
4. *May 29, 1975*—The Management Information System in New Mexico was administratively approved for increased FFP (75%) by the SRS Administrator.
5. *Two years and seven months* after enactment of the law the first system—New Mexico—was approved for 75% FFP. In August 1975 there was still only this one State system approved.

I immediately took the following actions:

1. Assigned the MMIS work highest priority in this office.
2. Instituted a central control procedure for assignments and for tracking correspondence and documentation.
3. Directed subordinates to clean up the outdated backlog of approval requests.
4. Tightened control and regularly monitored progress of all related projects.
5. Reallocated resources to concentrate on the MMIS development and implementation program.

As a result of these and continued action during the year there are now—
Eleven States with approved systems.

Nine more States scheduled for approval within the next six months.

Six more States scheduled for approval within the six months thereafter.

Competition

Regarding competitive procurement practices I would like to make it clear that although somewhat new to DHEW and the civilian side of Federal Service, I have previously spent many years as a regular Air Force Officer managing major research and development programs and systems. Subsequent to that my approximately 13 years of industrial experience prior to returning to the Federal Service, involved continual contracting under the Armed Services Procurement Regulations. This background and continued work under these well defined rules and regulations have trained me well in the practices, intent, advantages and respect for the competitive process.

Competitive procurement procedures within the Federal Government—as in any large organization—are directed toward obtaining the most effective services and equipment to fulfill a specific need at the lowest possible cost. State's procurements for services and equipment under Section 235 of Public Law 92-603 are to provide effective information systems and hardware for more efficient management and control of the Medicaid Program. This enhanced management capability should result in "more efficient, economical, and effective administration of the program."

I have consistently insisted on the competitive process within my office, and in dealings the States have with the private sector where FFP is involved. The requirement for such competitive procurement practice being followed is specifically expressed as a condition for FFP in 45 CFR 250.90.

The significant steps in the procurement process leading to contract approval are reviewed first at the Regional Office and then forwarded to OIS with recommendations. In the OIS, principal responsibility for review of MMIS pro-

posals resides in the Office of State Systems Operations for procedural review and in the Division of Medicaid Systems, Office of Program Systems Development, for technical and operational integrity of the system or hardware being procured.

I have been stressing, and intend to place even greater emphasis and attention on, our assessment of the evaluation criteria proposed by the States—their qualification specifics—relative to the requirements of the State and the problem to be solved—as well as the method of quantifying, and the value placed on, each of the evaluation elements. Proper application of skill at this point should lessen the extent of subjectivity of most present evaluations.

One of my interests in this area of competition is to expand the industrial base from which we and the States solicit potential bidders. My experience in the Information Systems business activities of DOD and NASA suggests that we are working with only a very very small segment of the industry here at HEW. There is a very large body of exceptionally well-qualified large and small systems design, software, and peripheral hardware contractors that have not yet been alerted to our problems.

This talent and experience should be tapped and given an opportunity to address our many problems. My concern, expressed repeatedly to my staff, is that we are limiting ourselves to only a very small sample of the national reservoir of talent that is available, by placing too high a value on "Medicaid experience". Under such a criteria the first contractor "in"—good or bad—get stronger; and the later entrants find it increasingly more difficult to qualify.

FFP approvals for systems, services and hardware under Section 1903 (a) (3) of the Social Security Act, as regulated through 45 CFR 250.90, are my responsibility as the Associate Administrator for Information Systems. The Washington State program fits into this category.

FFP approvals for contracts with fiscal agents or prepaid insurance plans based on Section 1902(a) (4) of the Act and regulated through 45 CFR 249.82, are the responsibility of the various Regional Offices as delegated by the Administrator of SRS. The Texas program for which BDS (Electronic Data Systems) was selected fits into this category.

I have insisted upon upholding the principle of contracting with the lowest bidder from the field of fully qualified—fully responsive bidders based upon the overall evaluation of the reviewing committee for contracts authorized under 45 CFR 250.90.

A recognition of high levels of competency in meeting the requirements of the RFP's scope of work is reflected in the weighting given by the States of the technical proposal, management approach, company experience and performance, and the combined assessment of the companies' relative likelihood of meeting all of the States expressed needs. Price is frequently given a value of something less than one-half (50%) of the total possible evaluation score—in Washington, for example, the State valued the cost proposed at 30% of the total possible evaluation score. I find it difficult to oppose this logic, since on frequent occasions the low bidder has also been rated the least able to do the job successfully as bid. (With schedule slippages and cost overruns the low bid alone may be more costly to the Federal/State Government.

For example, among others, the Georgia contract with Delphi, referred to in earlier testimony is a case in point. The contract had major changes after the "award to the lowest bidder"—still the modified contract schedule for implementation has slipped by an additional 4-5 months and the contractor has incurred a cost overrun approximately 35-40% of the adjusted bid price.

This was precisely the case in Washington, where the State determined that the lowest bidder of the two finalists in their judgment would be unable to meet the required schedule dates. This schedule had been imposed by the State on the realistic basis of major savings in program costs, and the need to have the system operational well in advance of the meeting of the State Legislature in early 1977. Considering those constraints, it appeared that the State agency had made a defensible selection. This was the expressed recommendation of (1) the Regional Commissioner who had his Regional representative participate in all of the evaluation proceedings, and (2) each of the two National Bureau of Standards technical consultants who had arrived at their separate recommendations independent of one another. Pertinent letters and documents are submitted for the record. [See attachment 2.]

The Texas situation referred to in testimony was somewhat different. A brief statement on the structure of the Texas system is probably in order, since the issue of "fragmentation" did come up relative to the State.

The Texas Department of Public Welfare is the single State agency which administers the Title XIX Medicaid program. As in other States, the administration of the program reflects the special needs and requirements specific to that State.

The Texas operation of the Medicaid System is divided into two separate, non-duplicative functions. The State itself operates one portion, and GHSI, Inc. (commonly referred to as Blue Cross/Blue Shield of Dallas) operates another portion of the System. The two combine to make up the total State Medicaid program. In FY-1976, program expenditures for Medicaid were approximately \$600 million. The State administered system managed about \$400 million of this, while the remainder was contracted under a Health Insurance Agreement to GHSI. This firm provides payment for physician, hospital and certain other auxiliary services.

The request for approval of the Texas mechanized system under 250.90 covers only the State operated portion—about 2/3 of the operational cost, and excludes the GHSI operation—about 1/3 of the total cost of the State program.

I might point out that to the best of my knowledge nowhere in the law or the regulation does the word "fragmentation" appear. There is no specific bar to approving what I would prefer to call separable functional processes as single operational entities within the law. I'm not even really sure what "fragmentation" means. If a State submits a plan to provide more efficient management accountability and is performing effectively for significantly large specific medical program services, then in my discretionary judgment the potential for approving such a system for increased FFP under 45 CFR 250.90 is within the intent of Congress and the spirit of the law.

The law and regulations

The statements regarding "bending" or "circumventing" the law or regulations are an unfortunate misinterpretation of words which frankly I don't quite understand.

No one has ever suggested to me (before this morning's testimony) that my interest in aggressively exploring all available possibilities to determine whether and how it might be possible to fulfill some obvious program needs and to plug some of the existing holes in the system for better overall management control was interpreted by anyone as a wish to violate or avoid the provisions of any law or the will of Congress. One would believe that anything so serious and so debilitating to the organization would have somehow been brought to my attention in the intervening six-month period since the April 5 date on the "research report" by Mr. Copeland Reihl which I attach for your review. I consider the attached "report" [See attachment 3] hardly befitting the importance of the subject matter—particularly since it references only the section of the law which refers to the State Plan requirements for the Medicaid Program, and only impact on the MMIS as a program consideration.

In the testimony under discussion my concern was with our regulations, or rather, our *interpretation* (in fact) of Section 235 of PL 92-603. This section—which became Section 1903(a)(3) of the Social Security Act—has as the key operating clause that 90/10 funding is available for *the design, development, or installation of such mechanized claims processing or information retrieval systems as the Secretary determines are likely to provide more efficient, economical, and effective administration of the plan . . .*, and goes on to provide 75/25 funding for the operation of such systems.

To me the Congressional intent is clear that efforts should be directed toward those systems that will provide the range of information necessary to establish entitlement to services, accurately process the claims arising from the provision of services, and provide the information to effectively monitor and control the expenditures that arise from the provision of such medical services.

The regulation cited deals only with the ADP functions for claims processing, monitoring and control and *assumes* that a properly functioning eligibility system is in operation. The currently known error rates in eligibility determination tell us very clearly that the present operating eligibility process is woefully inadequate and is costing the government billions of dollars annually. No provision exists in the current regulation or guide to establish a proper eligibility system and yet my understanding of the law is that it might well allow for such a "front end" development "to provide more efficient, economical and effective administration of the plan . . ." With this in mind, I asked my staff to review the law and the regulations to apprise me of the potential for pro-

posed rule changes to allow the expansion of the 90/10 funding to include the eligibility process consistent with the need for better management control.

In conclusion it is disturbing to me that, in the absence of clear qualifying interpretative statements of Congressional intent, a few staff members within the agency should presume that their personal, narrow interpretation of the law and regulation in the form of a detailed program guide should for all time prevail without question and should forever take on the cloak of the law.

Particularly since in this instance the interpretation was based principally upon the limited perspective of individuals with somewhat similar experience—biased to computer center and programming operations—exclusive of the broader systems design, development, test, implementation, and management backgrounds which are so fundamental to the program.

This position, almost defying change, is further perplexing since the guide itself, dated May 20, 1974, specifies that—and I paraphrase—SRS has determined that the MMIS General System Design (6 volumes of specifications covering about two linear feet and dating back to late 1970—early 1971) satisfies the requirement of the law and will be used as its standard for evaluation—while at the same time recognizing the limiting nature of the GSD and I quote:

"At this writing there are known to be requirements in addition to or superseding those contained in the version of the MMIS-GSD now on file with the NTIS. These requirements which are listed by subsystem below and *other future requirements will be added* to the NTIS MMIS documentation through updates to that documentation."

A letter from Mr. Charles Sylvester is submitted for further understanding of this attitudinal problem. [See attachment 4.]

[Attachment 1]

STATE DEPARTMENT OF PUBLIC WELFARE,
Austin, Tex., April 23, 1976.

MR. HAROLD F. WIENBERG,
Associate Administrator for Information Systems, Social and Rehabilitation Service, Department of Health, Education, and Welfare, Washington, D.C.

DEAR BUD: As a follow-up to some recent conversations that we have had, Commissioner Vowell, Dr. Gates, and I are requesting technical assistance from Mr. Charlie Cubbler of your immediate staff. We believe that he is the most qualified individual to provide us with this assistance. If you find this agreeable with you, Mr. Cubbler and I can work out the exact details.

I would appreciate your advising the Regional Office in Dallas so that his visit can be coordinated with them.

Thank you for your assistance.

Sincerely,

ROBERT NAKAMOTO,
Deputy Commissioner, Office of Planning and Management Systems.

STATE DEPARTMENT OF PUBLIC WELFARE,
Austin, Tex., May 7, 1976.

MR. HAROLD F. WIENBERG,
Associate Administrator for Information Systems, Social and Rehabilitation Service, Department of Health, Education, and Welfare, Washington, D.C.

DEAR BUD: This is an expression of appreciation in behalf of Commissioner Vowell, Dr. Gates, Deputy Commissioner for Medical Programs, DPW staff, and myself for your making available to us Mr. Charlie Cubbler, who provided us with technical assistance on Title XIX administration.

More specifically, Charlie looked at some aspects of Federal matching requirements and a consultant's report concerning administration of certain elements of Title XIX. If necessary, I am sure he will provide you with a more detailed report of his visit here.

Please pass on to Charlie our appreciation, and I would also like to commend you on your quick response to our request.

Hope to see you again sometime in the future.

Sincerely,

ROBERT NAKAMOTO,
Deputy Commissioner, Office of Planning and Management Systems.

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STATE DEPARTMENT OF PUBLIC WELFARE,
Austin, Tex., September 7, 1976.

Mr. HAROLD F. WIENBERG,
Associate Administrator for Information Systems, Social and Rehabilitation
Service, Department of Health, Education, and Welfare, Washington, D.C.

DEAR Mr. WIENBERG: In reference to my earlier letter forwarded to Mr. Clarke, dated June 30, 1976, I am requesting further services of Mr. Charles A. Cubbler of your office to review and comment on the proposed contract for purchased health services for a portion of Title XIX.

Specifically, we will request his preliminary review on the general applicability of Federal laws and regulations consistent with the responsibility of concerned parties and the allocations of public funds.

I appreciate your continuing technical assistance to this agency.

Yours truly,

RAYMOND W. VOWELL.

STATE DEPARTMENT OF PUBLIC WELFARE,
Austin, Tex., June 30, 1976.

Mr. STUART H. CLARKE,
Regional Director,
Department of Health, Education, and Welfare,
Dallas, Tex.

DEAR Mr. CLARKE: The Texas Department of Public Welfare would appreciate your good offer in requesting the Administrator of the Social and Rehabilitation Service to make available to us the assistance of Mr. Charles A. Cubbler of the Office of Information Systems, SRS, Washington, D.C. to review our plans, specifications, and funding arrangements for the Texas Medicaid Program.

Specifically, we have need for Mr. Cubbler's technical expertise in the information management and contract specification activities over the next few weeks in concert with his professional knowledge and experience of medical care administration. Mr. Cubbler's services are particularly advantageous to us because of his practical experience in State/Federal functions gained while he was Commissioner for Medical Programs for the State of Pennsylvania and his current assignment with DHEW.

The State is at critical stages in reviewing several aspects of the Title XIX Program. It is my sincere belief that Mr. Cubbler can provide the kind of technical assistance which will be of mutual benefits to both Federal and State governments.

I appreciate your continuing cooperation and support in providing assistance to this agency.

Yours truly,

RAYMOND W. VOWELL.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL AND REHABILITATION SERVICE,
October 28, 1975.

Memorandum to: Mr. Harold F. Wienberg, Associate Administrator, Information Systems.

From: Mr. Charles A. Cubbler.

Subject: Trip Report to Denver Colorado.

OSD/HEW Health Plans Relationships

On October 20, 1975, at the request of J. J. Delaney II of the Office of the Assistant Secretary of Defense for Health and Environmental Services I attended the Denver bidders conference on the proposed plans for regionalization of the CHAMPUS program to provide technical assistance in answering questions relating to MMIS.

O/CHAMPUS plans to reduce substantially the number of contracts it has currently with various fiscal intermediaries to a maximum of three primary MMIS type contracts. This meeting was for the purpose of securing proposals for the first contract—which includes a five-state region (California, New Mexico, Arizona, Nevada, and Texas). This area accounts for 30% to 40% of the CHAMPUS workload.

After all three regional primary contracts are operational, subsequent renewals will be on a *competitive* basis considering the mix of:

- (1) Unit *price* in terms of claims,
- (2) *Price* in terms of cost effective medical care management procedures,
- (3) *Price* in terms of program expenditures, and,
- (4) Effectiveness in terms of a) quality, b) quantity of care provided, and
- c) promptness with which providers are paid after their initial billings are received by the contractor,
- (5) Patient satisfaction with services received evaluated through the EOMB process.

Of major interest to the Department of Health, Education and Welfare is the coordination of claims process with Medicaid. It should be noted that thousands of enlisted personnel are also eligible for welfare when the father is absent, overseas, etc. These families can, and do, receive partial cash payments under AFDC. The AFDC eligibility card generally makes them eligible for Medicaid services.

On seeking medical care, and should the dependent not have the co-payment cash required by the CHAMPUS card, it is only natural for the dependent and the provider to select the Medicaid authorization because it requires no co-payment. I know of nothing in SRS procedures or the CHAMPUS operations manual to prevent an unscrupulous provider or facility from double billing because of the lack of cross-over procedures.

Another claims coordination problem is the transfer of benefit payment responsibility from CHAMPUS to Medicare for the over sixty-fives. These and many other mutual problems will be addressed by the forthcoming regional contract.

However, the one most important problem and one of massive proportions is *not* addressed in the proposed MIS contract. When phase II, III, etc. of price control was allowed to die strangling in the breeze, many providers anticipated some form of National Health Insurance. As a safety measure many boosted their prices causing a very large bubble in the medical care price index. This bubble (as the technicians predicted in 1973) although well hidden, is now 35% to 50%.

Medicaid and Medicare have been held to the FY71 cost data base—thereby holding the line of excessive program increases. FEP has not. FEP went to the 74 data base without any utilization controls on it and now claims it needs from 35 to 50% increase in premiums.

CHAMPUS, however, is also in the process of notifying all intermediaries to use the Medicare payment system *with the 74 cost data base!*

This action alone, I estimated for O/CHAMPUS, will boost CHAMPUS's program expenditures by an additional 105 million dollars in calendar year 76. It will further reinforce the imprudent FEP action and will in turn bring added pressure on BHI and Medicaid to move to the inflated 74 data base.

This action can, and will, if not blocked, result in an annual increase of \$10 billion to the total expenditures of the two HEW programs.

CHARLES A. CUBBLER.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL AND REHABILITATION SERVICE.

July 12, 1976.

Memorandum to: Associate Administrator Information Systems.

From: C. A. Cubbler.

Subject: Trip Report—Texas.

Place: Austin, Texas

Dates: July 5, 6, 7, 1976

Background: On July 1, 1976 Mr. Charles Sylvester of OIS instructed me to prepare orders to travel to Texas with a minimum of delay. He indicated he had received a telephonic request from the Office of the HEW Region VI Director, Stuart Clarke. He had authorized my proceeding to Austin, Texas to provide technical assistance and professional consultation to the Commissioner, Raymond W. Vowell, of the Texas Department of Public Welfare.

At that time I indicated verbally that I felt it was not appropriate for me, a member of the SRS/OIS Staff, to provide technical assistance to the State agency because the State was still in the process of considering offerings for the underwriting of its "Purchased Health Care Services".

I was assured, however, I would *not* become privy to, nor involved in, the detailed information in said offerings to the RFP or the evaluation of specific details. The technical assistance and professional consultation I was to provide was related to a separate problem which had been set forth in a letter from Commissioner Vowell to Regional Director Clarke (See attached letter.) My travel and assignment was then cleared with Mr. Floyd Brandon, the SRS Regional Commissioner. He also approved it.

I arrived in Austin July 5, 1976 and on July 6 I was assigned a place to work in Commissioner Vowell's conference room. Most of my work involved reviewing the State's total plans for its Medicaid Program and its ADP support to identify, clarify, and quantify the various options the State Agency should consider in the event the State's Board of Public Welfare¹ elected *not* to accept any of the proposals offered in response to the Department's RFP for underwriting purchased health care services. This involved identifying the types of hard data and specifications needed for both short and long range planning, programming, and utilization of services. It included clarifying and estimating the funding and personnel impact on the various organizational elements of the Department of Public Welfare.

This technical assistance also included providing professional advice on the various problems of medical care administration generated by the various options as well as the hostility that certain public administration solutions might generate with various provider groups of the medical community.

On Thursday morning, July 8, 1976 I gave my considered opinions to the Commissioner and three of his Deputy Commissioners verbally as no written opinion was requested or needed. I departed the Commissioner's office to the Airport at 3:00 p.m. to catch my plane back to Washington, D.C.

Discussion of Impressions

Attached, as a separate document, is a discussion and comment on impressions related to the Texas Medical Program. It provides staff with a broader view on the MMIS/Medicaid effectiveness problem, than a short report on just this visit. I put it together to give readers a better understanding of the needs of the State for technical assistance in planning for data processing from the perspective of professional medical care administration. I have also added the additional dimension of the kinds of problems that can be generated for a State Agency as a unit, when the two disciplines are impacted by the political realities of State Government.

Discussion of Impressions—Texas²

Situation

The historical record indicates the Texas Department of Public Welfare has long been the Country's most successful laboratory in applying and testing techniques of medical care administration in its Medicaid Program.

For more than a dozen years the Texas Welfare Agency has been a National showcase as one of the few, (if not the only) Medicaid Agencies in the nation making a serious, sustained, and successful effort to control the cost, quantity, and quality of the public medical care provided under its Welfare Program. It is to its great credit that this success has been accomplished with good judgement and scrupulous fairness to the best interests of both the taxpayer and the welfare patient.

Unlike other States, from the very beginning, Medical personnel of the Texas Welfare Agency's Medical Assistance Unit understood conceptually the basic principles of management and control essential to effective Medical Care Administration. Early on, they estimated the program's various types of long term care benefits possessed the greatest potential for cost overruns.

With the full support of an enlightened Welfare Commissioner, they designed a Medicaid program that included the right balance and types of controls needed for each type of program benefit. They understood it would take State directed utilization controls and medical reviews of the care each patient was receiving to insure the taxpayer money provided the best possible care—considering the inherent State funding restrictions of Medicaid.

They had learned much from the previous five year experience with the Texas Kerr-Mills Insurance program. They had learned that detailed and extensive

¹ The State Board of Public Welfare in Texas is an independent supervising Board appointed by the Governor.

² Attachment to trip report of July 12, 1976. CAC.

analyses of the drugs prescribed for recipients gave extensive diagnostic and treatment intelligence in the care and utilization patterns of providers and recipients in nearly every benefit the program offered. Therefore, the State elected to retain direct control over long term care and pharmaceutical benefits.

The State initiated a series of long-range developments in data processing and utilization reviews to provide the management information needed to control the program. The report requirements, coming as they did, from professionally and technically trained medical personnel e.g., doctors, pharmacists, hospital and nursing home administrators, nurses, and medical care administrators, etc.—required no data to be collected that was not multi-purposed.

The rest of the benefits were incorporated into a basic nonprofit insurance program with GHSI computed on the basis of experience rating the various categorical recipient groups.

Using Karen Davis' method for computing trends in Medicaid Expenditures (See Table #1, p.124 "Inquiry/Vol. XIII, June, 1976) the Texas Agency would appear to have accomplished a near miracle in controlling its Medicaid program since 1966. Miss Davis is a Senior Fellow at Brookings Institution.

The "fruits" of success

The Texas Medicaid's very success, however, has brought attacks on it from fuzzy minded social reformers and narrowminded auditors who have had little or no understanding of the basic mechanics of balancing the control of such a program. It has also from time to time been attacked by vested interests of the Hospital Association, several influential members of Blue Cross and Blue Shield Boards, several State Legislators, and has been subjected to an inordinate amount of investigation and harassment by various Federal agencies seeking to indirectly impose a public health type of control versus a public welfare control over the State's Medicaid Program.

Even within the State Agency there have been repeated efforts by the social service elements to limit the program's effective control mechanisms by attempting to reduce the flexibility and authority of the State's Medical Assistance Unit.

However, no one should be surprised at such actions. The program has been novative and solidly successful. This type of accomplishment is something bureaucrats and legislative staffs (State and/or Federal alike) have a difficult time accepting as authentic and valid. Most individuals do not understand what kinds of "balanced controls" it takes to manage a public medical care program successful. And what they do not understand they fear, and thus must harass.

In my opinion less than 10% of the known techniques in medical care administration, public administration, and electronic data processing are currently being synthesized and utilized in general in the State and Federal governments to control Medicaid and Medicare. In the case of the Texas program, however, the Agency is using nearly 35% of the known procedures.

Many State officials and staff, in fact 98% of them, attempt to limit Medicaid costs without making a careful analysis of the short and long term effects of their actions. It is axiomatic that any type of impact on one or more benefits of Medicaid has a positive or negative effect on *all* other benefits. Some individuals have attempted to control program costs by increasing eligibility requirements, reducing scope of benefits, cutting back on reimbursement levels to providers and institutions, etc. Experience resulting from such actions shows that all have failed, when used without being balanced by constructive middle-of-the-road actions.

For example, let us look at alternatives to long term care. To find acceptable alternatives to the increase in the numbers of skilled nursing home and intermediate care patients in recent years, the Texas Agency conducted a highly successful controlled study of the relative cost, quality, and effectiveness of alternative home health care programs.

The Texas data is extensive. It indicates conclusively that patients in two areas containing 8 to 10 counties could benefit materially from home health care. The study proved conclusively recipients as sick and sicker than their counterparts in institutions could be treated as well as better for 35% of the cost per extended period of need offered in SNFs and IOFs.

HDW was so impressed with the study it asked Philip A. Gates, MD, the program's director, to come to Washington and present the State's data. During his presentation two staff members of a congressional committee, upon learning he was presenting a successful State experience (instead of a witch-hunt on some provider or agency staff) became so abusive in their comments he was forced to leave without completing his presentation. This illustrates a typical

reaction from a staff that had its own hidden agenda—one that would not tolerate any facts to the contrary.

They had never heard of Dr. Gates. They knew nothing, and wanted to know less. And as a result of their rude techniques, they gave up an opportunity to find out how to reduce costs up to 60% in a major segment of the Medicaid and Medicare programs without reducing the quality and quantity of care provided.

Another example. For a number of years some of us (Dr. Gates and myself, etc.) have known the California RVS mechanism for paying for physician services was little more than an elaborate price-fixing method that vests control in various State Medical Speciality groups. The method boosts the total costs of MD services from anywhere from 25% to 50%, depending on the mix of services. We have been closely observing the F.T.C.'s review of consumer costs of the nation's health industry, and Texas has held off any use of the RVS in computing charges in Medicaid. As of last week, the F.T.C. ruled against the use of the RVS thus confirming another Texas action that paid off for the taxpayer.

I could go on and give a dozen other illustrations of good, solid, innovative medical care administration procedures initiated by this State Agency that saved the taxpayer's money while providing quality care to welfare recipients—and will do so on request, but I want to get to the current ADP and RFP, around which I provided consultation.

Current solutions to agency problems

As I indicated earlier, Texas has always been one of the few States that has made an honest and concerted effort to provide recipients with an effective medical program. In 1966, unlike most States, it anticipated accurately the future high cost of Medicaid. It has also understood thoroughly from the onset of the current program, and its 1962 Kerr-Mills predecessor, just how to insure itself against providers or recipients taking unfair advantage of the program. The Agency even comprehended thoroughly the little understood eligibility limitations in Section 1903(e) but this is a whole study in itself.

In the last year, however, the State Agency has attempted to react to some of the unfounded public criticism of its insured services operation by a few rabble rousers as well as several Federal auditors unfamiliar with the basic principals of non-profit health insurance. It has also attempted to react to legislative attacks as if they were valid criticism rather than political rhetoric. In fact, in my opinion, the State Agency appears to have over-reacted, somewhat.

Regardless of the reasons, however, the Agency has attempted to counter the sniping and criticism from vested interests by setting up and installing a NASA contractual process known as the "competitively negotiated procurement". This process was originally designed for NASA by the Advanced Research Projects Agency of the Office of the Secretary of Defense. This is a good process and one I would also recommend. However, to obtain maximum effectiveness, it must be supported adequately by appropriate technical and program advisory panels.

In NASA, the technical advisory panels to evaluation committees for the most part also represent the "program" because that is the nature of the NASA organization. In a public welfare (or a public health) organization however, the Medicaid "program" is not the basic organization. Therefore, the Medicaid program should be represented by a "medical care administration panel" consisting of medical care personnel from the Medical Assistance Unit i.e. MDs, Hospital and NH Administrators, Pharmacists, Mental Health, Mental Retardation Specialists, Nurses, etc. representing provider relations staff, UC/UR staff, and Medicaid program planning and evaluation, etc.

Because of absence due to illness of key medical personnel, this function of the process appears to have been overlooked to a certain degree causing a minor (15%) but significant imbalance in the Medicaid program control elements under consideration. In addition, review and comment on the ADP and RFP by appropriate HEW/SRS organizational elements appears to have been faulty. I have been told that on October 24, 1975 the Advance Planning Document (APD) was forwarded to the Regional Office for Central Office review, comment, and/or approval. On May 18 it was returned. On February 2, 1976 the Request For Proposal and model contract was also forwarded to the Regional Office for Central Office review, comment, and/or approval. On May 13 and 14, 1976 it was returned.

It is to Commissioner Raymond W. Vowell's credit that he sensed a lack of continuity and possible imbalance in the Medicaid's program controls being considered by his Agency staff. He appears to have been concerned by the lack of balanced input from the provider relations and the Medicaid program operations sectors, particularly as they interfaced with the proposed health insurance contractor's obligations and the Agency's data processing capability in current and future situations. I suppose he also sensed the guidance from the APD and RFP reviews was also a little thinner than usual. At any rate, whatever his reasons, he insisted on receiving technical assistance and professional consultation from the SRS/OIS Systems Planning and Evaluation Specialist. The assistance covered the Agency's long and short range plans affecting the Texas Medicaid program. (See attached letter Vowell to Clarke—June, 1976)

Conclusion

The Commissioner's oversight and insight proved to be correct. As stipulated in the basic report to which this discussion is appended, a verbal analysis of the Agency's plans was provided as requested.

It reflects great credit on Commissioner Vowell that despite heavy pressures from various powerful and potent vested interest groups he has successfully synthesized a good working relationship between Dr. Gates, Director of the Agency's Medical Assistance Unit, Mr. Nakamoto of the Agency's Data Information Systems and Departmental Communications, Mr. Hjornevik the Agency's Director of Financial Management and Administration, and the various elements of the State's medical and political communities.

We all know that an uncontrolled State Medicaid Program can be a real Frankenstein Monster to State taxpayers as has been demonstrated so well in many fragmented State programs. We have also seen how uncontrolled Electronic Data Processing procurement can also be a Frankenstein Monster capable of equal strength.

Only by using the "ADP monster" to neutralize the "Medicaid monster" can a State avoid being dominated by either. Only by using ADP intelligently within the framework of Medical Care Administration to control Medicaid, can a predictable balance be achieved.

C. A. CUBBLER.

[Attachment 2]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
March 29, 1976.

MR. WILLIAM CLEAVER,
Office of Program Systems Development.

MR. JAMES TRAINOR,
Office of State Systems Operations.

Thank you for your candid views regarding the Washington State MMIS Contractor selection.

I have weighed them carefully in arriving at my final decision to endorse Commissioner McGavick's recommendation to approve the State's selection of EDS.

Although I did not participate in *all* of our internal discussions of this matter (I assume that your reports to me of the discussions I missed were complete and accurate), I have spent considerable time in studying and assessing *all* of the written material available to the group, and have participated in all of the detailed discussions held with the State representatives—covering the extensive questions and explanations of the process followed and the facts resulting in their decision.

Everything on balance and keeping in mind that this was a final evaluation of the two lowest bidders out of a total of eight, and that not having been associated with either contractor in the past I perhaps can be even more objective, I:

1. find no reason to question their first hand unanimous technical and programmatic appraisals resulting from the extensive and rigorous evaluation they have had with the two finalists for well over a month of comprehensive in depth discussions, briefings, facility visits, and meetings and talks with project personnel. I feel that to question the group assessment of such an activity—while sitting 3,000 miles away and not having participated at any step of the way is quite out of the question.

2. Find that they admittedly did adjust the point scoring method to arrive at a more comprehensive comparison of the two low bidders. While

I too questioned this at first I believe their explanation is entirely rational and in fact shows good judgment, since I now understand that this was a refining process to better define those elements to be considered under the more general evaluation headings. I find no reasons, therefore, to question further their explanation of their overall point assignments and consider the process followed to be in full and complete compliance with the intent of the procurement standards established in 45 CFR Part 74.

3. Can find no basis upon which to question their "firm belief that the selection of Blue Cross/Delphi would result in a 6 to 12 month slippage," or to question their clear detailed analysis of the dramatic cost impact of this slippage in program benefit dollars and the many related difficulties this would additionally pass to the State. This very adequately answers the question of the "cost" of the contract price differences between the two vendors.

4. Believe the Washington personnel involved in this evaluation have displayed the ability to objectively temper a rigorous and difficult process with reason and good judgment, and in so doing have selected the vendor who will do the most good for the State Medicaid program at an acceptable cost.

I feel certain that I can count on your providing continued assistance to Washington in implementing this desired program and that by so doing we will insure that yet another State has the capability of properly and efficiently administering the Medicaid Program.

HAROLD F. WIENBERG.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL AND REHABILITATION SERVICE,
March 18, 1976.

Memorandum to: Harold F. Wienberg, Associate Administrator, Information Systems.

From: Director, Office of State Systems Operations.

Subject: Approval of Washington MMIS Contractor Selection.

In your staff meeting on August 26, 1975 you directed that AAIS staff should not concur on correspondence unless "the item is correct and you agree with it." In consonance with that direction I wish to inform you that I do not concur with your decision to approve the State of Washington's selection of EDS.

I do not concur primarily because I do not believe the State has justified the selection of a proposal which is \$4 million higher than a competing proposal which the State has indicated is technically acceptable.

I have additional concerns regarding the way in which the selection process was conducted. The initial evaluation in a rating which placed the Blue Cross/Delphi proposal first. After this evaluation a "risk" factor was included in the evaluation and 12 points for this element were awarded to EDS; none to Blue Cross/Delphi.

In addition the procedure was changed from rating bidders on a scale of 100 to splitting the points between the finalists for each category. This procedure had the effect of minimizing the price differential between the two finalists and maximizing the newly injected risk factor to the benefit of EDS.

In view of the foregoing I do not believe that the selection of EDS complies with the letter or intent of the procurement standards established in 45 CFR Part 74.

I further believe that approval of the selection of EDS will seriously undermine SRS's ability to insure that the competitive requirements of 45 CFR Part 74 are followed by other State and local agencies in the future.

JAMES J. TRAINOR.
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL AND REHABILITATION SERVICE,
March 19, 1976.

Memorandum to: Mr. Harold F. Wienberg, Associate Administrator for Information Systems.

From: Acting Director, Office of Program Systems Development.

Subject: Washington State Nonconcurrency.

I have reviewed and indicated my nonconcurrency on the file copy of the proposed response to Mr. Charles Morris on their contractor selection for MMIS. I do this with some reluctance, since I was involved in the analysis

of that procurement at your personal request. I have to believe that you assigned me because you wanted my views, whatever they ultimately were.

The letter as written adequately describes the basic rationale for approving the selection of EDS, which is Washington's judgment call on the ability of one contractor versus the other to deliver a system on time and the various impacts that a delay would have. I don't question that Washington reached that conclusion during and after the final selection process, or that delays would have the results they claim. I also appreciate the necessity of dealing pragmatically with the MMIS situation that exists *today* in Washington, as opposed to the situation that existed when the finalist was first selected. The February 25, 1976 paper from Washington clearly indicates that the EDS system is operating today in Washington. So there is really no question of whether or not to install the system; no such thing as asking them to negotiate a better price; and no such thing as getting delay penalties into the contract. There is an implication in the letter than we might require some changes in the "proposed contract" before FFP would be approved. Since they are well into system installation, these are essentially non-options for AAIS.

I was one of nine computer analysts who reviewed the two finalists' proposals and the evaluation process used in Washington. My objection to this procurement is that from the documents available for review, through iterative evaluations Washington completely reversed itself as to the winning vendor and then adjusted its evaluation scoring to support this reversal. It appears that some mandatory factors in the RFP were eventually ignored in the evaluations, and that many optional features of the selected system were given heavier weight as the evaluations proceeded. Also, the alternate proposal by EDS was emphasized in the final considerations without giving the other vendors a chance to compete on such a system configuration. It will not be known until the contract is in hand which EDS alternative is being implemented now in Washington. Without further belaboring the details, my objection is to the *selection process* used in Washington, not to the name of either of the two finalists. I would not wish to have to defend this agency in approving this procurement, which a concurrence would imply that I could. Of the nine analysts, I know of none who has supported the *selection process* as it was conducted in Washington. We have established precedent cases in AAIS where pro forma non-compliance issues were excused and FFP granted retroactively if the procurement itself was acceptable and the product was delivered as contracted. In this case, procedural requirements were met, but the procurement itself appears to me to be unsupportable, insofar as I understand 45 CFR Part 74 and procurement procedures. On that basis, I have nonconcurred in the attached proposed response from you to Mr. Morris.

WILLIAM E. CLEAVER.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL AND REHABILITATION SERVICE,
January 30, 1976.

Memorandum to: Mr. Don I. Wortman, Acting Administrator, SRS, Mr. John D. Young, Comptroller, OS.

From: Associate Administrator for Information Systems.

Subject: Status Report on Washington State MMIS Facility Manager Selection.

In response to my December 23, 1975 memorandum and invitation, a meeting was held on January 30 with representatives of Washington State to further discuss their MMIS Facility Manager selection. The list of participants is attached.

After a thorough review and evaluation of the two final competing proposals and all of the accompanying documentation that Washington had submitted, we had concluded (in December) that there were at best only small differences in the technical viability of the proposed systems and the capabilities of the contractors, which differences in no way justified the selection of the higher paid vendor. In preparation for the January 20 meeting, I submitted the material again to a searching review and evaluation—this time by the Institute for Computer Sciences and Technology of the National Bureau of Standards to assure myself of an objective evaluation and to insure against any inadvertent omissions on our part. The NBS team arrived at substantially the same conclusions although they did raise further questions concerning the growth po-

tential and increased difficulties associated with possible operational system with the proposed selection.

At the meeting on January 20, the Washington team understood the conclusions we had reached on the basis of the information submitted. However, they had a substantial amount of additional information derived through a series of briefings and meetings held with the two contractors which had not been transcribed and hence not submitted to us for consideration. After much rhetoric interspersed with technical dialogue and judgments, it became quite clear that Washington's selection was significantly influenced by the information they gleaned through the oral briefings, and which, in the verbally expressed judgments of the Washington representatives, caused them to conclude that EDS was more capable than the BC/Delphi team and more likely to meet the planned schedule.

I told Mr. Morris that in order to fully understand their position, we needed the important back up information which had played such a vital role in their selection but which had not yet been provided to us. Further, that I would forward a series of specific questions to guide his response which would document the points important to our deliberations. That letter with questions is attached.

Before forwarding the letter, I discussed the general thrust and important areas of concern with Mr. Charles Morris and Mr. Richard Nelson, and I feel that they fully appreciate our need for proper explanation and justification.

HAROLD F. WIENBERG.

DECEMBER 23, 1975.

Mr. JOSEPH L. MCGAVIOK,
*Regional Commissioner, SRS,
Region X—Seattle.*

We are in receipt of your letter of November 21, 1975 transmitting Secretary Morris' letter selecting EDS as facility manager for Washington State's MMIS and expressing your support of that decision. We have established a committee of analysts and program related people to review in detail the Washington State proposed contractor evaluation process.

After reviewing your letter, Secretary Morris' letter of November 19, 1975 and the proposals and evaluation material submitted by the State of Washington on October 28, 1975 it is our judgement that Washington's proposed selection does not comply with Title 45 Code of Federal Regulations (CFR) Part 74, Subparagraph 741154 (e) (1) which requires that, when formal advertising is employed by the State and Local government:

"The award shall be made to the responsible bidder whose bid is responsive to the invitation and is the most advantageous to the State or local government grantee, price and other factors considered."

In that both proposals seem acceptable, we cannot approve the selection of EDS since the cost of this proposal is about 4 million dollars greater over the life of the contract than the Blue Cross proposal. We are unable to determine sufficient benefits which will justify the substantial difference in price.

If Washington desires to proceed with their alternate finalist, approval is granted for a selection of the Blue Cross proposal since the evaluation indicates that the Blue Cross proposal is technically acceptable and competitively priced.

If however the State believes that additional substantive justification can be provided to support a selection of EDS in the face of the substantial price difference we shall be most agreeable to reviewing such justifications. Additionally, if Secretary Morris desires to discuss the matter with us we would be most happy to meet with him.

Please advise the State of Washington of our position and if they have questions to contact me at (202) 245-2184.

HAROLD F. WIENBERG.

JANUARY 27, 1976.

Mr. CHARLES MORRIS,
*Secretary,
Department of Social Services, Olympia, Wash.*

DEAR MR. MORRIS: I wish to thank you and your staff for the information provided during our January 20 meeting. We consider the sessions beneficial

and essential to our understanding of your rationale for selection of a facility manager for Washington's Medicaid Management Information System (MMIS).

We are most interested in an analytical summary of the oral presentations by the finalists, particularly for those areas which had the most influence on your selection. Please also quantify in terms of program dollar impact any decisions you made regarding the relative capabilities of the finalists to meet your RFP requirements, and address the State's intention and capability to assume the operation of the MMIS after the five-year contract.

Our primary concern is the \$4.4 million difference in the price quotations of the finalists to implement Option 1. We suggest that you attempt to negotiate the bids downward by requesting both finalists to review their Option 1 proposals and submit a best and final price quotation supported by detailed pricing by tasks, and a profit figure consistent with normal government procurements.

Regarding your consideration of Option 5 proposed by Electronic Data Systems, we are concerned over the non-competitive aspects of electing that alternative. Before pursuing that option, we feel it may be necessary to obtain competitive proposals from the other finalists, and consider any additional risk to the implementation schedule imposed by the added features of Option 5.

To guide your response, I have attached a list of specific questions regarding the overall selection process. It is extremely important that your response fully address each of these questions so that we may better understand the judgments underlying your selection. Please include any narrative or other explanation in support of your answers that you may wish.

Be assured we will respond promptly upon receipt of the above information. If you have any questions, please contact me.

Sincerely yours,

HAROLD F. WIENBERG,

Associate Administrator for Information Systems.

QUESTIONS FOR WASHINGTON STATE

The following questions apply to the overall evaluation procedure:

(1) What was the chronological sequence of critical evaluation events (i.e., initial screening, site visits, orals, etc.)?

(2) a. What function did the point scoring system serve in the final evaluation process?

b. What were the ground rules for point scoring?

c. Were the points assigned based on a vendors ability to: (a) meet RFP requirements, or (b) delivery optionals?

d. Were these points assigned in a comparative fashion (eg, vendor A gets more points if he delivers more optionals than vendor B)?

e. Explain in detail the rationale for assignment of points for the following areas in the final scoring process:

A. Technical Approach: Soundness and Integrity of the Logical Process—Project Plan and Risk: EDS 12 and BC none.

B. Experience and Performance History in MMIS and Claims Processing: EDS 8 and BC 3.

C. Cost—Bid Price: EDS 13 and BC 17.

Specifically, in what way did the site visitation help determine the overall technical competency of each vendor? Please be specific as to the technical area and the reasons behind the judgment.

The following questions should be answered in light of what was presented by EDS and BC/Delphi at the *orals* (and follow-up communications):

(1) Specifically, what made you feel that BC/Delphi would have a "chaotic implementation"?

(2) How did you estimate that the BC/Delphi project plan would require 136 man months to complete and would incur a slippage of 6-9 months:

(3) Why did you feel that BC/Delphi:

a. could not do the New Hampshire conversion in a timely manner?

b. would have difficulty in making the changes from a batch system to an on-line system?

c. would require a "major management effort from the State" during the implementation phase?

d. How was the State's support estimated and how much?

(4) Why did the BC/Delphi project management approach appear "weak"?

(5) How did you estimate that the EDS project plan would incur a slippage of two weeks?

(6) Did EDS commit to any penalties, and if so, what were they?

(7) A. What assurance did EDS give that their commitment to California/BC would not interfere with any future commitments to Washington?

B. What would be the impact of any future loss of their California/BC contract on their ability to fulfill obligations to Washington?

(8) A. What gave you the opinion that there was a "wide disparity" between EDS and BC/Delphi knowledge of Medicaid?

B. Why is the "disparity" significant to meeting the State's requirements for an automated MMIS system?

(9) To what extent were your impressions due to the project manager's ability to field questions at the orals and how much to the actual answers ultimately given?

(10) A. For Option I, what was the distinction each vendor made between State functions and vendor functions in the operational system?

B. For each, what were the estimates of State manpower, equipment, and cost and document how these estimates were determined?

C. Was the difference significant in determining your final evaluation?

(11) What State man-power requirements did each vendor assume would be available during an *implementation phase*?

(12) What specifically did each finalist commit to deliver initially and at the end of five years?

In comparing other experiences and references of the finalists, what did you determine was the past history of BC/Delphi project slippages? of EDS project slippages?

The following questions should be answered in light of either the orals, or any other information or knowledge you may have. However, please indicate for each response, the source of the information and reason for judgment.

(1) What risks to a) future changes, b) State takeover, are incurred as a result of the EDS system being written in assemblage language?

(2) In the Preliminary Evaluation, you state that EDS may not be able to meet the 75% FFP requirements without changes and extra cost. How much do you feel their further cost will be?

(3) A. What would be the cost to the State as a result of a 6 month slippage in getting a MMIS system operational?

B. Why can't the State afford a delay?

C. Present evidence that the cost of the delays would justify the expenditure of the additional \$4.4 million.

(4) Was the BC/Delphi plan deemed unacceptable because of a possible delay in implementation or because of the quality of the final product?

ATTENDEES AT MEETING JANUARY 20 WITH WASHINGTON STATE

WASHINGTON STATE

Greg Thompson.
Clint DeGabriel.
Charles Morris.
Dick Nelson.

REGION X

Joe McGavick—Regional Commissioner.

SRS

Harold F. Wienberg—Associate Administrator for Information Systems.
Lee Weisenborne—Division of Medicaid Systems.
Kee Chang—Division of Medicaid Systems.
William Cleaver—Office of Program Systems Development.
Wesley Baker—Office of State Systems Operations.
James Trainor—Office of State Systems Operations.
John Gallagher—Office of State Systems Operations.
Richard Moss—Office of Systems Planning and Evaluation.
Charles Sylvester—Office of the Associate Administrator.

NATIONAL BUREAU OF STANDARDS

Dick Dunlavy.
Dennis Conti.

U.S. DEPARTMENT OF COMMERCE,
NATIONAL BUREAU OF STANDARDS,
Washington, D.C., March 25, 1976.

Mr. HAROLD F. WIENBERG,
Associate Administrator for Information Systems, Department of Health, Education, and Welfare, Social and Rehabilitation Service, Washington, D.C.

DEAR MR. WIENBERG: At the request of Dick Moss of your office, Dennis Conti and I have reviewed the State of Washington response to questions about their MMIS contractor selection. We examined the relevant documentation independently on the afternoon of March 23, and came to substantially the same conclusion: that the State's selection be approved. Since our thinking processes differed somewhat and in view of the importance of this matter, we have drafted separate letters outlining our reasons for this conclusion.

For me the issue comes down to a choice between strict adherence to the rules of an RFP and selecting the vendor who will do the most good for the State Medicaid program at an acceptable cost. Although there is no question in my mind that the State altered the ground rules under which it said selection would be made, I have been persuaded that it is in the best interests of the State to accept their selection of EDS.

Several irregularities in the selection procedure continue to bother me. I am dissatisfied with the State's explanation of their use of the point system to grade the two finalists. They claim to have been "rigorous" in using the system but not "rigidly formulaic," and to have applied "the weights assigned to each factor by the RFP" but also to have reached their decision "in the light of the scoring system." This kind of double-talk does little to reinforce the credibility of either the selection process or the rest of the State's case. The elaborate rationalizations of changes to the original point schedule, the use of different scaling techniques, etc., are strained and unconvincing. The State might as well have answered candidly that the point system was an early cut at quantifying a process that was, in the end, not quantifiable at all. The State's man-month estimates of project slippage were highly impressionistic and open to question. The same can be said of the "key indicia" used to document the technical inferiority of the BC/BS facilities management capability. "Objective" criteria, such as project management flexibility, seem to get turned inside out depending on which vendor they are applied to. Throughout, the "on-line, interactive" capability of the vendors appears to have been given inordinate weight for what was a relatively minor requirement in the RFP.

What does come through in the State's answers, despite the weaknesses in their argument, is the sincere conviction that one vendor will deliver an acceptable system on time and that the other will not, and that the consequences to the State Medicaid program for the failure to deliver would be catastrophic.

I accept the State's contention that information learned after a preliminary screening of vendor proposals (during site visitations and oral interviews) has convinced them of the clear superiority of one vendor over another, that their reasons for this judgement are substantially well-founded, and that failure to select the superior vendor would lead to unacceptable consequences for the Medicaid program in the State of Washington.

Sincerely,

RICHARD F. DUNLAVY,
Applied ADP Technology Section, Systems and Software Division.

U.S. DEPARTMENT OF COMMERCE,
NATIONAL BUREAU OF STANDARDS,
Washington, D.C., March 25, 1976.

Mr. HAROLD F. WIENBERG,
Associate Administrator for Information Systems, Department of Health, Education, and Welfare, Social Rehabilitation Service, Washington, D.C.

DEAR MR. WIENBERG: On March 23, 1976 your office requested that I assist in evaluating the "State of Washington Answers to HEW Questions on MMIS Contractor Selection" to determine if the State selection of EDS was proper. This letter documents my response to that request.

The State of Washington choice of EDS appears to be proper for a number of reasons:

1. After considerable questioning, the State of Washington is still firm in their belief that the selection of BC/Delphi would result in a "6-12 month

slippage" which "would have a dramatic cost impact in program benefit dollars and the use of state equipment and personnel resources"—I have no basis upon which to question this judgement.

2. Apparently as a result of the oral presentations and later communication, the State of Washington still firmly feels that the selection of BC/Delphi would result in a "chaotic implementation"—without the benefit of these two influences, I again have no reason to question their judgement.

3. With respect to the point scoring method, it appears that the State of Washington did assign points to BC/Delphi and EDS in a rather subjective manner—however, realizing that any evaluation must involve some subjective judgement, I have no reason to question their overall point assignments.

In summary, with no strong basis to believe otherwise, I must accept the State of Washington's judgement that the selection of EDS would be in the best interests of their program and in the best interests of the taxpayers of the State. For the record, my only major concern is with the State of Washington acknowledgment that "takeover of the EDS system would probably not be feasible" and that "absent absolutely compelling reasons, we would have no interest in taking over the program at the end of the five year commitment period." The importance of this acknowledgment is, of course, a matter for your office to decide.

Sincerely,

DENNIS M. CONTI,

Applied ADP Technology Section, Systems and Software Division.

[Attachment 3]

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

April 5, 1976.

Mr. HAROLD F. WIENBERG,
Associate Administrator for Information Systems,
Washington, D.C.

Pursuant to your request concerning eligibility determination for Title XIX recipients I offer the following citation:

Section 1902(a)(5) of the Social Security Act— . . . except that the determination of eligibility for medical assistance under the plan shall be made by the State or local agency administering the State plan approved under Title I or XVI (insofar as it relates to the aged) if the State is eligible to participate in the State Plan program established under Title XVI or the State plan approved under Part A of the Title IV if the State is not eligible to participate in the State plan program established under the Title XVI; . . .

[Attachment 4]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,

SOCIAL AND REHABILITATION SERVICE,

Washington, D.C., October 7, 1976.

Mr. HAROLD F. WIENBERG,
Associate Administrator, Information Systems,
Washington, D.C.

DEAR MR. WIENBERG: I understand that during the recent hearings before the Senate Permanent Sub-Committee on Investigations there were statements made that you have directed or encouraged staff members to "bend the law". During the time I have known you I have never known you to make such a suggestion. Moreover, on the basis of all my discussions with you, I have never understood that to be your intent.

It appears to me that this allegation stems from a misconception from a few of our staff as to what is law. Unfortunately, staff members of OIS have, in recent years, taken policy positions, sometimes expressed in writing, which have come to be regarded by them as law. The Program Review Guide and oral interpretations of the Guide are an example. This material attempts to interpret the law and regulations and in so doing far exceeds the legitimate purpose of any Guide.

During the six-month period prior to your entering on duty (which was a period in which I was Acting Associate Administrator) I had many discussions with staff members regarding the implementation of Sec. 235 of P.L. 92-603, I felt that the interpretation of the law by staff (often without advice of Counsel) was much more rigid than was desirable and constituted a hinderance to

effective management of the program. As an example, staff had been advising States that 235 money could be used only for the original development of and operation of a system which could never be augmented. I disputed this interpretation and, in a written opinion, (memorandum dated July 9, 1975 attached) DHEW General Counsel agreed with my view that nothing in the law prevented augmentation.

During the many discussions I have had with our staff, I have frequently been frustrated by the contention of some that a more practical interpretation of Sec. 235 than the interpretation proposed by certain staff members is "bending the law". I have never been able to persuade some staff members that it is entirely legitimate to replace rigid dysfunctional implementation of a law with policy and procedures not only conforming to the law and regulation but which more effectively serves the purpose and intent of the program. Nor have I been able to make them understand that by personally interpreting the law, without advice of General Counsel and proper publication of proposed rule making, they not only risk violation of the law, but also exceed their own responsibilities.

When you entered on duty here, it was also your expressed belief that Sec. 235 was being inaccurately and improperly implemented. You continued and intensified my effort to achieve a more productive implementation of the statute. To achieve this we have questioned General Counsel regarding interpretations, have initiated a revision of Program Guides and a rewriting of Regulations. It is these entirely legitimate actions which I believe are now being improperly characterized as attempts to "bend the law".

I am offering this unsolicited statement to you not only because I consider the allegation unwarranted, but also because I believe your efforts to obtain a more workable policy for the betterment of the Medicaid Program were in a large measure influenced by my advice. In other words, I believe the same totally incorrect charge could and would have been leveled against me in similar circumstances.

CHARLES SYLVESTER,
Assistant Administrator Information Systems.

JULY 9, 1975.

JUDY BOGGS,
Office of Policy Control.

ROBERT P. JAYE,
Deputy Assistant General Counsel.

Request for Opinion Concerning Eligibility of ADP Improvements for 90% FFP.

This responds to the memorandum of Charles Sylvester, Acting Associate Administrator for Information Systems to Warren Whitted, dated June 26, 1975, which you have referred to us by memorandum dated July 2, 1975.

Mr. Sylvester's first question is:

May a system approved for 75% FFP (for operational costs) against a given standard, subsequently receive 90% FFP for additional improvements not required by that standard but acceptable under it?

Section 1903(a)(3)(A)(i) of the Social Security Act permits 90% FFP for expenditures "attributable to design, development, or installation of such mechanized claims processing and information retrieval systems as the Secretary determines are likely to provide more efficient, economical, and effective administration of the plan. . . ." 45 C.F.R. section 250.90(b)(1)(i) states that to be eligible for 90% FFP the system meets criteria established in program regulation guides issued by the (Social and Rehabilitation) Service . . .

It is a policy question whether 90% FFP will be available for those aspects of a system (whether introduced at the outset of a system's installation or subsequently) which will result in that system's exceeding the applicable Federal requirements. One could certainly envision a situation where the Administrator could find that additional features of a system above and beyond those required by the program regulation guides, will "afford more efficient, economical and effective administration of the program. . . ." If such a finding can be made, there is nothing in the statute or regulations to preclude 90% FFP for such additional improvements. The only legal requirement is that the criteria used in determining eligibility of 90% FFP for such additional incremental improvements be the same that would be applied if the additional features had been designed into the system at the outset.

Mr. Sylvester's second question is whether a system (already) approved for 75% FFP against a given standard, (may) receive 90% FFP for improvements to meet a standard subsequently changed and published by SRS.

As we stated in an earlier memorandum, once a system is approved for 75% FFP, that approval is not affected by subsequent upgradings in the underlying standards. Nevertheless, if it is desired to upgrade a system to meet new Federal standards there would be an even stronger case for 90% FFP than where it was merely desired to upgrade a system to exceed then-applicable Federal requirements. In the case of an upgraded standard, the Administrator would have no difficulty in finding that an upgraded system "is likely to afford more efficient, economical and effective administration of the program. . . ." since the upgraded standard would presumably have been promulgated for that very purpose. Again, there is no statutory or regulatory prohibition against 90% FFP for upgrading an ADP system in these circumstances.

Senator NUNN. Do you feel you need to bring something out here?

Mr. WIENBERG. Yes. There is one point. The last itemization, I guess it is the last page, the last attachment is not yet completed. It is only a scattering of the contracts that are in that category. I would like to point out one thing in this area.

The contracts dealing with medicaid management fall into two categories. One is the 250.90 Code of Federal Regulations and the other is the 249.82, which is a list on the last page, the first item of which falls in my area of responsibility; the second item of which pertains to grants made to fiscal agencies, contracts with health insuring organizations, and that sort of thing, and those contracts are the dollar volume contracts, the ones approved presently at the regional commissioner level and not in central office of SRS. That is effective as of May 8, 1975.

Prior to that, there was, I think, no approval of those contracts, prior approval required by the States or by central office.

Senator NUNN. Are we talking about the contracts that we have been alluding to in Texas and Washington State?

Mr. WIENBERG. Yes. The Texas contract with EDS was referred to in earlier testimony here, which is the large dollar volume contracts noted by Mr. Trainor.

Senator NUNN. That does not require approval of your office?

Mr. WIENBERG. It does not, sir.

Senator NUNN. What do you have Mr. Trainor and all of his people reviewing it for?

Mr. WIENBERG. It came in at the request from the regional commissioner for our approval of not the contract, but of the APD and the RFP associated with it. This was the point that Mr. Cleaver raised to me about the appropriateness of reviewing that contract, spending time on it or that procedure, at which point we then tried to get the point resolved.

I wrote to the regional commissioner, told him it was improper at the present time for us to review this thing, that we would get back to them as soon as we had some legal disposition based on an interpretation of the rules. We also requested HEW's legal counsel to review the rules and procedures because there seemed to be some misinterpretation of how the regional commissioners request should be handled.

Senator NUNN. I am confused because I understood yesterday that HEW, Washington, had held up a contract in the State of Georgia because you were not satisfied with the procedure. It was held up

for 8 or 9 months. As a result, there was a change in the award to the low bidder.

What level was that?

Mr. WIENBERG. This is why I brought up the subject. There are two regulations dealing with State medicaid contracting. One is the regulation pertaining to the section 235, the public law which authorizes Federal funding of Medicaid Management Information Systems.

[At this point, Senator Percy withdrew from the hearing room.]

Mr. WIENBERG. The other regulation 249.82, specifies the method by which Federal or fiscal agency contracts and grants in process as well as health—contracts for health insuring organizations where the State pays the capitation fee, like an insurance company, for their medicaid recipients—that those contracts are not the responsibility of central office for approval. They do not come to me for approval.

Senator NUNN. I am talking about the contracts we have been referring to for 2 days, MMIS contracts relating to the development of the system and then relating to the operational system. Let's talk about the development contracts where 90-10 funding is concerned. Do those come to your office?

Mr. WIENBERG. They do.

Senator NUNN. You certify them or approve them?

Mr. WIENBERG. I do.

Senator NUNN. You have the right to reject them?

Mr. WIENBERG. I do.

Senator NUNN. What is done at the regional level that we have been talking about?

Mr. WIENBERG. The regional level reviews each one of those items before they come to me.

Senator NUNN. They make a recommendation?

Mr. WIENBERG. They make a recommendation to me based upon their association with the State and their understanding of the process that the State needs, and so forth. In addition to that, I get additional recommendations depending upon the subject at hand. I get additional recommendations from the bureau chiefs that are involved.

Senator NUNN. Then you have your staff analyze it. Is that right?

Mr. WIENBERG. Yes.

Senator NUNN. That is what we have been referring to this morning. We have been leaving to the staff analysis based on the regional recommendation before it goes to you? Is that right?

Mr. WIENBERG. That is correct. In addition, if I may add, in the case of Washington, as an example, I also enlisted the aid of the Computer and Software Institute of the National Bureau of Standards and had two of their staff experts, Dr. Conti and Dr. Dunlevy, review in detail the technical proposals of the two contractors that were referred to for the Washington bid.

[At this point, Senator Percy entered the hearing room.]

Senator NUNN. Let's take this in order. Your staff did not concur with your decision to certify the Texas State system in Austin, according to testimony. Indeed, the staff recommended against certification and the record of the hearings yesterday show you took it upon yourself to certify this system.

So the first question is why did you certify this system and on whose recommendation was that based?

Mr. WIENBERG. The inputs from the approval came, or the certification came that we sent out to Texas, indicated that there were some minor deficiencies in the Austin, the in-house operations that Texas was running and that they also had reviewed for certification purposes the Dallas function which was the capitation of the medicaid program under contract to the State of Texas.

If I may for a moment, the Texas people, as I think was explained by Mr. Fialkewicz yesterday, had broken their system into two accounts, one of which was an insuring arrangement with the Blue Cross activity in Texas; the other portion of which was the State themselves did work in-house. The State ran the system and actually did the operation. The so-called fragmentation is a misnomer, if you will. It is the State portion.

Senator NUNN. Let's get into the issue of fragmentation in just a minute. I want to separate the procedure from the substance. Let's observe the substance just a minute.

You talked about this evaluation team. Is that a team from your office that went to Texas?

Mr. WIENBERG. It is a group of people that went down and were appointed for that purpose, yes.

Senator NUNN. Was Mr. Cubbler one of those people?

Mr. WIENBERG. No.

Senator NUNN. Did Mr. Cubbler play any role in the Texas decision?

Mr. WIENBERG. No, he did not.

Senator NUNN. You didn't get any memorandum from him, you didn't have any conversation with him, it was completely separate from his—

Mr. WIENBERG. I asked certain specific questions verbally of him after the inspection was made about the field that he was expert in, namely, utilization and review, how indeed you can piece together elements of the information to come up with a result.

Senator NUNN. He didn't make any recommendation to you about Texas, except that one area?

Mr. WIENBERG. Yes.

Senator NUNN. Did you know or have any reason to believe that he had made recommendations to the evaluation team or anyone else before it got to you?

Mr. WIENBERG. No, no idea.

Senator NUNN. Was he supposed to be involved in this particular decision?

Mr. WIENBERG. No, he was not.

Senator NUNN. Did Mr. Cubbler play any role in the \$700 million contract in Texas between Blue Cross and the State?

Mr. WIENBERG. Again, the information that I have about his activities with Texas in that regard were subsequent to the decision-making process and had to do with internal State regulatory matters.

This was the stated purpose in Commissioner Vowell's letter to the regional director requesting his technical assistance to State people in July. This was in the trip he made down there in the beginning, the first part of July. To my knowledge, that was the scope of his

activity with that particular program in Texas. That is the program I am referring to that is not within our domain for approval or disapproval. That rests with the regional commissioner. That is one of those capitation contracts, the approval for which is done out in the field.

Senator NUNN. One more question and I will defer to Senator Percy. I would like the chief clerk of the subcommittee to show you a letter dated February 21, 1975, sent out over the signature of Mr. Charles Cubbler. This letter informs States and contractors of a major change in the general systems design called the GSO of the Medicaid Management Information System.

Can you explain how Mr. Cubbler was allowed to send out this major change?

Mr. WIENBERG. No, sir. I wasn't in HEW at that time. I have no idea. I joined HEW approximately 6 months after this thing went out.

Senator NUNN. Do you know anything about this change or this policy?

Mr. WIENBERG. No, I do not.

Senator NUNN. It is the first time you have ever seen it?

Mr. WIENBERG. To my knowledge.

Senator NUNN. Is it still in effect, or do you know?

Mr. WIENBERG. I don't know, sir. I haven't read it. I don't know that it was ever adopted or anything. At the particular time this was written, he was not even working in the Office of Information Systems. He was assigned to the Office of Management, Medicaid Systems Activity. He joined, officially joined the office that I now run, the Office of Information Systems, in February of 1976.

Senator NUNN. Do you know offhand whether he had authority to issue that kind of a statement?

Mr. WIENBERG. No sir.

Senator NUNN. You don't know?

Mr. WIENBERG. I do not know.

Senator NUNN. Senator Percy?

Senator PERCY. Just from what you have seen of it, do you think he did possess under your jurisdiction the authority to issue something like that, or would it have to have gone to you before it could have gone out to the field?

Mr. WIENBERG. This could not have issued from my office, to my knowledge, sir.

Senator PERCY. You mean it shouldn't even have come out of your office?

Mr. WIENBERG. It is written as though it did and perhaps at the time, I guess this is during the period that he was detailed as the acting head of the Division of Medicaid System; that organization being in the organization I run, but he was not in that position since I have been there.

If indeed this had come out—let me put it this way: Such things would not come out of that particular division. They would come out under my signature as the associate administrator, but not anybody in an acting capacity. We don't have policy being generated at those levels.

Senator PERCY. Mr. Cubbler reported directly to you during the time that you were in your present capacity. Is that right?

Mr. WIENBERG. Yes, sir.

Senator PERCY. Along the lines of the questions from Senator Nunn, in your supervision of him, were you aware of the fact that he worked well into the night at the office on occasion?

Mr. WIENBERG. Yes, sir, I am. One of his, I consider to be good attributes, was the fact he was a very hard-working individual, someone you could give an assignment to and he would work at all hours to complete it, which far exceeded the zeal perhaps of a lot of others.

Senator PERCY. In completing his departmental assignments, that is one thing. If he was using governmental facilities, telephone service, local and long-distance, and so on, for other purposes, would that be a matter about which you would want to be aware?

Mr. WIENBERG. Yes, sir.

Senator PERCY. Were you aware, as we have heard today, that he spent long periods of time on the telephone talking not to people in regional HEW office or Government employees, but to private contractors and others and that he was carrying this on at HEW offices?

Mr. WIENBERG. No, sir. Let me explain, if I may. His office was on the second floor of the building we are in. My office is on the fifth floor of that building. People that reported his activities, the schedules he kept and so on, were persons who also worked very late and Bill Cleaver spent many long hours in the office along with him, not necessarily working together to be sure, but he was able to report on his activities and schedules; the way he could report on Mr. Cubbler's schedule certainly was far better than I was in a position to do.

I was not aware of the extent of his attendance at the office in the manner Mr. Cleaver discussed this morning, to that scope. I knew he was there at night because I would leave ordinarily at 7 or 7:30. He is usually there. He walks out of the building with me occasionally.

Senator PERCY. Were you aware that Mr. Cubbler did travel a great deal?

Mr. WIENBERG. Mr. Cubbler did not travel a great deal while I was there. I certainly heard about his travels prior to my arrival under the former two Associate Administrators.

Senator PERCY. Did you say it had been curbed?

Mr. WIENBERG. I curbed that, yes, sir.

Senator PERCY. You curbed it?

Mr. WIENBERG. Yes.

Senator PERCY. Were you warned at the time you came on board about Mr. Cubbler. Were any concerns expressed to you about his activities by anyone?

Mr. WIENBERG. I had discussions with the gentleman who is my assistant at the present time, Charles Sylvester, who had occupied, in an acting capacity, the job I presently hold for some 4 months before I arrived. He told me about Mr. Cubbler's facility for embellishing facts, let's put it that way, and—

Senator PERCY. Embellishing what?

Mr. WIENBERG. Facts, and that you had to be quite careful about what he did report to you because you couldn't very frequently sift out the whole truth from all of the information. I think that was expressed early, Charlie was quite an extrovert and liked to embellish the truth a bit here and there.

Senator PERCY. Were you warned about any other of Mr. Cubbler's characteristics by anyone?

Mr. WIENBERG. No, I was not.

Senator PERCY. Did you observe during your period of supervision any characteristics that you would look upon with some degree of concern? If so, what were they?

Mr. WIENBERG. Again, I think the thing that did concern me, and I pointed this out to him a number of times, was the fact that he would talk about the Medicaid program. That seemed to be his whole living interest. You couldn't have a drink with him anyplace without him continuing to talk about the Medicaid program. He was always willing to answer questions for anybody that asked him questions.

In fact, frequently, you avoided asking him a question because then you couldn't turn him off. So I used to point this out to him. Yes, sir.

Senator PERCY. Was he a name dropper?

Mr. WIENBERG. Oh, yes.

Senator PERCY. What names do you know of that he mentioned?

Mr. WIENBERG. The ones that were reported this morning or the one—anyway, Congressman Mills was the one that he had mentioned to me.

Senator PERCY. Did you ever look into that relationship? Did you ever see any evidence of the close relationship with Wilbur Mills?

Mr. WIENBERG. I saw no evidence of it, nor did I look into it. I thought if he had an association with Congressman Mills, that was up to Congressman Mills and him.

Senator PERCY. There has been testimony this morning that you spent considerable time with Mr. Cubbler in your office. How many people report to you?

Mr. WIENBERG. Far too many, sir.

Senator PERCY. How many do you have a direct reporting relationship with?

Mr. WIENBERG. I have, I would say, about 10 people.

Senator PERCY. Ten people that report directly to you?

Mr. WIENBERG. Yes.

Senator PERCY. So you have a total of how many personnel reporting directly to you through these 10 people?

Mr. WIENBERG. There is a total of about 120 people authorized. I presently have about 107 people or 108 people on board.

Senator PERCY. 170 on board?

Mr. WIENBERG. 107.

Senator PERCY. So you have about 10 reporting to you and maybe on an average they each have about 10 reporting to them. About how much time would you say you would spend with Mr. Cubbler?

Mr. WIENBERG. I do not believe that I spent more time with him than I spent with all of the others; but certainly some of the others. If I may explain for a moment, the office that Mr. Cubbler was as-

signed to by me is a four-man office, each of whom reports to me because the Personnel Division there is such that this accounts for the large number of people reporting to me. The personnel situation in my organization and in SRS itself is quite bad.

I have some nine senior vacancies at the present time, each one of which is the head of the division. The Civil Service Commission rules are such that I cannot in many instances continue to assign personnel in acting capacities as the head of those units because of the rule that they cannot act in a grade higher than that which they occupied for a time more than 120 days in any 1-year period.

It seems to me I have gone through all of the people that are eligible to so be detailed and in instances such as the office that Mr. Cubbler was assigned to, I had just used those people to report directly to me while we were awaiting the classification action of Personnel to get to the point that we could post the job and hire competitively somebody to take on those positions.

Senator PERCY. You say you spent more time with some and less time with others. During the course of a week, how many hours a week would Mr. Cubbler be with you?

Mr. WIENBERG. It is hard to say. I would say an hour a day, at the very most.

Senator PERCY. An hour a day?

Mr. WIENBERG. At the very most, but never necessarily by himself. He very infrequently was there by himself. He was there with others as part of some particular problem he might be talking about.

Senator PERCY. There has been sworn testimony today that suggests that Mr. Cubbler had a good deal of influence with you and with respect to policies and programs in HEW.

Would you give us your testimony on this, confirm it or deny it and tell us if he did have influence with you, why he did and how he exercised it?

Mr. WIENBERG. I spoke earlier to the fact that Mr. Cubbler had what I considered to be the organizational memory of SRS in the medicaid management area, in the whole medicaid program area. He was assigned for many years, up until he was assigned to me, in the Medicaid System Agency under the Commissioner of Medicaid, under a few commissioners of medicaid, as a matter of fact, and also had been assigned to the Office of Management within that utilization and review of the medicaid program.

I, therefore, found that his information about regulatory matters, about State regulations, about State plans, about the way in which regulations had been developed and their intent through previous testimony leading up to their passing, and so on, it was extremely valuable information which was not available in the records. You couldn't find those facts, at least in the records that were available for immediate reference. So we used him as a walking encyclopedia, if you will, in many instances.

Senator PERCY. Could you again state your association with Mr. Cubbler, whether you had any reason to believe or suspect that he was being paid by or receiving any favors from any private companies which had or sought business with HEW and when you first learned that he did have such income or favors?

Mr. WIENBERG. I was never aware of such improprieties at all or acts on his part until I read the testimony yesterday and heard prior to that on the 21st of September the allegation that was presented to Dr. Weikel that such had occurred.

Senator PERCY. Did you know that Mr. Cubbler was apparently implicated 8 years ago in trying to weaken newly proposed Federal standards in nursing homes on behalf of the nursing home owners?

Mr. WIENBERG. No, sir. I was not.

Senator PERCY. You had no knowledge of that?

Mr. WIENBERG. Absolutely not. This is the first time I have heard of it.

Senator PERCY. When did you first have knowledge of that possibility?

Senator PERCY. You had not read the New York Times story this morning, then?

Mr. WIENBERG. No, sir.

Senator PERCY. On these hearings?

Mr. WIENBERG. No.

Senator PERCY. You have no knowledge then that even though he was implicated, according to this story, that no investigation of his activities was made?

Mr. WIENBERG. No, sir, I have no knowledge of that.

Senator PERCY. I would like to give you an opportunity to just talk about your own situation. You have a fairly solid business background; you are obviously a man of considerable competence.

Have you had any business relationship with any company seeking to do business with HEW?

Mr. WIENBERG. No, sir. We have met with them and that sort of thing. No; the answer is no.

Senator PERCY. Have you done any consulting for any firm seeking to do or doing business with HEW?

Mr. WIENBERG. No, sir.

Senator PERCY. Have you ever accepted gifts, gratuities, services or payments from anyone seeking to do or doing business with HEW?

Mr. WIENBERG. No, sir.

Senator PERCY. References were made this morning to comments that you had made to some of your own subordinate employees. Why did you tell these employees that they should find ways to evade HEW regulations? Why did you tell them that you didn't want to break the law, that you wanted to bend it?

What was your motivation in saying this? What effect do you think, as an experienced supervisor, your comments and the way you made them would have upon the morale of your Department, particularly when the implication was very strong that if they couldn't comply with your request, they had better seek employment elsewhere?

Mr. WIENBERG. That is a very lengthy question, sir. Let me first state that, first, I made no such statements. They, I think, are perhaps misinterpretations of things that had occurred; but I never instructed anybody to evade regulations.

I have at all times——

Senator PERCY. Did you ever use the term that you wanted to bend the regulations?

Mr. WIENBERG. I wanted to get the job done and find ways that we could do it and stay within the letter of the regulations and the law. It is very easy to use a law or the regulations, rather, to say something cannot be done.

Senator PERCY. The implication might be that you didn't want to actually break the law, but you wanted to bend it or somehow evade it or work around it and not fulfill the spirit of the law.

I want to give you, Mr. Wienberg, an opportunity to fully explain exactly what you meant, because if your intention was as you now describe it, that intention was obviously not imparted to the employees over whom you have direct supervisory responsibility. They were disturbed and have so testified.

Mr. WIENBERG. At no time have I ever wanted to, nor have I ever instructed anybody or imparted any indication that I in any way wanted to bend or change.

Senator PERCY. Did you ever use the term bend?

Mr. WIENBERG. Perhaps I did in terms of the regulations, but I want to explain what I mean. I don't know that I did. I don't have such a recollection. I would like to explain what I was trying to say to my staff.

The regulations are interpretations of the law. We write our regulations. We publish them and they then become the thing by which we and the States do business. We are constantly modifying regulations. As we learn, as we become more familiar with the problems involved, regulations change. They are modified, amended, they are changed.

Any comments relative to bending regulations—again, I do not recall using such a term—any such references were made in the sense of what would make good regulatory modifications, that we would go through the normal process of reviewing proposal changes at the various levels of government and either be accepted or denied, which would permit us to get on with the program more expeditiously and to fulfill the intent of the law which is to put into business and put into operation in the States the adequate management information systems necessary to control the expenditures of the program and approve the quality of care of the program.

One of the points I would like to make is that my belief and I believe my interpretation of that law is that it is intended to control program costs, program costs, not administrative costs although it will that, hopefully; but I think it is a very shortsighted view to try to approve a very small fraction of the cost of the medicaid program, which is the administration of it, vis-a-vis controlling the actual dollars that go out to the providers and the recipients. That is the system we are trying to put in. That is my intent.

What I was trying to do and continue to try to do is get our regulations so specific that they are not misinterpretable and that they are understandable to the States. At this time, the State understanding of the regulations is not necessarily always the case.

Senator PERCY. But if you have the authority to write regulations and amend those regulations, why is it that we have sworn testimony that you said, "Don't tell me what I can't do, tell me how to circumvent the regulations?" That testimony, I wish to advise you, was given in the context of a meeting with more than one person.

Those instructions were given to them immediately following your receipt of a memorandum of clarification stating that the law was quite clear as to what could and could not be done. That memorandum is in our record.

We could call more witnesses to see whether or not that was the language used. Communications is what is said and how it is interpreted. If there is a total communications gap there, we ought to try to discern that; but there seems to be a difference of viewpoint as to what was really intended.

What did you mean? Do you recall using the word circumvent?

Mr. WIENBERG. No: I do not.

Senator PERCY. Do you flatly state that you did not use that word?

Mr. WIENBERG. I do not recall using that word, sir, and I do not believe I did.

Senator PERCY. You do not recall using the word bend, even though sworn testimony clearly seems to indicate that both of these words were words that you used?

Mr. WIENBERG. Perhaps I used—I don't recall using that, no, sir.

Senator PERCY. You say perhaps you could have, but you don't recall?

Mr. WIENBERG. That is correct, I do not recall using the word. Again, the subject under discussion was the manner in which we could—there are two things: We have three programs we are administering in SRS that I am responsible for in terms of the information aspects of it. Each one has differing Federal funding associated with the administrative end of those programs. This is very confusing to the States and to the manner in which the States augment and actually develop their programs for information systems.

One of the problems is that the eligibility of the recipient cuts across those three programs and it is a matter of interpretation as to where eligibility starts and stops, in terms of one program versus another. As a case in point, some 60 percent of the people receiving medicaid services presently are eligible by virtue of their AFEC eligibility and are automatically given medicaid services. Others have to come in and become eligible through the medicaid program specifically.

This causes the States a great deal of unnecessary and duplicative type of paperwork. The same problem occurs in the food stamp program, the same thing occurs in a social services program.

At the varying levels of financial participation in these various programs, this complicates the management of the money out in the field, in the States a great deal. It depends upon where you put various costs and charges.

The thing that we are trying to do or I feel would be a great expedient for all the programs would be to have an integrated eligibility system. We are trying to get such a program underway. This would cut down the complexity of these programs. It would cut down the paperwork. It would cut down the stress and strain in the field.

It is in line with the potential modifications of regulations that we would propose changes and test through the legal channels and so on before they ever become official. I do not have the responsibility

for, nor can I write or authorize a regulation. I can write a draft of a regulation and send it through the proper channels. If, indeed, it is reviewed and approved by legal counsel, then it could become a regulation, if the Secretary so decides.

That was in the process of doing internal staff work, trying to get the people to work toward developing, draft ways that we could then go through the system to see whether amendments to the regulations were possible, that these discussions occurred.

Senator PERCY. I am very anxious not to be unfair to you or jump to any conclusions at all. It is a serious problem. The regulations permit the payment of 90 percent Federal share for a control system to be installed by a State. But it is subject to interpretation as to whether you have a multiplicity of systems installed, of which we pay 90 percent for each one of the systems. Each time you are installing a system, you are obligated to pay 75 percent of the operating expenses of it.

In the explanation that you have given as to what you were attempting to accomplish, I wouldn't have seen cause for concern by the employees who testified before us; but they were obviously disturbed by the interpretation they put on your words.

Did you have further cause to explain to them what you had in mind or having heard them now, can you make any conjecture as to what caused them to be concerned about your statements? To whom do you report?

Mr. WIENBERG. I report to the Administrator of SRS.

Senator PERCY. To the Administrator?

Mr. WIENBERG. Yes.

Senator PERCY. Did you take your concerns to him about the need for—I won't use the word circumvent or bend—but the need to fulfill the letter of the regulations or law, and also the need to do something beyond what you felt you had the authority and responsibility for doing?

Did you take your case to the Administrator?

Mr. WIENBERG. I have chatted with the various administrators that I have had. I have had three in the year that I have been there.

Senator PERCY. Three in a year that you have been there?

Mr. WIENBERG. Yes, sir.

Senator PERCY. There has been that much turnover?

Mr. WIENBERG. Yes, sir. We have talked about the various programs and the various manners in which things should be done. I have vocalized to each of them the real need for an integrated eligibility system, the need to make certain regulatory changes. Mr. Fulton and I were discussing some of these even as late as last night. They go back to when I first joined SRS. It is a continuing process.

These discussions frankly go on constantly during or throughout our business because that is what we live by. Some of the regulatory changes that we are trying to get are ones that the staff endorses. Those aren't the ones they bring up. The ones they talk about are the ones they don't particularly like, I guess.

If I may try to set in perspective the organization for you in about five minutes, I would like to do that. I think it would give you a

better understanding of what the situation was in the past versus what it is now. May I have that opportunity?

Senator PERCY. The problem is why couldn't the very people who were working on it, who were devoting their lives to it, who had been there some time, why did they misunderstand directions that you gave to them? Do you ever recall using the phrase, "If you can't do it, you can find jobs elsewhere," or anything like that?

Have you ever threatened in that way any employee working under your direct supervision?

Mr. WIENBERG. I have pointed out to the employees that a lot of the tasks that were asked for them to do were tasks that they were very delinquent in not having done long before I arrived, that we were going to tighten up and have some discipline, managerial discipline in the way we behaved in the organization. Yes, sir.

As an example, if I may, I was shocked when I first became the associate administrator. The regulation guide they discussed this morning, this program relation guide which was put out in 1974 is the only procedure in existence in the organization, yet they talk about poor management by the people who were responsible for the activities vis-a-vis the States and central office have. Not one office procedure has been established in terms of how to prepare or even describe what is meant by an "RFP." They have no written examples for the States, they haven't put out examples of what an advanced planning document is, they have not put out examples of what good contract language should be in terms of the various and sundry contracts we might have.

There is no direction in terms of the documentation standards that I feel each contract should have in it so that programs, computer programs that are generated by contractor A can then be turned to the State and modified, if necessary, with some degree of possibility of success.

There is no similarity between the various contracts let by the States. It is a hodgepodge of little helter skelter sorts of operations. That is what I wanted to talk about a bit so that you would understand, I think a bit more fully about some of these problems.

Senator PERCY. I would like to comment that I was rather surprised by your statement, alleged statement to the employees, that they could look for jobs elsewhere. In 1943, I had supervision in the Navy over Civil Service employees. Let me tell you, I tried to fire a couple of them. I shook hands and congratulated them when I left Washington a year after I arrived.

They were still in the appeals stage. I just defy anyone to get rid of anyone in that system. I was amused that a carryover from the private sector would cause you to think that you could do something about it.

Mr. WIENBERG. I have perhaps learned it is a little more difficult than I had hoped it might be.

Senator PERCY. I have just two comments and questions.

The turnover in administrators interests me. Can you name the three administrators under whom you have worked; the Administrators of Social and Rehabilitation Service. Who are they, where did they go after leaving SRS, and why did they leave? Why is there

such a large turnover in such an important area? Do you think that having such a high turnover has contributed to some of the problems in this area?

Mr. WIENBERG. The three administrators, people that I reported to, Mr. Svahn was the acting administrator in that position at the time I came aboard in August or September through the time he left which was mid-January.

Senator PERCY. Why did he leave?

Mr. WIENBERG. He was acting and I guess he didn't think that they were going to confirm him as the administrator and decided that he would leave.

Senator PERCY. Where did he go? He left voluntarily?

Mr. WIENBERG. Yes, sir. He resigned.

Senator PERCY. Mainly because he was made an acting administrator and never appointed to the spot as permanent administrator?

Mr. WIENBERG. Let me explain for a moment. He served as the Commissioner of APA and, as an additional duty, was a deputy to the administrator who was James Dwight. For some time before I arrived, James Dwight left in June sometime, Jack then became the acting administrator.

It became—he was not made the, he was not mentioned for the job of administrator. For what reason he left, I don't know. I don't know. He just left. I think his own position, he can explain this perhaps better than myself.

Senator PERCY. Do you know where he went?

Mr. WIENBERG. Yes. He went to Haskins & Sells, an accounting firm in Washington.

Senator PERCY. The second then?

Mr. WIENBERG. There was then an appointed acting administrator, by the name of Donald Wortman, who occupied that position until Mr. Fulton, Bob Fulton arrived in June or July sometime.

Senator PERCY. Mr. Fulton has held the job since when?

Mr. WIENBERG. I think it is June or July; early summer.

Senator PERCY. While we are mentioning Mr. Fulton, Mr. Chairman, I think it would be wise if Mr. Fulton could talk directly with Secretary Mathews, a man for whom I have the highest regard. He has my sympathy in taking on this gigantic job with the problems that it has had. I have been impressed with the way he has gone about trying to resolve many of these problems. I think we would like very much to hear from Mr. Fulton after he has briefed the Secretary on these hearings so that we can have a top-level policy statement tomorrow.

Is Haskins—Counsel?

Mr. COTTEN. Is Haskins & Sells associated with the MMIS program in any way?

Mr. WIENBERG. Very peripherally in one instance that I know of. They have been put under contract by the State of Idaho to serve as the technical evaluator for the State of Idaho of respondents to an RFP on the MMIS system.

Senator PERCY. Do they receive Federal funds through the State of Idaho?

Mr. WIENBERG. They do not as yet because we have not yet approved that selection. The SRS central office was not involved in selecting that evaluation contractor.

Senator PERCY. But they are applying for Federal funds?

Mr. WIENBERG. They would get some sort of Federal funding. I don't know whether they could qualify for 90-percent funding or whether it would be the simple 50-percent program, if indeed that program is approved.

Mr. STATLER. Do you know whether Mr. Svahn, since he has gone on with Haskins & Sells, has in any way been associated with the contractor you just referred to?

Mr. WIENBERG. I don't believe he has. I don't know for certain. I have been told that Jack has not been involved in this in any way.

Senator PERCY. I will ask one more question.

We had testimony from Mr. Trainor, Mrs. Ryan, and Mr. Cleaver. You are their supervisor. The only way they could have evaded my questions would have been to take the fifth amendment. I don't think you would have felt that they should have. Did you feel they had an obligation to answer those questions?

Mr. WIENBERG. Absolutely.

Senator PERCY. Do you endorse my giving them assurance that they would not be punished or be put in an awkward position by you or anyone in the Department? Do you support my assurance to them that, as a result of their testimony here, their relationship would be identical to the relationship it was before the testimony?

Mr. WIENBERG. Certainly, absolutely.

Senator PERCY. I felt I could assure them of that. I have Senator Nunn's backing and support.

Mr. WIENBERG. In my behalf, too.

Senator PERCY. I thank you very much indeed. Thank you.

Senator NUNN. Just one question

Senator NUNN. How many other employees that you know of in your division have gone to work for Haskins & Sells?

Mr. WIENBERG. In my division, none, sir. Nobody from my organization has gone to work for Haskins & Sells.

Senator NUNN. How about the Dallas Regional Commission?

Mr. WIENBERG. There are people in SRS that have gone to work for Haskins & Sells, not in my organization.

Senator NUNN. Let's ask about that. In SRS?

Mr. WIENBERG. In SRS, there have been two regional commissioners that have gone to work for Haskins & Sells, and the former administrator went there prior to Mr. Svahn.

Senator NUNN. Who was that?

Mr. WIENBERG. James Dwight.

Senator NUNN. Are they involved in doing business with the SRS division?

Mr. WIENBERG. They are not involved in doing business with the programs that SRS are normally responsible for. They have some involvement in the special program that is under the direct control of the administrator.

Senator NUNN. Are you concerned about this cross-relationship between people who have been in your Department or in SRS and other firms, for instance Haskins & Sells or others that they go to

work for, that might do a substantial amount of business with the Federal Government?

Mr. WIENBERG. Yes, sir, if indeed it is improper, I think yes. If indeed their actions after they are engaged by a private company, if indeed they continue to do business in the areas that they were working in, I do believe that is improper.

Senator NUNN. Have you had a study done of that?

Mr. WIENBERG. A study done of that?

Senator NUNN. A study or any kind of research project on that?

Mr. WIENBERG. I have not, no.

Senator NUNN. Have you seen anybody else that has one? Are you familiar with one?

Mr. WIENBERG. No.

Senator NUNN. Do you have any rules or regulations set up regarding any length of time in which a person who has been involved in SRS should not be involved in a private company after leaving Government that does business with SRS? Is there any kind of rules or regulations on that? Mr. Berkley?

Mr. BERKLEY. No; the only thing that we do is make sure that the employees are aware of the criminal prohibition in section 207 of title 18. In fact, before he left, Mr. Dwight came to my office and I explained to him in some detail, at his request, the workings of section 207.

Senator NUNN. You don't have anything comparable to the Department of Defense regulations in that area about the length of time that they would not be involved in Government work?

Mr. BERKLEY. No; we just follow the criminal law that says you cannot ever represent anyone with regard to a particular matter in which you participate personally and substantially as a Federal employee, and, where you didn't participate personally, but someone under your supervision did, you cannot represent anyone as to that particular matter for 1 year.

Senator NUNN. Perhaps the same, is there a year? Is that the law, the criminal provision, for 1 year?

Mr. BERKLEY. The criminal provision says if you personally participated in a particular matter, then you can never represent anyone in connection with that particular matter. If you have been a supervisor, like the Administrator, any particular matter that any of your subordinates have worked on, even though it didn't come to your desk while you are there, you are precluded from representing anyone in that particular matter for a year.

But that does not mean that you cannot, for example, make a grant application to HEW as soon as you leave, as long as it is a new matter, something that was not pending. On the other hand if there is an RFP on the streets that was prepared by your subordinate while you were still at HEW, then that particular RFP would be a particular matter as to which you would be precluded from representing your new employers for one year after you left.

Senator NUNN. Is that the same kind of rule that the Department of Defense has? Don't they have more specific rules than that?

Mr. BERKLEY. I think they do, by regulation.

Senator NUNN. Have you considered the necessity or desirability of such a rule in HEW, a more rigid rule?

Mr. BERKLEY. About 2 or 3 years ago, I am not sure exactly when, there was a notice of proposed rule making published by the Department which tracked more or less with the OEO rule, which is that if a former employee of the department is working for a proposed contractor, this prior Department employment is supposed to be identified in the contract proposal or bid and it must then be approved at one level higher than would be the ordinary rule for such a contract proposal.

But this has not been finalized. I don't know just what its present status is in the Department.

Senator NUNN. Do you see there may be a need for HEW now to look in this area, since you are handling really more funds basically than even the Department of Defense?

Mr. BERKLEY. On the facts that have been brought out in this hearing, there is no indication that any impropriety has occurred in connection with a contract because there was a former HEW or SRS employee involved.

Senator NUNN. That is right. I am not insinuating that in any way. I asked you about the Department of Defense experience.

Mr. BERKLEY. It has been under consideration and I am sure it is still under consideration.

Senator NUNN. By who and at what level?

Mr. BERKLEY. I am not sure. It was originally initiated by the Office of Grant and Procurement Management, which was established approximately 3 years ago. It is in the Office of the Secretary, headed by a Deputy Assistant Secretary.

Senator NUNN. Could you forward to us for the record any kind of memo on that subject that is being considered now or may have been considered in the past?

Mr. BERKLEY. Yes; I will.

Senator NUNN. Furnish that for the record.

Mr. BERKLEY. Yes; I will.

[The information to be furnished follows:]

OCTOBER 1, 1976.

HOWARD J. FIELDMAN,
Chief Counsel, Senate Permanent Subcommittee on Investigations,
Washington, D.C.

DEAR HOWARD: As you will recall, at yesterday's hearing Chairman Nunn asked me about the Department's Conflict of Interest rules relating to former employees. I told him that our policy was to rely on the provisions of 18 U.S.C. Section 207 in this regard. I also mentioned that in 1974 the Department published a Notice of Proposed Rule Making to establish a policy similar to the regulation which OEO has in this area.

Senator Nunn requested me to report on the current status of this proposed regulation and to supply the committee with documents relating to it. I enclose herewith a Xerox copy of the Notice of Proposed Rule Making and the public comments, principally from Universities and mostly adverse to it, which were received by the Department.

Because of the questions raised by these public comments, the Office of Grant and Procurement Management has been attempting to redraft the proposed regulation for approximately two years. I have been informed by Mr. Paul Stone, Deputy Assistant Secretary for Grant and Procurement Management, that he expects to have his redraft ready within the next six months.

Very truly yours,

BURTON BERKLEY,
Deputy Assistant General Counsel,
Business and Administrative Law Division.

Senator NUNN. Mr. Wienberg, have you ever been contacted by any former administrator regarding any matter that would come under their supervision while they were part of HEW?

Mr. WIENBERG. No, sir.

Senator NUNN. You don't have any former administrator who may, or employee who may, in effect be breaching any of these rules or criminal laws that we have talked about?

[At this point Senator Percy withdrew from the hearing room.]

Mr. WIENBERG. No.

Senator NUNN. This conflict of interest?

Mr. WIENBERG. No.

Mr. FELDMAN. Senator, could I place in the record a memo referred to by Mr. Wienberg on execution of staff advisory responsibilities as exhibit No. 67?

Senator NUNN. Without objection.

Mr. FELDMAN. Also an issue paper from the Director, Office of State Systems Operations, regarding systems fragmentation; then as the next exhibit, the form letter alluded to today signed by Mr. Cubbler?

Senator NUNN. Without objection.

Mr. FELDMAN. I would like as a sealed exhibit, various materials we have received, which have not been verified, but I would like to put them in the record at this time subject to perhaps future public release.

Senator NUNN. Would you identify it? Is this going to be more than one sealed document?

Mr. FELDMAN. It is many documents. Perhaps Mr. Vienna can generally describe them.

Mr. VIENNA. They relate to—

Senator NUNN. Tell us why they are sealed.

Mr. VIENNA. They relate to activities of employees, consultants, former employees of HEW; their relationships with private industry, and with Federal health and welfare programs.

Mr. FELDMAN. That will be exhibit 70.

[The documents referred to were marked "Exhibit Nos. 67-70" for reference and may be found in the files of the subcommittee. Exhibit No. 70 will be retained in the confidential files of the subcommittee.]

Senator NUNN. This morning, as indicated previously, I signed the subpoena calling for the personal appearance of Mr. Charles Cubbler before this subcommittee tomorrow morning at 10 o'clock. A subpoena duces tecum, which was for records was served on him by staff August 25, 1976. This first subpoena has not been responded to. Mr. Cubbler hopefully will be served today. I have not received notice whether he has been served. Assuming he is served, if Mr. Cubbler does not appear either to testify—he has constitutional rights, that is his choice—I will recommend to the full committee that the Senate proceed against Mr. Cubbler for contempt.

Tomorrow morning, hearings are set at 10 o'clock in this room. We will have Mr. Robert Fulton, Associate Administrator, Social and Rehabilitation Service, Department of HEW. He has been here this morning. We appreciate your patience, Mr. Fulton. We think timewise, it will be better starting again tomorrow morning.

Mr. Wienberg?

Mr. WIENBERG. I would like very much to be able, for the record, to explain some of the—well, address comments to the various points that were made this morning about management, the organization, about some of the decisions made, if that would be possible.

Senator NUNN. Why don't you go ahead now? I don't want to cut you off. I will wait here. You can respond right now, if you want to. The two charges heard made relating to poor management and very grave concern by Mr. Trainor relating to the lack of competition. Why don't you go ahead now because you have a right to respond?

Mr. WIENBERG. Fine.

When I came in and took over the organization, it was in a state of chaos, if you will. This was a year ago. This had been in operation for some 2 years during which time it was run by caretaker type of acting administrators, part of which were a group of consulting people from an outside corporation who were on the staff running the organization as consultants.

This demoralized the employees and had a tremendously bad effect on the whole 120 people that are there.

They had joined unions, they had union grievances all over the buildings, they had grievances, one against the other, against management. It was a very bad situation.

This was further aggravated by the fact that because of these various personnel practices, the division of personnel had instituted a 100 percent job classification study of the whole organization. This meant that every one of the 120 positions had to be individually scrutinized by personnel, they had to be reevaluated and reclassified.

This action threatened a lot of the individuals who were extremely concerned about their continued career development in the Government service.

As a result, what had happened was there were many groups of individuals, each working for themselves and within their own little area of activity with no coordination between them at all and no general supervision, trying to tie them together.

Senator NUNN. This was approximately 1 year ago?

Mr. WIENBERG. Yes, sir. That is right.

When I came aboard, I immediately met with the union. We tried to straighten out a lot of grievances. I was advised by personnel at the time that if indeed I tried to reorganize or reshape the organization in any way, it would be totally chaotic because it would start the reclassification process all over again which was at that point some time—

Senator NUNN. Let me stop right there. How do we get in this kind of mess in the Government? I am sure you are going to relate some things you have done, but what is wrong with Government that allows this kind of situation to exist? How do we get there in the first place?

Mr. WIENBERG. I think you got there in the first place by virtue of the lack of a leader in that organization from the time it was created.

Senator NUNN. In the particular organization you are talking about?

Mr. WIENBERG. The one I run.

Senator NUNN. You are not talking about all of HEW?

Mr. WIENBERG. No, sir. I have got troubles enough. [Laughter.]

I don't know about the rest of HEW.

Senator NUNN. So you would agree that there was poor management when you arrived?

Mr. WIENBERG. I will agree there was hardly any management when I arrived.

Senator NUNN. You don't agree there is poor management now?

Mr. WIENBERG. I believe that the management still has a great deal to be desired and part of it is, not a small part, is due to the fact that only within the last month has the personnel process finally gotten to the point where we now can go out and post jobs. I presently have nine senior positions, GS-15 level positions, each one being the director of one of those organizations in my organization that have been filled over the past number of years by acting people, just going in like dominoes, in and out, in and out, never having more than a few months of tenure.

This has caused a great deal of confusion, all of that.

Senator NUNN. Do we need to change the law? Is there any kind of legal impediment that keeps us from having good management, Civil Service Commission rules, political interference? What can we do here in Congress? I think the American people can see that HEW has a few problems, not just your shop. We found problems, tremendous problems in the student loan program.

I won't go into those now, but probably they were just as great as those in this case.

Mr. WIENBERG. If I might offer, I believe that modifying the civil service regulations so that you can get the most competent people aboard rapidly to do the job for you is one of the ways.

Senator NUNN. Does that mean also you need to have more flexibility to fire incompetent people?

Mr. WIENBERG. Yes.

Senator NUNN. Do you still think you have incompetent people in your shop?

Mr. WIENBERG. I am sure every organization has a degree of incompetence in its shops.

Senator NUNN. Do you have people in your shop you would like to fire if you had the opportunity?

Mr. WIENBERG. I would say so. Yes.

Senator NUNN. What percentage? I am not asking for names. I don't intend to. I am not putting you in a trap on that score. I am not asking for names. Do you have 120 people working for you?

Mr. WIENBERG. Yes.

Senator NUNN. How many of them would leave, if you were in private enterprise and had the authority to discharge employees?

Mr. WIENBERG. If I was in private enterprise, I would make sweeping original changes and probably get rid of 20 percent of my employees.

Senator NUNN. About 20 percent?

Mr. WIENBERG. Yes, sir.

Senator NUNN. What organizational changes would you make?

Mr. WIENBERG. The organization as it exists that I inherited has great overlapping areas of responsibilities. It is very difficult to have a clean line of responsibility throughout the organization. The thing

I wish to do is strengthen, by strengthening the organization, by cleaning up the overlapping and redundant responsibilities that exist as the first step and then redress the problems that we have and set it up more functionally than it presently is set up.

Senator NUNN. Senator Percy and I have been into that at length. We both joined together and sponsored a bill that has just passed, that removes the very top echelon in the Drug Enforcement Administration from civil service protection, giving more flexibility there, similar to the FBI.

We had a lot of testimony about what you said. They virtually cannot get rid of the people who can't do the job.

Do you have recommendations for your office or for HEW? How could you accomplish this purpose of being able to terminate people who are not doing the job, and yet give the kind of protection that is needed to avoid jobs being abolished on political whims?

Mr. WIENBERG. There certainly is a process in the civil service regulations. It is quite time consuming and cumbersome and one that people undertake because of the extreme difficulties with it.

Senator NUNN. If you had your way right now, you would reorganize your department? If you had the authority to do it in the private enterprise, you would reorganize your department, get rid of some overlaps in jurisdiction?

Mr. WIENBERG. Yes, sir.

Senator NUNN. You would also fire 20 percent of the employees?

Mr. WIENBERG. Of that 20 percent, I would replace a number of people, and I would reassign a number of people. I would reorganize and strengthen the organization.

Senator NUNN. You don't think you have that authority?

Mr. WIENBERG. I don't have any.

Senator NUNN. You are certain you don't?

Mr. WIENBERG. Yes, sir; right now in the manner in which we described. That is correct.

Senator NUNN. Could you get by with fewer people if you reorganized?

Mr. WIENBERG. No, sir. We are vastly understaffed for the responsibilities we have right now. That with the overlapping responsibilities and not all the topnotch people makes the job even more difficult to do.

Senator NUNN. Have you taken these frustrations to any of your superiors?

Mr. WIENBERG. Yes, sir.

Senator NUNN. Who is your superior?

Mr. WIENBERG. Mr. Fulten is my superior.

Senator NUNN. What kind of response do you get?

Mr. WIENBERG. Very sympathetic response. He is very well aware of the problems.

Senator NUNN. Does he feel he has the authority to accomplish these goals?

Mr. WIENBERG. I think certain ones he probably has, as soon as he is there long enough to really understand what the extent and scope are throughout the organization. Yes, sir.

Senator NUNN. Again, I ask are there any legal changes that need to be made. Is there anything Congress can do to assist in this problem?

Mr. WIENBERG. I would off the cuff suggest the following: That the review of civil service regulations be done in a manner that is geared toward primarily executing the functions of the Government organizations rather than totally concerning themselves with the employment of individuals.

Senator NUNN. Let's see if you can express that again so I can understand exactly what you are saying.

Mr. WIENBERG. I said I feel that perhaps looking at civil service regulations from the point of view of getting the Government job accomplished effectively, efficiently and economically and put that as the primary priority of Government employment rather than employment of individuals.

Senator NUNN. You think right now the emphasis is on the protection of individuals to the exclusion of getting the job done?

Mr. WIENBERG. I do, sir.

Senator NUNN. I have heard this statement off the record many times by people in almost every department of Government and I am inclined to think you have a legitimate point. I appreciate your bringing it up.

Are there any other points you want to make along that line?

Mr. WIENBERG. I have a list of things that I can tell you that were done to improve the conditions that were there. I think the morale of the individuals have greatly increased over what they were. We have tried to strengthen the organization by establishing management procedures because there are no procedures of any sort.

Information was coming in and out, letter, proposals, documents were coming in to any division or office and going out from any unit and not being responded to by the individual receiving the letter if they didn't know what to say.

Senator NUNN. You mean they would sit there and ignore them?

Mr. WIENBERG. That was in being when I arrived. Yes. We have tried to clean out the back files of previous correspondence dating back perhaps a year from the time of my arrival; tried to respond to the States, tried to respond to the individuals that had forwarded these things. We have instituted a correspondence and information-tracking system so that now we get things through a central point, know what is coming in and what is going out.

So we can control the individual responses properly to get the information people request. We have instituted a review of our National Center for Social Statistics, which is under my jurisdiction, as part of the 120 people, to review their procedures and reports that they are generating in to determine the manner in which they are presently executing their responsibilities. I feel this responsibility needs a great deal of attention so that we can use that center as the resource that it originally was set up to provide.

We have undertaken a series of programs just recently to look at the ability and the possibility of having the very thing that people are talking about this morning, a single MMIS system serving a

multiplicity of States. I had a project underway with the National Bureau of Standards with transition quarter funding that could not be completed because the fiscal year funds could not be transferred to that agency. This was specifically to have them set up a laboratory and develop a tri-State program to see what the efficiencies were that could be provided by a central information system processing activity servicing two or three or more States in the medicaid, principally the medicaid area.

Another problem, when I arrived, was that there was no budget for the organization.

We had no staffing plan for the office of information systems except on an interim basis and this was developed by other people outside of the organization because of a lack of leadership.

We managed finally to get a handle on the budget and tried to get our own plans put forward to get these into the budget, the resources that I think we required to do our job.

Again, we have 10 regions. None of the regions are staffed, equipped properly to handle the information system activities. There was no effort made before my arrival to staff the activities in any way. They were out there, dispersed amongst three or four other program areas, not in the information system area.

So we rely on the staff of the regions which is totally inadequate, sometimes one man in one region is supposed to be knowledgeable in four States.

Senator NUNN. If some U.S. Senator 1 year ago when you arrived, described your shop as being in total, absolute chaos and is completely bureaucratic mess, you would have agreed with him. Is that right?

Mr. WIENBERG. I would have agreed with them, right, when I arrived.

[Laughter.]

Mr. WIENBERG. I will tell you the following: About one of the comments here alluded to my particular management, Mr. Trainor's organization was the one dealing with the States, dealing with the region, having been in that position some 5 years, there was only in existence one program regulation guide without any definition of what those terms mean, but a continuing confusion in the States as to what constitutes a decent advanced planning document or what an RFP should be or what proper evaluation criteria should be established for contract evaluation.

There has been no attempt made even upon my direction for this to be done, to expand upon those things and become more specific so that the States have fewer reasons for misinterpreting the rules and the regulations that they have in their hands which are difficult.

Senator NUNN. Thank you, sir. Any other particular points that you feel, allegations have been made, that you feel you need to respond to?

Mr. WIENBERG. I mentally noted a bunch of them while the testimony was going on. I didn't jot them down.

Senator NUNN. We will keep the record open so you can add anything.

Mr. WIENBERG. I appreciate that very much.

Senator NUNN. We are not trying to make judgments here about who is right and wrong in all of these management functions. Congress cannot manage HEW. I think we can give oversight to it and try to stimulate better management in HEW. That is what we are doing.

Mr. WIENBERG, I appreciate that. I feel a bit sorry, I guess, of the misinterpretations by my people that have been made. I will try to improve our communications so that since the language of it there will be little opportunity for misunderstanding of what is said back and forth.

Senator NUNN. Thank you very much.

Mr. BERKLEY, do you have any other comments?

Mr. BERKLEY. No. I just want to thank the chairman for his courtesy today.

Senator NUNN. Thank you.

Mr. FULTON, we will be hearing from you tomorrow morning. One of the areas I would like for you to discuss with Mr. Wienberg—I didn't have a chance to pursue as much as I would like to—is this area of some competition in these computer contracts. I think that is essential. From your point of view, I don't expect you to be an expert on it, but I would like to know what can be done to make sure we have competition in the remaining contracts. I think this has a tremendous fiscal impact over a period of time and all of us know that medicaid costs have become uncontrollable both at the Federal and State level virtually.

So this is extremely important.

Thank you, sir.

[Whereupon, at 1:50 p.m., Thursday, September 30, 1976, the subcommittee was recessed, to reconvene at 10 a.m., Friday, October 1, 1976.]

[Member present at time of recess: Senator Nunn.]

MEDICAID MANAGEMENT INFORMATION SYSTEMS (MMIS)

FRIDAY, OCTOBER 1, 1976

U.S. SENATE,
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met at 10:10 a.m., in room 3302, Dirksen Senate Office Building, under authority of section 5, Senate Resolution 363, agreed to March 1, 1976, Hon. Sam Nunn (acting chairman) presiding.

Members of the subcommittee present: Senator Sam Nunn, Democrat, Georgia; and Senator Charles H. Percy, Republican, Illinois.

Members of the professional staff present: Howard J. Feldman, chief counsel; David P. Vienna, investigator; Walter S. Fialkewicz, detailed employee, Justice Department; Stuart M. Statler, chief counsel to the minority; Jonathan Cottin, investigator to the minority; Ruth Y. Watt, chief clerk; Jay Constantine, staff member, Finance Committee; and Val J. Halamandaris, staff member, Special Committee on Aging.

Senator NUNN. The subcommittee will come to order.

[Members of the subcommittee present at the time of reconvening: Senators Nunn and Percy.]

[The letter of authority follows:]

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

Pursuant to Rule 5 of the Rules of Procedure of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations, permission is hereby granted for the Chairman, or any member of the Subcommittee as designated by the Chairman, to conduct hearings in public session, without a quorum of two members for administration of oaths and taking of testimony in connection with Medicaid Management Information Systems on Friday, October 1, 1976.

SAM NUNN,
Acting Chairman.
CHARLES H. PERCY,
Ranking Minority Member.

Senator NUNN. Is Mr. Charles Cubbler here this morning? If Mr. Cubbler is here, will he come forward.

Yesterday, on September 30, 1976, Mr. Charles Cubbler, an employee of the Department of Health, Education, and Welfare, refused to appear before this subcommittee pursuant to my letter of request to Secretary Mathews, dated September 27, 1976, which has been made exhibit 23.

A representative of HEW testified yesterday that Mr. Cubbler disobeyed a HEW directive dated September 29, 1976, for him to appear.

Mr. Cubbler's attorneys responded to the HEW request by informing them early yesterday morning by letter dated September 30, 1976, that he would not appear. This is exhibit 66.

Mr. Cubbler's attorneys had previously written the subcommittee in a letter dated September 28, 1976, stating reasons why he should not appear in public session while all testimony related to him should be held in executive session and why at the very least he testify in executive session. Counsel for Mr. Cubbler stated that in any event Mr. Cubbler would exercise his constitutional right not to testify. Counsel did not state that if Mr. Cubbler was not permitted to testify in executive session he would not appear before the subcommittee. All of this is exhibit 24.

At the request of Mr. Cubbler's counsel, their letter was circulated to all subcommittee members with a memorandum on that same day, September 28, 1976, indicating the view of the acting chairman and the ranking minority member, that Mr. Cubbler be required to give public testimony. No objection was received from any subcommittee member.

Counsel notified the subcommittee chief counsel, Mr. Howard Feldman, at approximately 9 a.m., yesterday, that Mr. Cubbler would not appear to testify.

On September 30, 1976, I signed the subpoena for Mr. Cubbler to appear at 10 a.m., on Friday, October 1. A copy of that subpoena will be made a part of the record.

[The subpoena follows:]

UNITED STATES OF AMERICA

CONGRESS OF THE UNITED STATES

To Charles A. Cubbler, GREETING:

PURSUANT to lawful authority, YOU ARE HEREBY COMMANDED to appear before the SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS of the Senate of the United States, on October 1st, 1976, at 10:00 o'clock a.m., at their committee room 101 Russell Senate Office Building, Washington, D.C., then and there to testify what you may know relative to the subject matters under consideration by said committee.

HEREOF FAIL NOT, as you will answer your default under the pains and penalties in such cases made and provided.

To ----- to serve and return.

GIVEN under my hand, by order of the committee, this 30th day of September, in the year of our Lord one thousand nine hundred and seventy-six.

SAM NUNN,

Acting Chairman, Senate Permanent Subcommittee on Investigations
of the Committee on Government Operations.

Senator NUNN. Mr. Cubbler has previously been served personally on August 25 with a subcommittee subpoena to produce certain books and records. That appears as exhibit 27.

He has not complied with that subpoena.

A U.S. Marshal attempted to serve the subpoena on Mr. Cubbler which I signed yesterday. There were attempts made all day yester-

day and early this morning to serve the subpoena. They were unsuccessful in serving Mr. Cubbler.

Mr. Cubbler is obviously evading our process. He was aware of these hearings. His attorneys were aware of these hearings and they gave us every reason to expect his presence until yesterday morning. His attorneys were yesterday morning made aware of the intention of this subcommittee to issue a new subpoena for the personal appearance of Mr. Cubbler at today's session.

I have been informed that the Department of Health, Education, and Welfare is forwarding material relevant to Mr. Cubbler to the Department of Justice.

We will ask Mr. Fulton of HEW, who is here this morning, to comment further on that at our hearing this morning. I will ask the subcommittee—and I am confident that I have the complete concurrence of Senator Percy on this, but he can speak for himself—to forward our record to the Department of Justice.

The essential thing is that we have a complete, full and impartial review of these facts by a law enforcement agency with jurisdiction.

Because Mr. Cubbler has not complied with the subpoena served on him personally on August 25, 1976, I am directing staff to commence processing papers to forward to the full committee at the appropriate time so that it might make a determination on whether Mr. Cubbler should be cited for contempt.

I would like to also state that the subcommittee is in no way waiving its requirement for a witness to appear before it in public session, notwithstanding the representations made that such witness will exercise his constitutional rights not to testify.

Senator PERCY. Mr. Chairman, I would like to be certain. As I recall, the wording of our original subpoena was that he should provide his records pertinent to this situation forthwith. In the judgment of counsel, is a period of 3 or 4 weeks—in view of the notoriety that this situation has had, the full notification that Mr. Cubbler has had and the subpoena having been issued personally to him—sufficient time for the records to be readily available? In the opinion of counsel, is he in violation of that subpoena? How much time has elapsed, by the way, since the subpoena was issued?

Senator NUNN. I will let counsel answer that question.

Mr. FELDMAN. The subpoena is dated August 24, 1976, and it was served on August 25.

Senator PERCY. So it has taken over a month to simply furnish records. It would appear to me that he is in default on that subpoena alone. Therefore, I think we would appreciate advice from counsel as to what action the committee should take.

Mr. Cubbler's attorney said that he did not wish his client to appear before us because it might prejudice his case. Isn't it true that Mr. Cubbler has made comments to the press for public consumption about his situation, answering the same sort of questions from the press that would have been put to him by members of this subcommittee?

Mr. FELDMAN. Taking your last point first, Senator Percy, I understand from a UPI interview I have read that Mr. Cubbler, indeed,

gave an interview to that wire service. But I have no firsthand knowledge of that. I was not at the interview, obviously.

We were discrete in our press release announcing these hearings, as the press knows. We did not name individuals, nor would we give out names of witnesses until the morning of each hearing day.

With regard to the question of Mr. Cubbler's attorneys making statements that he would not appear, I talked to an attorney for Mr. Cubbler yesterday after he did not appear and asked him if he would accept process, a subpoena for Mr. Cubbler's appearance. He told me, as one of the attorneys that told Mr. Statler and myself earlier yesterday morning, that he could not. He said he was not authorized to accept service on behalf of Mr. Cubbler.

The fact that Mr. Cubbler's counsels have made arguments to the subcommittee on behalf of Mr. Cubbler, but, on the other hand, tell us they are not able to accept process, should be examined by this subcommittee, as well as statements that they made to HEW within their letter. I think these representations are factors in our deliberations here.

As far as the subpoena served August 25, 1976, for books and records, I think Mr. Cubbler has had enough time to respond. Mr. Cubbler was told to appear here yesterday by letter. Although it is true that the attorneys for Mr. Cubbler have said that he did not intend to turn over his books and records, I don't again see how we can accept representations when they cannot accept service for Mr. Cubbler. So in that regard, I believe their warranties and representations cannot stand on their own record. There is a case here for referral to the full committee for it to decide whether or not it wants to process a contempt citation.

Mr. STATLER. One further point on that. On the question of the first subpoena and the production of books and records, Mr. Feldman and I met with counsel for Mr. Cubbler earlier this week and we explained to them that, not having already received the book and records, it was expected by the subcommittee that those books and records would be produced at the hearing that took place yesterday. In other words, forthwith was clearly defined as meaning yesterday, at yesterday's hearing.

Senator NUNN. That was with the attorneys for Mr. Cubbler.

Mr. STATLER. That is right.

Senator NUNN. That was in oral conversation between you and their attorneys?

Mr. STATLER. That is right.

Senator NUNN. And that was a clear understanding, the records and books were to be produced no later than yesterday?

Mr. STATLER. No later than yesterday.

Senator NUNN. It will be up to the full committee, assuming the full committee decides to proceed, to recommend he be in contempt. The Senate could act negatively or affirmatively on such a recommendation. If it acts affirmatively, it will be referred to the Department of Justice for action. That, in fact, will not take place today, since we will be adjourning, but at the appropriate time it will take place, assuming the committee makes an affirmative decision.

Senator PERCY. I think it is important that Mr. Cubbler be advised of this. We do not take lightly his refusal to appear and to

produce records. This is not essentially the business of the Senate. We are legislators, essentially. While we have no intention of persecuting him, we also have no intention of allowing anyone to put themselves above the powers given to the Senate.

Therefore, the minority will certainly support the action of the chairman in this matter and we will have to proceed with it.

I believe Mr. Fulton is here.

Senator NUNN. Thank you very much, Senator Percy. We concur completely on this matter and we will proceed within the law and Constitution.

Our first witness this morning is Mr. Robert Fulton, Administrator, Social and Rehabilitation Service, Department of Health, Education, and Welfare.

Mr. Fulton has patiently waited through yesterday's hearings. I think that it has been valuable, I hope from your point of view, to hear testimony that has preceded you. I don't know if you have a statement this morning or not.

TESTIMONY OF ROBERT FULTON, ADMINISTRATOR, SOCIAL AND REHABILITATION SERVICE, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; KEITH WEIKEL, COMMISSIONER OF MEDICAL SERVICES ADMINISTRATION, SOCIAL AND REHABILITATION SERVICE, DHEW; BURTON BERKLEY, DEPUTY ASSISTANT GENERAL COUNSEL FOR BUSINESS AND ADMINISTRATIVE LAW, DHEW; AND GALEN POWERS, ASSISTANT GENERAL COUNSEL, HUMAN RESOURCES, DHEW

Mr. FULTON. I would like to make some opening comments.

Senator NUNN. If you have any other gentlemen who will be testifying or answering questions, could you identify them?

Mr. FULTON. I would like to introduce Dr. Keith Weikel, who is our Commissioner of the Medical Services Administration within the Social and Rehabilitation Service. Dr. Weikel will be able to help answer questions.

Senator NUNN. I believe you have Mr. Berkley with you, who was here yesterday and who is legal counsel at HEW.

Mr. FULTON. That is right. Also with me is Galen Powers, who is Assistant General Counsel in HEW. He is actually the attorney for the Social and Rehabilitation Service.

Senator NUNN. Thank you.

I will ask all of you to take the oath. Do you swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. FULTON. I do.

Dr. WEIKEL. I do.

Mr. BERKLEY. I do.

Mr. POWERS. I do.

Senator NUNN. Mr. Fulton, before we start asking questions, I would like you to have the opportunity to proceed with any statement you would like to make.

Mr. FULTON. Thank you, Mr. Chairman.

I don't have a formal opening statement. I would like to make some brief comments. I would also like to report to the subcommittee that I have talked with Secretary Mathews, as both of you requested yesterday. I have also talked with Undersecretary Lynch, and the comments that I will make have their endorsement.

They both wanted me to convey to you the very serious concern of the Department of Health, Education and Welfare about the matters that are before the subcommittee and their assurance, as well as mine, that we will act expeditiously and vigorously on the problems that have been identified. Further we will deal with the management improvements, many of which we are already working on, just as effectively and efficiently as we can.

I want to take just a moment to set the scene of the medicaid management information system working with the Social and Rehabilitation Service. I will use SRS, if it is all right with you, without saying the whole name.

SRS is the agency within HEW which has responsibility for the public assistance programs, other than the supplementary security income program which is now administered by the Social Security Administration. We handle the aid to families with dependent children program, the medicaid program, social services program under title 20 of the Social Security Act, and child welfare services programs under title 4(b) of the Social Security Act.

We also have some other responsibilities relating to the Cuban refugee program and the Southeast Asia refugee program. Those are our primary responsibilities, the three major programs. Of these medicaid is the largest.

We have an authorized Federal staff in the SRS of about 2,125 people. We have program responsibility for Federal funds in fiscal year 1977 that are estimated at about \$19½ billion.

In addition to those Federal funds flowing through us to the States, we have about \$14½ billion in State and local moneys that are required as matching shares to go along with these Federal funds. So we are talking about a very large range of program responsibilities with a relatively small Federal staff providing policy, legislative work, oversight, evaluation, monitoring, and so forth.

SRS has been through a great deal of turmoil internally in the last 2 or 3 years. Mr. Wienberg testified yesterday about the vacancies in his organizational unit. The pattern that he described is somewhat worse than it has been in the agency as a whole, but the whole agency has undergone a great deal of shifting of leadership, of morale problems associated with the 100-percent classification review that Mr. Wienberg described, stemming back to some union allegations and civil service investigations relating to personnel administration in the past, 2 or 3 years ago.

As a result of those investigations, the Civil Service Commission recommended that appointment authority be withdrawn from the Administrator of SRS for all positions GS-13 and above. Only recently have we made enough progress on the improvement of personnel administration within the agency to get back that appointment authority with the approval of the Civil Service Commission.

We are making rapid strides on bringing the organization up to full staffing, both in terms of the management jobs and other staffing

positions. As recently as February, we had 450 vacancies in the agency. We have cut that down by 200; and we are continuing to work just as hard as we can to get the remaining positions filled.

As to the leadership positions at the top level, I have now filled three senior jobs since I have been on board and we have two other appointments in clearance. That leaves two of the central office senior positions reporting to me yet to be acted on; but we are working just as hard as we can to stabilize the leadership and get the agency on track. We are also engaged in a very vigorous work planning and priority setting effort that will guide our work over the next year.

I am new on the job. I got there 90 days ago.

Senator NUNN. Ninety?

Mr. FULTON. Ninety. I was sworn in on June 21. I might say that previous to that I was the Regional Director for HEW in the New England region, headquartered in Boston for the last 3 years. So I have some acquaintance with SRS problems and issues and the relationships it maintains with the States.

We are not as bad as we look to the outside world sometimes, I think. With the medicaid fraud, abuse and other allegations and other problems that come up with our programs, I think sometimes we look to the Congress and to the general public as though we are totally incompetent and not doing anything right.

In fact, we have a large number of very competent and dedicated employees who are working, as was indicated yesterday, extraordinary hours in coping with some very major responsibilities. We have a complicated environment to work in.

We are working not as direct Federal administrators of actual service to people, but we are funding 53 States and territories and through them a large number of other entities, such as counties and private and public agencies of other types. So we have a huge complex of agencies and organizations involved and we have a relatively small top leadership group in the Federal Government.

I mentioned that the medicaid program is our largest. The program level there, we are now predicting, will be about \$10.3 billion in Federal funds and about \$7½ billion in State and local funds this fiscal year, beginning on October 1, 1976.

In that program, we have encountered some new problems or some new manifestations of old problems; but it is the fact that the costs are escalating rapidly, something in the order of \$2½ billion in a year now in Federal and State and local costs, that is putting a squeeze not only on our Federal priority setting, but also on State and local budgets.

We also have the problems of abuse and fraud in medicaid that have been highlighted by the Moss subcommittee's recent reports and other congressional reports. So we are doing a great many things on the fraud and abuse front to try to deal with that.

The fundamental problem we believe in medicaid is that the program has outrun the capacities of States and localities to administer it efficiently and effectively. We have been trying.

Senator NUNN. Would you amend that to say State, local, and Federal Government?

Mr. FULTON. I would add Federal Government to that. I certainly would. We have been trying to operate without adequate management

systems for dealing with a program of this scope and magnitude. MMIS, medicaid management information systems, is one of the Federal Government's major responses to these problems.

The system was described yesterday by Mr. Wienberg and it was described by the committee staff in some of the material submitted to you and I won't repeat that; but I would say that the MMIS system, providing sound, rational, effective, modern management techniques for handling bills, claims processing, reporting, analysis at the State and local levels is a critical part of our efforts to get improvement in medicaid management.

Senator NUNN. So it is fair to say that the various systems we have been talking about that Mr. Cubbler, Mr. Wienberg and others are dealing with, are the systems that are designed to eliminate, or at least reduce as much as possible, the kinds of fraud and corruption that were revealed in the Moss hearings and in other hearings.

Mr. FULTON. Yes; but I would add, Senator Nunn, that it is not only the MMIS that is our response to the fraud and abuse problem. We have a number of other activities going on, including building up our staff in the regional office to do much more work on reviewing State management systems and encouraging arrangements between State welfare departments and prosecuting officials within the States.

We also have our own direct Federal sampling program now underway in which we go into selected States with the agreement of the Governor and do detailed reviews of a selection of medicaid payments to assess the extent to which fraud and abuse is occurring and then use the information that we obtain to help the State not only deal with the specific cases we uncover, but to deal with its own systems problems in monitoring and following up on fraud and abuse to prevent, detect and prosecute fraud and abuse where it is found.

I want to say again that the Secretary, the Undersecretary and I believe all of the SRS senior management team personally have the strongest possible commitment to assure integrity in all of our processes. We are most concerned about the problems that have been identified by the subcommittee and which have been elaborated here the last 2 days. We appreciate the subcommittee's work in bringing these to our attention.

I want to say again that I believe that the vast majority of our employees are competent, dedicated and clean. We are going to do everything we can possibly do to make that 100 percent so. I think it is nearly that now. We apparently have some instances where that may not have been so. I assure you that the problems you have identified will be dealt with promptly and decisively.

I also would caution that since we are a rather small staff at the Federal level, we have to be most concerned about the procedures and the processes which we set up for States and localities to use. In that regard, the concern of the subcommittee yesterday, about competition and rules that apply to State and local procurement of not only MMIS, but other services, are very important to us.

In that regard, the subcommittee is correct in indicating that what we do now in regard to building systems will have a very important effect on the success or failure of future reforms of health financing in this country. We take very seriously our obligations to not only

administer well now, but to build well for the future administration of whatever responsibilities rest at the Federal and State levels.

I do want, in regard to the competitive processes, to say that I believe the fundamentals are in our regulations. We have a set of excerpts from HEW regulations that deal with the competitive requirements applicable to the States that describe the particular requirements that apply to certain kinds of State purchases or procurements and we can make those available to the subcommittee.

Senator NUNN. Do you have those in a package that I can identify as an exhibit?

Mr. FULTON. Yes; we do. If it would be all right, I will identify for the record the excerpts that we have and then I will give them to you.

We have excerpts from 45 CFR 74, 151 through 154, which deal with general procurement requirements applicable to the States. We also have excerpts from 45 CFR 250.90 which deals with the MMIS requirements themselves. I think you already have those in the record. We also have 45 CFR 249.82, which outlines requirements which apply to fiscal agency prepaid insurance contracts and certain other health care project grant centers. These are requirements that go beyond the generally applicable ones.

Finally, there is one other regulation that deals with management studies, this is 45 CFR 74. The reason that is particularly relevant to your MMIS consideration is that sometimes things that are undertaken under the authority of our management studies regulation lead into MMIS developments. So we don't have a total separation between all these different requirements; but we do have these available.

Senator NUNN. They will be admitted into the record, all as approved, without objection. That will be Exhibit No. 71.

[The document referred to was marked "Exhibit No. 71" for reference and may be found in the files of the subcommittee.]

Senator NUNN. Mr. Fulton, on this latter point of competition, we have years and years of experience with military procurement showing the relationship between cost and the lack of competition and vice versa.

I think as we get into the design and operations of systems to try to control fraud and try and to process claims in the huge health care area, competition for contracts is perhaps one of our most important concerns. The alleged criminal activities of one particular employee, in my opinion, greatly is exceeded by our concern about how this affects competition. My questions are in this regard.

First of all, what have you done in terms of referring materials on Mr. Charles Cubbler and related activities to the Department of Justice?

Mr. FULTON. We have referred the information that has come to us through the subcommittee to the Department of Justice. We have also initiated, with our own Office of Investigations, a review ourselves of the matter to see whether there are any other things that may bear on the question of his activities.

Senator NUNN. The complete record of the subcommittee will be turned over to the Department of Justice.

Mr. FULTON. I heard you say that.

Senator NUNN. I am certain they will welcome any other material that you have.

As far as Mr. Cubbler is concerned now, what is his status as of today?

Mr. FULTON. As of this moment, Mr. Cubbler is still in the status described yesterday. That is, he has been detailed out of his regular position in the Office of Information Systems into our planning office, the Offices of Planning, Research and Evaluation. It is my understanding, that he has actually not been in the office since that detail was executed. He has reported on sick leave the last 2 days. The question of further action relative to him, as far as disciplinary steps, is under consideration right now.

Senator NUNN. Do you have any rules in HEW that refer to disciplinary action that would be taken in the event a particular employee refuses to obey an order of the Secretary to appear before a congressional committee, which is the case we have in Mr. Cubbler's matter?

Mr. FULTON. Insubordination is a ground for disciplinary action. I would defer to Mr. Berkley on the extent to which we do or do not speak to this particular type of insubordination.

Mr. BERKLEY. The situation that we have before us is apparent insubordination. Because of what also appears to be apparent evidence of a criminal activity, we feel that we should consult with the Department of Justice on what administrative steps should be taken because we wouldn't want to do anything that might in some way prejudice an ultimate criminal prosecution. But we have been in touch with the Department of Justice. I spoke to someone in the criminal division yesterday, and we are going to continue speaking to them. We are not just going to drop the matter. One way or another, there will be a decision made as to what is to be done.

Senator PERCY. I don't want to nitpick the situation, but on the other hand, when you mentioned he is reported to be on sick leave, I can imagine that he is kind of sick about this situation. I would hate to have him continue as a paid employee out on sick pay, with all of these allegations pending against him.

Mr. BERKLEY. Under the Civil Service regulations, you do not need a doctor's certificate if the sick leave is less than 3 days. And it is my understanding that he reported on sick leave yesterday and the day before, but today his wife called in and said he is on annual leave.

Senator PERCY. So now he is on annual leave?

Mr. BERKLEY. Yes.

Senator PERCY. In other words, he is still on the payroll?

Mr. BERKLEY. He is still on the payroll. As I say, as far as disciplinary steps are concerned, we feel that we have to be guided at least by the opinion of the Department of Justice. While they are assessing the case, we are going to have to keep working closely with them.

Senator NUNN. Will you take steps, Mr. Fulton, pursuant to legal advice to insure that, even though you are rightfully concerned about the rights of Mr. Cubbler, and so forth, the interest of the public and the interest of HEW are protected in terms of influence on contracts and of access to confidential material? Are you taking steps to insure that the interest of HEW and the taxpayers are being ade-

quately protected while Mr. Cubbler's disciplinary and other possible actions are pending?

Mr. FULTON. Yes. Mr. Cubbler will not be in a position to have anything to do with the awarding of contracts in MMIS or any other aspect of SRS's operations, nor will he be involved in any kind of planning activity that involves the request for proposals or any other phases of contract awards.

His duties will be strictly internal to the operation of our own system of management objectives, as Mr. Wienberg described it yesterday.

Senator NUNN. We have a Federal marshal who would like me to ask you whether you know where Mr. Cubbler is taking annual leave?

Mr. FULTON. Sir, I do not know. I do not believe any of my associates do.

Senator NUNN. Turning to the broader question, Mr. Fulton, what are the present rules in HEW, as you understand them, regarding employees doing consulting work on the side, so-called moonlighting, both as to the fees and as to expenses?

Mr. FULTON. We do have available to give to the committee the standards of conduct, for our employees. In this regard, we use the Department of Health, Education, and Welfare Standards of Conduct and they do provide a number of requirements relative to outside employment activities that are undertaken on employees' own time, and require advance approval in any situation in which there could be any suggestion of real or apparent conflict of interest or favoritism or any other condition that would cause the public to have less confidence in the integrity of the Federal Governmental process.

Senator NUNN. What are the penalties for failure to notify and failure to get advanced approval for consulting activities?

Mr. FULTON. These are matters for disciplinary action. There are a range of penalties, depending on the particular conditions, that can range all the way from a reprimand up to suspension and termination.

Senator NUNN. One of the most difficult areas to deal with in Washington—and I don't in any way imply that this problem is confined to the executive branch or to HEW—is the question of entertaining employees by marketing representatives and lobbyists.

What are your rules and regulations concerning new employees' relationships to private concerns and lobbyists, and the entertainment of these employees by private interests?

Mr. FULTON. Well, essentially the requirements are that anything of significant value not be received. I am going, again, to have to defer to Mr. Berkley for the details on this.

Mr. BERKLEY. As I mentioned yesterday, I am the deputy conduct counselor for the Department and my division has the responsibility for enforcing the conduct program in the Department.

In our regulations, we say that no one can accept anything, except something of nominal value. Now we haven't spelled out exactly what nominal value is. As I alluded yesterday, when we give conflict of interest lectures, which we give on a regular basis to employees throughout the Department, we tell them so far as we are concerned something like a free lunch is of more than nominal value.

We tell our employees they should not accept lunches or dinners, they should not accept football tickets, theater tickets, opera tickets. In a situation where someone is on a site visit, for example, and he is sitting in an office or laboratory of a professor and they are discussing business and the professor has arranged to have sandwiches brought in or something, or if they go to some sort of faculty club where there is no check offered, it would be difficult to say, "How much is the lunch?"

I am talking about a situation where the business is continuous, where it is not a social setting and no check is presented. Under such circumstances, it would be very difficult for a person to say, "How much is my share?"

We tell our employees in a situation where they are in a regular restaurant and a check is presented, they should make an effort to pay their share; and from my own personal experience, I find if you really insist, that, after looking somewhat aghast, people do let you pay your share of the lunch. This is what our employees are told.

Senator PERCY. You mentioned you tell employees this. Is this actually an employment regulation?

Mr. BERKLEY. The regulation states an employee may accept nothing of more than nominal value. In other words, it is not exactly spelled out.

Senator NUNN. Nominal value is not defined?

Mr. BERKLEY. That is right.

Senator NUNN. You don't have a \$50 rule or anything of that sort?

Mr. BERKLEY. No. In fact, my personal feeling is a \$50 rule would be high. I would consider something more than just a dollar or two to be more than nominal.

Senator PERCY. Your own regulations are stricter than those for the general Government employee?

Mr. BERKLEY. That is right.

Senator PERCY. \$50 is in a form of a limitation?

Mr. BERKLEY. Yes.

Senator PERCY. That applies to all of your employees? Is nominal value—you say \$50 would be high—something less than that?

Mr. BERKLEY. That is right. For example, when the predecessor of my superior in this job used to give conflict of interest lectures, he would take a black Government plastic pen out of his pocket and say, "This is nominal," and then he would take a gold Mark Cross pen out of his pocket and say, "This is not nominal value."

Senator NUNN. Would you say, Mr. Berkley, that, hypothetically, \$600 worth of entertainment by a contractor for a HEW employee in 1 year is more than nominal value?

Mr. BERKLEY. It would depend, as to over how long a period of time, just what it was.

Senator NUNN. Let's say a series of lunches over 1 year.

Mr. BERKLEY. I would say if it were more than one or two lunches a week, it probably would be more than nominal. Again, even the one or two could be bad if it is not tied in with very specific ongoing business as opposed to what could be considered sort of buttering someone up for the future.

Mr. FULTON. I guess maybe I have a little more rigid view of that than he is expressing. I think one or two lunches a week would get

beyond the point of nominality, myself. I would feel that maybe the HEW regulations don't speak to that explicitly. Personally, I would think that would give an appearance of a relationship that would not be consistent with the highest standards of integrity.

Senator NUNN. This is a difficult area. I don't pretend it to be easy. We have exactly the same kind of problems here. It is difficult when you are laying down rules for your own staff. You have all sorts of constituents who come from your own State. It is not easy, but I think all of us need to pay very, very close attention to it and do as good a job as we can in defining it.

Of course, you have a nominal value rule, but that obviously is interpreted by different people in a lot of different ways. What about the use by HEW employees of luxury cars or any kind of automobile that is furnished free of charge by potential bidders and contractors hoping to receive or receiving HEW funds?

Mr. FULTON. I don't see how that can conceivably be interpreted any other way than that it would be a violation of our standards of conduct.

Senator NUNN. How about a situation of an HEW employee being furnished transportation by, say, No. 1, State governments and, No. 2, by private companies?

Mr. FULTON. Generally, that would be out of bounds. There are probably situations in which people, are on official business within a State, that might ride on a State airplane or accept a ride in a State car to a particular worksite. That would be appropriate. But any kind of involvement where it is for the financial benefit of the employee—for example, for getting a consultant fee or something of that sort, or otherwise not proper in terms of the code of conduct—would be out of bounds.

Senator NUNN. Would the same rule apply for a State government plane picking someone up as for a private plane picking someone up or would these be two different circumstances?

Mr. FULTON. I would say yes, unless it was in the case of the State plane within the State and in the company of State officials engaged in a joint Federal-State matter.

Senator NUNN. There would be nothing wrong with that?

Mr. FULTON. I don't think so. In certain situations it certainly would seem appropriate, if the best way for the State and Federal officials to go to a remote corner of a State would be to ride the State airplane, I wouldn't think there would be anything wrong with that.

Senator NUNN. How about a State plane picking up a Federal official in Washington and taking him to the State?

Mr. FULTON. I would not think that was appropriate in general.

Senator NUNN. What about the question we have come up this week about a Federal employee revealing or furnishing to a potential bidder the advance planning document from a State government?

Mr. FULTON. Any kind of use of inside information to benefit one bidder or proposer at the expense of another would be out of bounds. I believe our regulations speak to the use of inside information.

Mr. BERKLEY. Yes. It is specifically in the regulations, yes.

Mr. FULTON. That is simply not consistent with the public interest. Something that is not available to all of the proposers should not be available to one.

Senator NUNN. Is there any violation of Federal law for a State medicaid official to own stock in a company that has an MMIS contract with the State? Is that a violation of any Federal statute?

Mr. FULTON. I am going to have to turn to the attorneys on that one. I am not aware of any Federal statute that bears on that.

Mr. BERKLEY. There is no Federal statute that bears on conflict of interest among grantees. The conflict of interest laws apply solely to Federal employees, but there may be State and local laws that apply.

Senator NUNN. In other words, if a State official owns 100 percent of the stock of a company that wins an MMIS contract, for which 90 percent of the funds are paid by the Federal Government, and if that State official even makes the decision to award the contract, is there a violation of Federal law?

Mr. BERKLEY. No.

Senator NUNN. I gave you an extreme example; but the principle remains the same?

Mr. BERKLEY. No violation of Federal law. In our regulations, as Mr. Fulton already stated, in part 74, we do require in all contracts by grantees of the Department that there be competitive bidding.

Now it is possible that if this information were known, in reviewing the contract, we might feel there was some question as to whether the competitive bidding process has really been carried out.

Senator NUNN. I would hope it would raise some doubt in your mind.

Mr. BERKLEY. But this would be under our regulations and would solely relate to whether we invalidate the contract or not approve the contract, as opposed to whether there is a violation of a Federal law.

Mr. FULTON. There is some work being done through the American Bar Association in cooperation with the Justice Department and now we have some money invested in this on a model State procurement code. That is of considerable interest to us.

We recognize that many States have not refined the rules and procedures relative to outside purchases to the extent that they have been in the Federal Government. Although we have, as I indicated, relatively clear standards on contracting as far as competition and avoidance of conflict of interest, the implementation of that within some of our States is not as strong and effective as we would like.

Senator NUNN. It seems to me what we are describing here is a huge gap in the Federal law. The subcommittee is going further and further into the area of grantees in subsequent hearings. Hopefully, we will give more authority to the States in the future.

According to my own political philosophy, I believe State governments can, in many cases, administer many programs more effectively and efficiently than the Federal Government.

At the same time, if we are furnishing Federal money to States and there is no Federal law relating to flagrant violations or what would be violations if these abuses occurred at the Federal level, it seems to me we really need to focus on this area and remedy the situation.

Mr. FULTON. In that regard, we are reexamining our own internal delegations of authority and procedures relative to State procurement actions that we review, and also the general rules that we lay on the States.

We are going to look particularly at the question of whether we have left gaps which leave the Federal Government vulnerable to charges that we have led the Federal Government into systems that are not sufficient to protect it. I think the subcommittee's raising these issues is most appropriate.

Senator NUNN. It seems to me that just giving lip service to competition is not going to work at all.

Mr. FULTON. It is not enough, no, sir.

Senator NUNN. What about another situation, and then I will defer to Senator Percy. What about a situation where a high official in one State serves as a consultant to a private bidder in another State; No. 1, is this illegal? No. 2, do you see anything wrong with this?

Mr. FULTON. Again, I am going to have to ask for the attorney's view.

Senator NUNN. Let's ask you the second question.

Mr. FULTON. Do I see anything wrong with it? I think that smacks of something that is not quite straightforward, yes, particularly if that first State has received Federal support, let's say, for a system development and then the State employee goes over and helps some private firm get business in a related field in the other State. That doesn't seem clean to me.

Senator NUNN. What we are describing here is a huge expenditure of Federal funds that has grown by leaps and bounds over a very short period of time and we, it seems to me, have not in any way caught up legally, administratively, with the problems involved. Do you think that is an overstatement?

Mr. FULTON. I think that is a fair characterization.

Senator NUNN. Mr. Berkley?

Mr. BERKLEY. Yes; there is no Federal law that would cover that. Again, the Federal conflict of interest laws have historically been limited strictly to the conduct of Federal employees, and there is no question that this leaves the whole area of grantee activity wide open.

Senator NUNN. Yet, that is the area that is growing faster than any other area of Federal expenditures in HEW.

Mr. BERKLEY. That is right.

Senator NUNN. Senator Percy?

Senator PERCY. Mr. Chairman, I would like to insert in the record at this point the biography of Mr. Robert Fulton. I find it an impressive record of public service. I think your testimony here and the candor of your comments is certainly noteworthy.

Mr. FULTON. Thank you.

[The biography of Mr. Fulton follows:]

BIOGRAPHY OF REGIONAL DIRECTOR ROBERT E. FULTON

Mr. Fulton was appointed in May 1973 to his present position of HEW Regional Director for the six-state New England Region headquarters in Boston.

For the three years prior to this appointment Fulton served as Regional Director of the Office of Economic Opportunity for the same six-state area.

He previously served as the Regional Administrator in Chicago for OEO's Community Action Program from 1968 to 1970.

Before joining OEO, Fulton served for one year as Political Military Affairs Officer with the U.S. Department of State and for eight years was with the U.S. Atomic Energy Commission. While with AEC, Fulton held posts as NATO Affairs Coordinator and Management Assistant in that agency's Division of Military Application.

Fulton also served with the Navy Department as a Management Assistant from 1956 to 1959 and taught in elementary schools in Missouri from 1948 to 1952. He served as an enlisted man in the Army from 1952 to 1954.

He was graduated from Southeast Missouri College in 1956, received his law degree in 1960 from American University in Washington, D.C., and a Master of Science Degree in Business Administration from George Washington University, Washington, in 1965.

Fulton, a native of Missouri, is a member of the Maryland Bar. He received Superior Performance Awards for his service with the Navy, in 1959, the Atomic Energy Commission in 1963 and 1967, and the Office of Economic Opportunity in 1969 and 1972.

He lives with his wife and three sons in Winchester, Massachusetts.

Senator PERCY. I think it might be useful to test the information given at SRS. We have heard during the past 3 days of unfairness in the awarding of bids, about the fragmentation of the development of the MMIS system in the States.

We have also learned of an influential HEW official who took gifts and cash from a private firm which successfully bid for an award in which this official had some authority. We have heard three of your employees testify that their superior—who reports directly to you—on at least two occasions told them he wanted to find ways to circumvent HEW regulations.

When was the first time you were aware of these kinds of occurrences in the Department?

Mr. FULTON. Well, you have mentioned several problems. Let me see if I can talk about three of them. One of them, the general problem of contracting and assuring integrity in our processes, is a matter requiring top level attention within our agency.

From the date I arrived at SRS, various aspects of our contract review procedures were coming to me as either problems or issues that required clarification of policy. There have been a number of specific State procurement actions that I have been contacted directly on by State officials and by Regional Commissioners to see if we could help get the HEW decision, the SRS decision faster. So the interaction of myself and other top people in SRS with the contracting issues and the matter of reviewing State proposals is continuing.

Relative to the specific matters involving Mr. Cubbler, I was told very early in my time at SRS, by Mr. Wienberg, that the subcommittee was reviewing various aspects of the handling of our MMIS responsibilities and that there appeared to be a special interest in Mr. Cubbler.

I was told that that had been going on for some time and that we were cooperating in providing information and answering the specific questions asked of us. Somewhat later, Dr. Weikel talked to me about the same matter and told me essentially the same things that are relevant to that matter.

I did not involve myself personally in that matter until about a week ago when the specifics of the allegations against Mr. Cubbler were reported to us by your staff.

With regard to the comments that were attributed to Mr. Wienberg yesterday, relative to bending, evading the rules or circumventing the rules. I do not condone or endorse any indication to employees or others that we do not carry out fully both the letter and the spirit of our rules, regulations, and especially the law.

I would point out, though, that many times there are judgmental questions that senior managers have to deal with that sometimes the potential of misunderstanding about the premises on which a manager proceeds. It is not always possible for the manager to accept the advice of the staff. I know in the case of the MMIS reviews, pressures come from many different directions relative to the speed with which we make the decisions and the content of the decisions.

Concerning the issue of MMIS system fragmentation that you touched on, I would like to have Dr. Weikel talk about a little bit more; but I would just say that decision is one of those management judgments, in our opinion.

The law does not say there will be a single MMIS in a particular State. The law talks about developing systems and we have had the issue, and it is not fully resolved yet, of the extent to which we will allow States to develop components of an MMIS system that are ultimately tied together, but are nevertheless developed in separate blocks.

We are not in the business of promoting a separate MMIS for every county of a State or in slicing the medicaid program up into thin salami slices and giving MMIS support to developing pieces that aren't tied together.

However, I do think the issue of whether or not there has to be a single MMIS in a State in order to qualify for the higher Federal matching rate is a judgmental one rather than a matter of bending the law or violating the rules. We need to amend our regulations to clarify some of these matters; but I do not believe that that particular issue should be regarded in the negative light in which it may have been posed yesterday.

Senator PERCY. In your judgment, with your background as a regional HEW director, is this an isolated case, not at all representative of the way that the work is carried on?

I have never found people who work as hard as they do for the Government. I found that in both the executive branch and the Congress. I think we do a disservice to imply that HEW is fraught with this kind of practice.

I would appreciate your observation as to whether this is an isolated case. It is not bad to take an isolated case, because it tends to tighten things up. Those that might have in mind getting around or evading regulations or conducting themselves in a manner that should not be condoned might think twice because of this hearing.

Individual cases of income tax evasion are frequently in the headlines. I am confident that IRS feels it is a good thing to warn people that the law is there and it can be used and will be used.

Let me ask you, is this in your judgment an isolated case? Make any comments you would care to about business practices carried on in HEW?

Mr. FULTON. Thank you, Senator Percy. I very much appreciate your comments about your own view of the matter.

I do believe that this is an isolated case. I am not suggesting that there might not be another one somewhere in HEW or even in my own agency that is waiting to be discovered; but I do believe that the vast majority of the Federal employees, including those in SRS, proceed with their work on a basis of integrity, of respect for the public interest and that the vast majority of them give an honest day's work for a day's pay.

I do agree with you also that the discovery of a situation such as this is a lesson to us—it must be a lesson to us—in terms of having our processes and our review systems in good enough shape that we have a very high probability of detecting and correcting any kind of laxity that would permit an employee to not only exert undue influence, but even to suggest on the outside that he has that potential for exerting undue influence.

We can't always guard against our employees' private lives and what they do and who they talk to and what they say, obviously, but I think the way we conduct ourselves officially as far as our procedures, our public statements, has a great bearing on how credible any kind of conjecturing on such statements outside our official duties might be.

So I do agree with you that the systems and processes have got to be worked on continually to improve them. We do have areas in which we have inconsistencies. Some of our own internal SRS requirements are not totally consistent with each other. We review certain kinds of things the States do more vigorously than we do. I think we need to streamline those.

I certainly feel that it would not be appropriate to paint all Federal employees or even a substantial number of them, including those in my own agency, with any kind of brush that says, well, this is typical. It is certainly not typical.

Senator PERCY. Were you able to talk with Secretary Mathews before the time of the hearing yesterday and this morning?

Mr. FULTON. Yes, I did; and the Secretary asked me to relay to the subcommittee his personal appreciation for the work that you are doing on these issues, his concern about the matters that have been raised and his commitment to working within the Department to improve our processes in dealing with employee conduct with our contracting procedures, to try to make this kind of situation less likely to happen.

Senator PERCY. I won't ask you to tell us everything he said because I don't know what I would say if I were sitting in his shoes with the Justice Department and the subcommittee breathing down my neck. We are trying to work in tandem with him in making his operation more effective and efficient. Sometimes we act in a sense like outside auditors. Sometimes you don't always like outside auditors, but you know darned well your operation is better because of them. We certainly want, both Senator Nunn and myself, to impart that spirit of cooperation.

Mr. FULTON. Fine.

Senator NUNN. Are there things that the Secretary and you have devised that can be done now to get a handle on this situation? Do

you think, for instance, the concept of an Inspector General—a bill that is now on the President's desk for signature—will help in this matter? Would an Inspector General give you a feeling that there is a degree of responsibility for personnel, with authority and influence in HEW who can now look internally at these matters and who would really help in the conduct of your Department?

Mr. FULTON. Well, we have been moving—the Secretary announced late last year the establishment of an enlargement of the Office of Investigations. We began adding in March of this year the medicaid program fraud abuse staff that I talked about earlier.

The Inspector General bill, it is my understanding, does have the support not only of Secretary Mathews, but also of the Administration. Unless there are problems that I am not aware of, I would expect that bill to not only be signed, but also to be helpful in our further efforts to strengthen our administrative processes and our investigating capability, so that we can give greater assurance to the Congress and to the public that where there are indications of weakness in our systems that we are able to move in with Federal reviewers to assess the situation, find the problem, and get corrective action taken.

We have to work on a broad front of actions dealing with front-end management, as I have tried to discuss. I think the critical thing for us and the States in addition to this inspection and investigation capability is the vigorous work we are trying to do on strengthening the front-end management. It simply is not possible to have enough State or Federal investigators to watch every aspect of the program. So that the basic systems have to be sound and then we have to use our investigating capability to help us where the systems don't protect us.

Senator PERCY. Mr. Fulton, I have some questions here that I think can be answered very briefly. In the interest of time—and this is our last, or possibly next to last, day in session—I would ask unanimous consent that, if you would like to answer any of these questions in further detail, we will keep the record open for that purpose.

Senator NUNN. Without objection.

Senator PERCY. On the question of competitive bidding, how important do you regard competitive bidding in the program for developing effective MMIS systems in the States?

Mr. FULTON. I think it is fundamentally important. We have a lot of capabilities that have been developed over recent years in the systems areas. We simply must assure that the best talent at the lowest prices that we can get it for is brought to bear on these systems. I think we have agreement on that with the States, by the way. I don't think that is only a Federal position.

Senator PERCY. What happens if there is no competitive bidding, as has been suggested throughout these hearings?

Mr. FULTON. Well, we get a situation where the firms that are in this field, if they don't feel our processes and those of the States are fair, then some of the reputable firms will be discouraged from further building their capabilities in this field.

We also get, I think, an adverse impact on the public attitudes about what we are doing if we have allegations of favoritism, and so forth. Simply without the competition, we will not get the capa-

bilities and the support that is available to us in the States in these areas.

Senator PERCY. We have had some suggestions from both HEW officials and the computer companies that certain firms seem to have a lock on business with the States. Would you describe why you think this condition exists and whether that lock could be broken somehow through some changes in procedure?

Mr. FULTON. I am not sure, first of all, that that is a totally accurate characterization. We don't have a monopoly in the systems field on the part of any firm or firms now. We have a large number of firms that do have contracts with the States and if it did develop that we were squeezing the competition down to one, two or three firms, I think it would be a matter of great concern. I don't see that as being the present situation and I will try to make sure it does not become the situation.

By the way if our own procedures and the requirements we lay on the States have an adverse affect on the competition, to the extent that that occurs, I would consider that bad.

Senator PERCY. On the basis of your discussions with Secretary Mathews and the Under Secretary, what steps have you agreed to take to insure that there will be competitive bidding for MMIS contracts as well as other contracts let?

Mr. FULTON. The Secretary has recently established a task force on contracts and procurements, staffed in large part by people outside HEW, to look at our systems and procedures across the board in the contracting grant areas. He has directed that the MMIS area be focused on by that group as its first priority.

That will give us, in addition to the internal reviews that we are making under my jurisdiction, an objective outside look at our MMIS procedures. They are in need of improvement, as Mr. Wienberg indicated yesterday. They are perhaps unduly complex. They may require too many stages of Federal review and this perhaps gives some credence to some of the views that you just have to be inside HEW's head somehow to be able to get these systems approved. I would like to have our procedures provide for the maximum of objectivity.

So we are looking on an urgent basis at the MMIS procedures with the help of this outside task force, to try to get those procedures refined, improved, and out to the States as quickly as we can. Of course, the basic requirements are published as a Federal regulation. We will have to go through the rulemaking procedures as we amend those; but the work that the subcommittee has done will certainly be helpful in that regard.

Senator PERCY. I would like to go back to Mr. Wienberg's testimony and the testimony of some of his employees. Did you have a chance to talk with Mr. Wienberg yesterday, or possibly even with some of his employees, to see if you can sort out what really happened there? Why did they interpret his comments to have been "to bend the regulations" the way they did and why did it cause them concern?

Mr. FULTON. I did talk with him.

Senator PERCY. How did you, as a top supervisor, sort that all out?

Mr. FULTON. Well, I am not sure exactly what I can or should do relative to interactions between Mr. Wienberg and his employees in light of what was said yesterday. I have talked with Mr. Wienberg

on a preliminary basis about the exchange yesterday. I am very concerned that we have a teamwork effort throughout our agency, and I will work with Mr. Wienberg in helping make sure that that does occur in his office.

The question of those words that he was quoted as having said is a matter of disagreement about whether they were said in the context in which previous testimony indicated. However, I myself, and all of the managers of our agency, have a responsibility to try to use words and terms and expressions that are not misinterpreted.

I have talked with Mr. Wienberg about that. I have not finished the discussions, but I have begun them. I think it is vital that I help Mr. Wienberg get his supervisory jobs filled so that that office stabilizes and does not have the extent of disorganization that he described yesterday and that previous testimony described.

Senator PERCY. I wouldn't want what we do here to be misinterpreted either. I don't think we want employees in responsible positions in a Department like HEW, dealing with matters like this, to look at those statutes and not exercise common sense and judgment. They should not be so rigid that they, in the worse sense of the term, become bureaucrats who are immovable. We don't want that.

We want people with commonsense, who have judgment, who can look at those regulations and then look at the spirit behind them. They are there to protect, they are there to serve, they are there to give benefits to people. If you say "bend" in that sense, bend them so they fulfill the spirit rather than frustrate the spirit.

Mr. FULTON. I agree.

Senator PERCY. What I was concerned about yesterday is why three responsible employees, obviously troubled, did misinterpret him. Possibly communications can be improved in that regard.

Mr. FULTON. That is a matter of concern to me. I certainly agree with you, that we don't want our employees to be scared of their shadows in terms of never making a judgment that can be challenged. Otherwise, we are stymied in trying to get aggressive leadership and management. There is a balance there and we all have to struggle continuously to find that.

I think Dr. Weikel wants to comment on this point. If it is OK with the Chair, I would like him to do that.

Dr. WIEKEL. I would like to comment on several points you raised over the past week. I will start with the one you have just been discussing.

I have been associated with this program for 2 years as the Commissioner. The Medicaid Management Information System has not been under my jurisdiction throughout those 2 years. I have seen, I believe, what the intent of that statute is, to provide assistance to States to have effectively managed medicaid programs.

I would have to support Mr. Wienberg in instructing his employees to find some way to implement the spirit of that statute, and that is what is at stake in this because there have been obstructions over the last 2 years in terms of developing many, many more steps than are necessary for States to go through. This has been principally documented by Systems people who do not understand programs, and that has been a major problem.

One of the things Mr. Wienberg has done is to try to emphasize that you don't say no every time, but you try to work and to fulfill the spirit of what Congress intended. I think that is critically important in this area.

I do not believe the Information System should be running a separate medicaid program, as some employees would lead you to believe.

Let me speak to a couple of specifics. The question of fragmentation, that you should not certify a system that doesn't include all services—that is the height of absurdity! If a State has a capability to effectively operate their own drug program or their own nursing home program and has an outstanding management system and has outstanding management reports—as does take place in the State of Texas in the case of drugs and nursing homes—to say that you have to certify all systems or none doesn't make any sense, if we are interested in competition. That would mean that you have to have a firm who can handle the entire spectrum of medical services rather than just some of them.

I believe that what was done in that Texas case supports competition, I think this is part of the difficulty we have had in administering the medicaid management information systems over the past years. You can talk to many, many State officials throughout this Nation who are involved in medicaid and they will tell you the same thing.

I believe your own office staff, and I believe you personally, have been concerned about the MMIS in the State of Illinois. One of the reasons for that concern was the fact that it does take so long, that there are so many things in the regulations that clearly are not necessarily mandated by the statute.

This is a problem we face with Congress almost daily—are we overstepping the statute? That is one of the reasons Secretary Mathews has instituted the new procedures for the development of regulations.

I would suggest that some of the comments about circumventing the law or the regulations could very well have been interpreted as saying, "Give me a reason why something can be done, rather than a reason or 5,000 reasons why something cannot be done." That must be taken into consideration in this case because it has a very high probability of being the truth.

Senator PERCY. I can remember as a comment was being made yesterday, in saying to a group of lawyers, "My God, don't tell me what I can't do. Tell me what I can do." I can imagine that taken out of context and interpreted in the wrong way. I just want to be sure how you interpret this. I am pleased that you have already met on it.

It is a communication problem. I think Mr. Wienberg has to be extraordinarily careful in the way he expresses himself. There could be a way to say the same thing without alarming anybody about it. I was impressed with his competence. He is a very intelligent man.

It was mentioned yesterday by Mr. Wienberg that when he arrived for his new assignment, he found his office in total chaos. Mr. Fulton, when you arrived as the third in 1 year in your position, was there a major problem? I hope this is not typical of the way the

Federal Government is organized or HEW is organized. Why is there such chaos?

Mr. FULTON. I would not describe the overall situation in SRS in those terms. I do want to point out that the organization has experienced that turnover of senior managers. The Administrator, Mr. Dwight, left better than 1 year ago, about June of 1975. There was an Acting Administrator, Mr. Svahn, for about 6 months and then another Acting Administrator Mr. Wortman, for about another 6 months. During that time some of the decisions that would have needed to be made about key positions were not made. They were delayed in the expectation that an Administrator would be appointed.

There were other problems, such as the reviews directed by the Civil Service Commission and problems of downgrading. Positions were held vacant because it was believed that some employees who would otherwise be downgraded should be moved into positions that could justify their grades, but you couldn't do that until you went through the classification reviews.

So I would not say this is typical of HEW or of other agencies that I have worked in, this degree of turnover of leadership and organizational upset.

Senator NUNN. Will Senator Percy yield for just a moment?

Do you think there are some problems inherent in the law or in the structure of HEW that we need to address? I can understand all of your frustrations and I can see all the problems you have in this area. You have Civil Service Commission rules and you have pressures in every direction. But if you were just sitting back home working hard for a living, making \$8,000, \$10,000 or \$12,000 a year and paying taxes, maybe you would agree with people who are less and less sympathetic to all of these structural problems in government.

Whose fault is it and what do we do about it? When I say we, I mean executive and legislative branches.

Mr. FULTON. I don't think that as a result of vacant positions or turnover of people in SRS, that you could reach any conclusions from that about organization of HEW.

Senator NUNN. I am not reaching it just on that. We have had other hearings. I have had people call me from HEW in the last 2 weeks, telling me that they don't do anything. One lady said she had been making over \$30,000 for 2 years and hasn't done one lick of work. She doesn't want to testify, but I am hearing this everywhere. I am not just judging it on this program. To top all that off, she said her efficiency report was excellent.

Senator PERCY. She didn't make a mistake.

Mr. FULTON. I think what I said was that there is a breakdown in management supervision when we have people who don't have enough to do, and that is most unfortunate. And the public doesn't understand that. The public should be unhappy about that, in my opinion.

The broader questions, of how the Federal Government should be organized and whether HEW should be reorganized or broken up, I think perhaps are beyond my ability to add much to the debates that have gone on in the past. I will say that Secretary Mathews is having a review made of broad organizational issues within the De-

partment. There have been discussions. Your colleague, Senator Talmadge has a bill which would have broken a piece out of my agency, the medicaid program itself, and combined them with medicare. So there are proposals to do various things.

Senator NUNN. I don't want to interrupt you, but just in the SRS, Mr. Wienberg yesterday testified that if he had the authority and had the kind of authority he would have in private industry, he would terminate approximately 20 percent of the employees in his shop. Now, do you agree with that assessment?

Mr. FULTON. I don't know his employees in that amount of detail. I would not say that I would terminate that many of the people who are reporting directly to me, no, sir. I think I have a good team and that I can work with the team, some of whom I inherited, some of whom I am hiring.

Senator NUNN. He is part of your team and that 20 percent is part of your team.

Mr. FULTON. All right. I don't know the details of his department's capacities and the track record of people who work for him. I do agree with him, that we are too restrictive on manager's flexibility to move people out of Government employment. I think there needs to be some better balancing of the public's right to efficiency and the protection of individual employees.

I don't have specific recommendations on how to accomplish that. You can fire a Federal employee. I have done it. However, it is not easy, as Senator Percy said yesterday.

Senator NUNN. It is a life-time project, isn't it?

Mr. FULTON. Not quite.

Senator NUNN. Do you think we ought to change the civil service rules? Is there too much protection of the individual to the detriment of governmental functions or governmental programs?

Mr. FULTON. I think we ought to examine those rules relative to this area and move some more flexibility to managers.

Senator PERCY. Senator Nunn and I found to our amazement that when you get a new administrator for the Drug Enforcement Administration, he literally can control only three or four employees. If he is to effect anything or get anything done, he can't move anyone around that really can implement policy. So we just adopted the Percy-Nunn bill—in Georgia, the Nunn-Percy bill—to exempt the top 40 jobs from civil service. Should we try to exempt more policymaking jobs?

Mr. FULTON. In HEW, the regional directors are non-career, with about three exceptions. There are 3, I believe of the 10 who were moved into career status as a result of the time they served in limited executive appointments. The regional commissioners of my agency, the Social and Rehabilitation Service, who report in a fairly complicated way to both me and the regional director, are for the most part Grade 16 career employees. Within our total organization, we have a number of noncareer jobs in addition to my own.

Having come out of the career service, I am not an advocate of wholesale conversion of career positions into noncareer. I do believe that there have to be enough noncareer positions to enable a top manager, a Presidential appointee, let's say, to have some assurance that

he has enough people that he has personal confidence in to get the job done. That requires a balance.

One of the reasons we have so many reorganizations in Government is to move career people around in different ways so that you can shake on to the top of the heap those that you really have confidence in. And it would be perhaps healthier if there were in many agencies more noncareer positions so that those kinds of maneuvers would be less attractive, that is another explanation.

Perhaps it could be an explanation for why the woman doesn't have duties. It could have been she has been reorganized out of a job because she was a problem in the job she was in.

Senator PERCY. Could you give us your thoughts or the Department's thoughts on how important the success of the MMIS program is in achieving cost savings and in reducing or eliminating fraud and abuse in medicaid?

Mr. FULTON. I would like to get Dr. Weikel's comment, too. But I will just say it is vitally important. It is the systems building, the management capacity building that is a fundamental necessity for good medicaid management.

There are other aspects of that, such as the question of the State administrative strength for handling medicaid, even the States capacity for handling the MMIS information that was produced, you don't get a lot if you just get a good MMIS system but don't use the information.

Senator PERCY. Dr. Weikel, if you could then very briefly comment. If it is so important, as has been said by Mr. Fulton, why has it been allowed to deteriorate? Who is responsible for this?

Dr. WEIKEL. I am not convinced that it has been allowed to deteriorate. I would very strongly argue that in the last 2 years it has improved rather than deteriorated, despite what some of the employees have testified. The MMIS is critical. You can't have an effectively managed medicaid program unless you have an effective claims payments system—as MMIS is—which has controls built into it, to prevent fraud and abuse.

But I would like to clearly point out, because reports in the media over the last week have indicated that the problem identified by this committee is indicative of rampant fraud in the administration and management of the program at the Federal and State level, that I do not believe that fraud is rampant among the administrators at the State or Federal level.

The individual who is the concern of this hearing is not an employee of the Medical Services Administration and has not been during the last 2 years.

In terms of the MMIS, I believe that it is essential, but it must be administered flexibly so that States can implement it with regard to their individual needs. The medicaid management information system, as is designed in these regulations, doesn't have to be the only effective management system for medicaid. There are other alternatives.

But fraud and abuse detection and prevention is only done partially by MMIS. I believe that the Medical Services Administration in the Department of Health, Education and Welfare has a very

good track record in the last 2 years of attempting to develop programs to ferret out fraud and abuse and to assist the States. Our investigators out there in the States now are investigating providers.

And I think the record speaks for itself even in the last 2 years. In 1975, there were approximately 2,500 providers investigated for defrauding the medicaid program. In 1976, there were 7,500 providers investigated for defrauding the medicaid program. Now, that is a dramatic increase in a single year. I believe part of it is due to the fact that HEW has been encouraging the States to investigate fraud and to implement MMIS.

In 1972, when the statute was passed by Congress, many States were almost operating medicaid programs out of shoe boxes. What they really needed to run the program was a sophisticated cash register, rather than jumping to an IBM 5070 all in one gigantic leap. As the program was developed, I believe we may have overdesigned sophistication and presented too many reports to the States that they couldn't handle. That is another important point I think that Mr. Fulton just made.

We can have a perfect system in place but if there is no one at the end of that system to notice the reports on providers who have been identified as potentially abusing or defrauding the program, to follow up with peer review committees or with criminal investigators, then the system is of no value in preventing fraud and abuse. So this is only part of the system.

I think on behalf of my staff, the Division of Fraud and Abuse, who have been out there working almost day and night to try to uncover fraud in the State programs over the last 6 months, it should clearly be pointed out to the public that this particular incident has no relationship whatsoever to the Fraud and Abuse Division that is charged with detecting fraud and abuse in the medicaid program.

Senator PERCY. Mr. Fulton, could you give us your assurance, as Mr. Wienberg did, that the three employees who appeared before us—who certainly testified with reluctance and from their hearts—will in no way be injured as a result of their testimony here?

Mr. FULTON. Yes. You have my assurance on that. And moreover, I think action in any other direction would have devastating effects on the rest of our employees. So I give you that assurance.

Senator PERCY. Does the fact that you have more investigators of medicaid fraud and abuses simply point to the fact that there may be more crooks dealing in this area? Is there an increasing trend toward abuses in the system?

Mr. FULTON. I think the program has attracted more than its share of fast operators and people who have been tempted by weakness in the system who perhaps weren't cheating in the initial years of the program. Some of them have been tempted, by what they thought they could get away with, to do things. I don't know. We don't have any data that would let us measure precisely the growth of fraud and abuse from the time the program began until now. But it is clear that the program has expanded rapidly. It has tripled since 1970 in terms of Federal and State dollars.

And it is just a huge system with lots of open-ended features in which people who want to engage in rip-offs have same chance of getting away with it.

Senator PERCY. Finally, I have introduced my own concept of a national health insurance plan, which is certainly ahead of the AMA proposal, but a considerably more conservative approach than the full-blown Social Security program that Senator Kennedy sponsored.

Based on your administration of nursing homes, medicaid and medicare, and so forth, do we really know how to run a national health insurance program now; the kind that is a full-blown, fully federally financed system?

How far away are we from getting to some sort of a national health insurance program that we can look to as meeting needs that are not now being met, but would not lead to the bankruptcy of the U.S. Government? The health insurance program in England contributed to England's economic problems.

Dr. WEIKEL. Senator Percy, many of the problems that we are confronted with in medicaid are problems that anyone in any national health insurance proposal will be confronted with. And many of those problems are problems that cannot be solved through simple legislation. They are management problems. They are problems of administration and implementation. And they must be worked out. I believe that we have the tools and the knowledge available to do it if we have access to an adequate number of managers and program experts in order to implement it.

But we cannot simply solve these problems through legislation. There are some things that could be addressed through legislation. You could have uniform eligibility criteria, which will reduce some of the complexities that we have to administer, or uniform benefits. But much of what we are dealing with—fraud and abuse, quality assurance, adequate quality of services—cannot be legislated, I would submit. They must be solved, and it is hard management work to solve those problems.

Senator NUNN. Would you say on that point that we should pause before we go into national health insurance and try to get the kind of management we need on the programs that are already on the books? Wouldn't it be building on quicksand if we went into a national health insurance program now? Give me your frank opinion.

Senator PERCY. Doctor, this is just between us.

Dr. WEIKEL. My personal opinion is that we need a great pause. We need not to leap, but to crawl to national health insurance; we need a process of incrementalism rather than a gigantic step, if you will. There are a lot of these problems that we can't solve. But we need some time to work with the system we have.

Senator NUNN. I concur completely. I think that is exactly it.

Senator PERCY. When you say "work with the system we have" I think we both appreciate your feelings on the health insurance program in that a large part of it is in the private sector now. Tens of millions of people are covered. They do have systems.

Dr. WEIKEL. Absolutely.

Senator PERCY. They do have systems for uncovering fraud, for keeping cost down for their subscribers, and so forth. Do you feel that to wipe all that aside and not build on it would be wrong?

Dr. WEIKEL. If you are asking for my personal opinion, I think it would be absolutely wrong to discard what is out there in the private sector, whether it is the health insurance industry or whether it

is the health administration firms. I don't believe—and this is my personal opinion—that the Government is in a position to operate those systems themselves. They are very complicated.

On the other hand, just one word of caution. I believe that there has been some overselling on the private sector too in terms of their ability to prevent fraud and abuse in their own programs. Fraud and abuse technology is available, but it has not been implemented across the Nation publically or privately to the extent that it should be.

I think when we talk about fraud and abuse, it is critically important that we point out that medicaid is providing services to 23 million Americans, that there have been significant results from this program in its 10-year history. As an example, the utilization of health service by the low income population in this country today is at the same rate as the nonpoor. And that is dramatically different than 10 years ago before the implementation of medicaid.

So it has made access to health services available, because private practitioners have been willing to take medicaid patients. We do have problems, especially in our urban areas—Chicago, and New York and other major metropolitan areas—to get private-practicing providers to participate in the program. And that is something we need to address from an administrative and from a legislative point of view. The administration has testified previously on some of those issues.

But I should point out that we believe that most of the providers that are participating in the medicaid program are honest providers. They are not ripping off the program. Nor are most recipients. It is a small minority that are ripping it off to a handsome tune. There has been a change in the medical profession during the past several years and the American Medical Association is very strongly in support of our fraud and abuse initiative and is assisting in the States.

Senator PERCY. Is the next place to go, with a sense of confidence, the national health insurance for catastrophic coverage? It is really hard to fraudulently present a case there when it is a long-term situation, confinement for a long period of time. There is the possibility of a family being wiped out. Everyone wants to somehow insure against that. The cost is minimal compared to a comprehensive package. I think that is the next step and we ought to move in that direction rapidly in the next Congress.

Mr. FULTON. Senator Percy, I am not speaking for the administration, other than on this reaction. I would just say that there are competing priorities too that ought to be examined before we make that decision.

For example, the question of ambulatory service and how we provide that in the urban areas where the physician's availability is dropping to such an extent that many people don't have a chance to have a family physician. What do we do about that problem? Likewise, the health of children.

In the medicaid program, one of the disturbing things is that the benefits go in very large proportion to elderly people and not to children. Now, that is disturbing in the sense that we are probably not yet getting through with the child health thrust consistent with what we have been trying to do.

The only thing I am saying is that—I guess it is somewhat of a caution—the cost of the catastrophic coverage ought to be evaluated against this priority as against some others, as well. And I do agree that catastrophic coverage is a critically important thing. But we have some others.

If I could just make two other comments on the health area. One of the problems with the incremental approach is that we have runaway costs in the meantime, and we have to find ways of getting the private sector and the public sector to work closely together to deal with some of these escalating cost problems. We are searching for ways to do that. But one of the arguments for comprehensive health financing, of course, is to give us a handle for dealing somehow with these escalating costs that are increasing more than twice as fast as the general cost of living index.

Senator NUNN. Mr. Weikel, I have a few questions for you. You actually are Mr. Cubbler's supervisor, are you not?

Dr. WEIKEL. No, sir.

Senator NUNN. He doesn't work for you?

Dr. WEIKEL. He does not. He has not worked for me since I became an employee of the medicaid program.

Senator NUNN. What is your relationship with Mr. Cubbler?

Dr. WEIKEL. I have no relationship. He is an employee of the office of information systems, and that office does not report to me. I am the Commissioner of the Medical Services Administration. We have responsibility for the medicaid program, but there are significant components of the medicaid program that do not come under my jurisdiction, such as the Medicaid Management Information Systems.

Senator NUNN. Are you familiar with Mr. Cubbler's work?

Dr. WEIKEL. I have been familiar with his work when he was in the office of information systems when he was involved with medicaid.

Senator NUNN. At what stage was that? When was that?

Dr. WEIKEL. Well, he has been involved in the office of information systems, I believe, for about a year, or a year and a half probably, most of the time that I have been there.

Senator NUNN. Are you familiar with the Pennsylvania contract to health applications systems and paid prescriptions?

Dr. WEIKEL. I am not.

Senator NUNN. You are not familiar with that at all?

Dr. WEIKEL. No.

Senator NUNN. You are not familiar with Mr. Cubbler's work in that regard?

Dr. WEIKEL. I am not. That was before I came over.

Senator NUNN. Have you ever attempted to have Mr. Cubbler transferred or removed or fired?

Dr. WEIKEL. I have not attempted to have him transferred, removed, or fired. I have expressed some concern in the case of the West Virginia proposal to previous administrators, and the concern was over the long-term care component.

Also, Mr. Cubbler was on the Medical Services Administration rolls and detailed to the office of management when I arrived as a Com-

missioner. I chose not to have him return to the Medical Services Administration.

[At this point Senator Percy withdrew from the hearing room.]

Senator NUNN. Would you give us the reason for that?

Dr. WEIKEL. I think Mr. Cubbler is very knowledgeable in terms of the medicaid program and the regulations. He did not have a style that I appreciated in terms of one of my employees.

Senator NUNN. I want the Chief Clerk to show you a sworn statement that you gave to the subcommittee on September 23 and I want to discuss it with you.

First of all, if you will take a look at that and look at your signature and identify the document before we proceed. Is that already an exhibit?

Mr. FELDMAN. Yes.

Dr. WEIKEL. That is exhibit 43.

Senator NUNN. Is that your statement?

Dr. WEIKEL. Yes.

Senator NUNN. Is that your signature?

Dr. WEIKEL. Yes.

Senator NUNN. Thank you.

We don't have an available copy here. You don't happen to have a copy with you, do you?

Dr. WEIKEL. I do.

Senator NUNN. Read that statement, if you will.

Dr. WEIKEL. "I, M. Keith Weikel, freely and voluntarily make the following statement to David P. Vienna and Walter Fialkewicz who have identified themselves to me as members of the staff of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations. No threats, force, duress, promises, or representations have been used to induce me to make this statement.

"I am a citizen of the United States. Since July 1974, I have been the Commissioner of the Medical Service Administration of the Health, Education, and Welfare Department's Social and Rehabilitation Service, SRS.

"I acknowledge that on April 17, 1975, I sent the attached memorandum to Associate Administrator of SRS for Information Systems calling for the addition of a long-term care element, LTC, to the State of West Virginia's Medicaid Management Information System, MMIS, development program.

"I recall that Charles Cubbler, who is mentioned in the memorandum, talked to me about this project. He told me that the State wanted it and that the addition of the LTC element was required for a complete MMIS system. He encouraged me to go along with the State's request.

"Cubbler told me that the addition of the LTC was most appropriate at the time, because the State was developing an MMIS system. Moreover, he told me that the State of West Virginia could not wait until a model LTC was completed in the State of Utah before going ahead with such a system in West Virginia.

"He also said negative things about the Utah project. I recall that he implied that certain members of Congress were concerned with the length of time and money involved in the Utah prototype LTC

module development. I clearly recall that he mentioned that Gov. Arch Moore of West Virginia was personally behind the LTC element for West Virginia.

"The reference to the congressional concern with Utah and the interest of the Governor were Cubbler's way of doing business. I turned the proposal over to my staff and they agreed that it should be done and I thought it was a good idea.

"The staff of the subcommittee asked me if I would have advocated the LTC element in West Virginia if I knew at the time that Cubbler was receiving money from the State MMIS development contractor.

"In response to that question, I will make this categorical statement. If I knew that anyone, advocating any project to me, was directly or indirectly involved in the receipt of money from the beneficiary of a federally funded project, I would not advocate the project, no matter how good or important I thought the project to be.

"Furthermore, I would do all in my power to stop Federal funding of any project if I knew a Federal employee, involved in the HEW decisionmaking process, took money from a contractor whose services were reimbursed all or in part with Federal funds. In addition, if I had such knowledge, I would report it to the Department of Justice.

"I have read, reviewed, and initialed each page of this statement and the attachment and I swear, to the best of my knowledge and belief, it is true and correct."

Senator NUNN. Thank you, Dr. Weikel.

An overall question of conflict of interest is a difficult one. Just from your personal experience and views, suppose hypothetically you had a close friend involved in a company that was bidding on certain contracts, what do you feel you should do in that situation, as far as yourself being involved in the decisionmaking process?

Dr. WEIKEL. I believe that I would remove myself from that process, and I have done so.

Senator NUNN. Have you done so?

Dr. WEIKEL. Yes, sir.

Senator NUNN. Could you give us the case involved there?

Dr. WEIKEL. The case involved Health Application Systems, and I would like to clearly state for the record what my relationship is.

Senator NUNN. Fine.

Dr. WEIKEL. The president of Health Application Systems, Dr. Robert Abrams, when I was a student at Philadelphia College of Pharmacy and Science, was one of my professors. When I got out of graduate school, I returned to the Philadelphia College of Pharmacy and Science as a faculty member and he was my major professor. He was my departmental chairman.

At that time, after I left teaching, I went with Hoffman and Laroche and he was a member of the Hoffman and Laroche staff. Since I resigned from Hoffman and Laroche, I have had no working relationship. He has been for a long time, since 1956, a personal friend of mine.

Senator NUNN. Thank you, sir.

Is this Health Application Systems involved? Is this company involved and related to the Paid Prescriptions, Inc., company?

Dr. WEIKEL. That is correct.

Senator NUNN. I believe one is nonprofit and one is profit. Is that right?

Dr. WEIKEL. That is correct.

Senator NUNN. And haven't they got a contract with the State of Pennsylvania?

Dr. WEIKEL. Yes, they do.

Senator NUNN. Do you know whether Mr. Charles Cubbler was on loan from HEW to the State of Pennsylvania during the period this contract was entered into?

Dr. WEIKEL. I believe he was.

Senator NUNN. You believe he was?

Dr. WEIKEL. Yes.

Senator NUNN. Do you know Mr. Harry Colby, who works for that company?

Dr. WEIKEL. I have met him, I believe, on one occasion.

Senator NUNN. Is it true he works for the same company as Mr. Abrams?

Dr. WEIKEL. He has worked for them one time. I cannot tell you whether he worked for them at this time.

Senator NUNN. Did you realize that he had paid to Mr. Cubbler the sum of \$2,552 during the period of time that Mr. Cubbler worked for the Pennsylvania Medicaid program?

Dr. WEIKEL. I absolutely did not.

Senator NUNN. If you had known that, what action would you have taken?

Dr. WEIKEL. I was not in a position to take action. I was not in the Medicaid program at that time. If I had been, I surely would have referred it to the Justice Department.

Senator NUNN. Is this the particular contract where you disqualified yourself?

Dr. WEIKEL. No, sir. I was not involved.

Senator NUNN. You were not involved at this time?

Dr. WEIKEL. I was not involved. The contract I disqualified myself on was the North Carolina contract.

Senator NUNN. That was the same company involved in that?

Dr. WEIKEL. That is correct.

[At this point, Senator Percy entered the hearing room.]

Senator NUNN. Thank you, very much.

I think there is a very definite contrast between the way you have handled this and the way another employee may have handled his own situation. I think it demonstrates the point that should be made here that there is a sense of integrity and honesty in HEW among its employees.

I don't want to draw conclusions that all employees are involved in kinds of corrupt activities. I appreciate very much your position. I think it demonstrates that you are very conscious of possible conflicts of interest and you are to be commended for it.

Dr. WEIKEL. Thank you.

I mean, I really don't believe I have a conflict in that case, but I knew that the view could be taken that there was a conflict and, therefore, I removed myself.

Senator NUNN. Mr. Fulton, do you have any other comments to make?

Mr. FULTON. Mr. Chairman, in view of the discussion we have had about SRS and its organization and relations, I might just ask the subcommittee to include in the record of its proceedings a chart showing the organization of SRS and the leadership, the individuals who are in leadership positions now.

I say this because, as Dr. Weikel indicated, there is not a single office within my organization that has the total responsibility for all aspects of medicaid. He has the largest responsibility dealing with all aspects of the program; but our Office of Information Systems works on the MMIS aspect, as we have indicated here.

Our Office of Management has the quality control leadership on a sampling program to try to find ineligible who should not be receiving medicaid benefits. Our Office of Assistance Payments really deals with the major part of the eligibility rules, because people who receive cash assistance under the AFOC program are automatically eligible for medicaid. So the policies that apply to their eligibility affect medicaid directly.

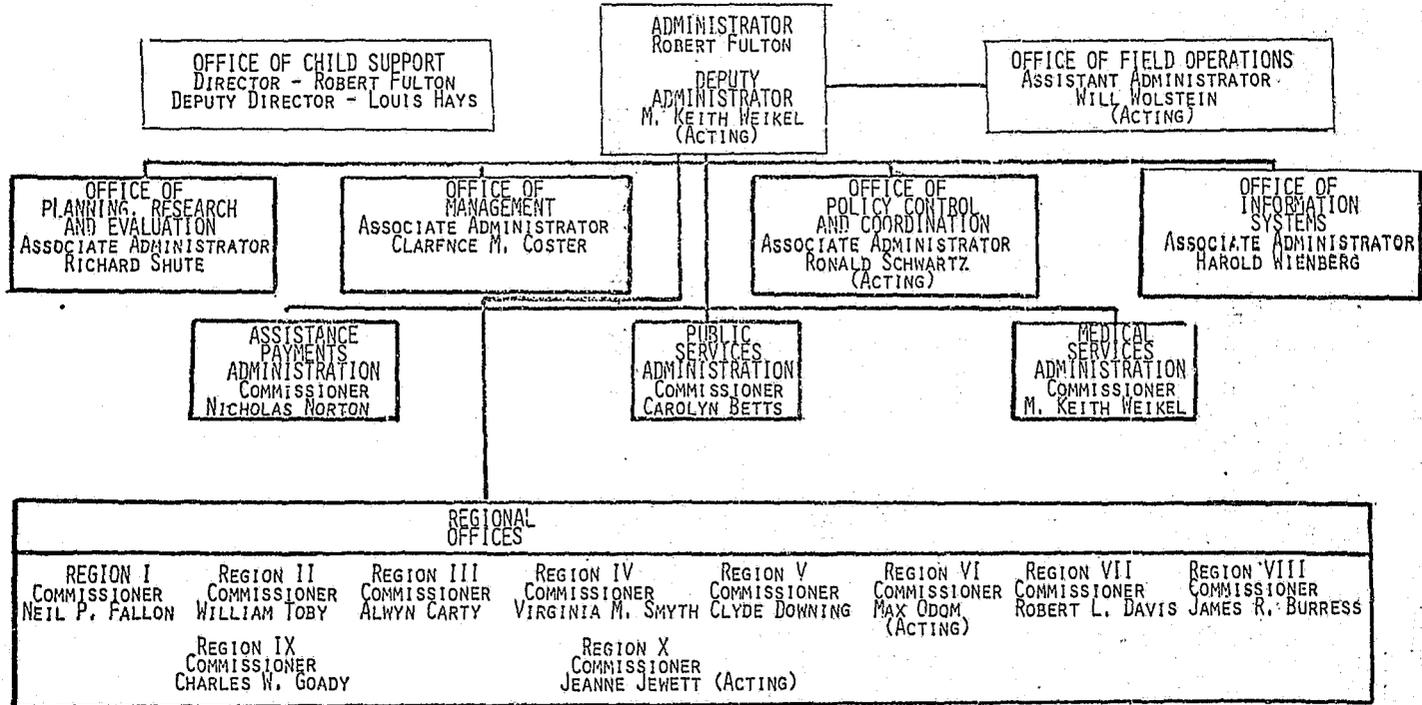
Finally, our Planning, Research and Evaluation Office does direct a variety of experimental programs relating to the health services, health financing, and so forth. So we do have a program that is a great big one and has more than one part of our organization involved in it.

If it would be agreeable to you, I would like to submit an organizational chart for the record that does indicate how we are set up internally. It does not describe these responsibilities, but I thought perhaps with my brief discussion on them it will help people who review the report to understand.

Senator NUNN. Thank you.

[The organization chart to be furnished follows:]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
 SOCIAL AND REHABILITATION SERVICE - CENTRAL OFFICE



Senator NUNN. Let me ask you one other question. Do you sometimes have the feeling that the programs that you are trying to handle are so large and so huge that they can't be properly managed?

Mr. FULTON. Well, I don't quite have that feeling. I have the feeling sometimes that we have an impossible challenge of managing them well enough to get program changes made so that they will be seen as equitable and fair by the majority of the American public.

I do believe that these programs are directed at really critical problems in our society and that it is fundamentally important that they be well-managed. I think, as Dr. Weikel indicated, we have made a lot of headway on the management fronts. We have to keep running faster and faster to keep from getting overtaken by the problems.

I do not agree, no, sir, that they are unmanageable. I think it is a question of persistence and ability to change rules and laws as we need them changed, but that these programs can be managed better than they have been in the past and better than they have been today. I think we are making headway in that regard.

Senator NUNN. Dr. Weikel, do you have anything else you want to add?

Dr. WEIKEL. I would just go back to one of your previous questions in terms of, I believe your question, Senator Percy, in terms of the Civil Service Commission and the difficulty the manager is confronted with.

I have been a manager in the private sector, at a university, and now in the Federal Government. I don't believe it is necessary to be able to fire a large number of employees. I do believe a manager has to have some discretion and some ability to rapidly handle the employee situations where they are not managing.

My experience in the private sector, where I had that experience, is that very few employees are really fired; but the fact that it can be done, without committing one's career for a year or two to doing that, brings about a somewhat difficult attitude. I also would indicate that I, too, came out—

Senator NUNN. Are you saying at this time that you don't have that kind of authority?

Dr. WEIKEL. It takes a very long period of time, and I think the bill you and Senator Percy have been involved with on DEA makes a great deal of sense; but it is not only on firing, because we have a lot of very capable employees. The problem is how rapidly can we bring new employees on.

We have had 119 positions for fraud and abuse since early spring. We have 80 of these filled. I would have to point out to you that is a fairly dramatic track record, to have that many positions filled in that short a period of time.

So it is not only dismissal of employees. It is bringing employees onto the Federal rolls who are competent, who are coming through the career system. It takes a very long period of time; and I do not have a reputation within SRS of not screaming about the personnel system.

Senator NUNN. What causes that blockage in terms of not being able to get qualified personnel rapidly? What is the problem there?

Dr. WEIKEL. I am not really competent to answer that because I, myself, get many, many, many different answers; and all I know as a manager is that the people aren't coming out at the end of the channel when I put them in at the beginning. I am talking about the people we get out of Civil Service registers. It is a problem.

I have been in the job for 2 years. It is only within the last 6 to 8 weeks I believe that I have had all my division director positions filled. It has taken me essentially 2 years to do that. That is fairly intolerable as a manager.

Mr. FULTON. I may comment that the processes of getting positions classified and advertised under the merit promotion rules that we have to apply internally, coupled with getting people through the Civil Service register certification system, accumulate into rather extensive delays on an awful lot of jobs. Everybody in a managerial level is frustrated by this.

Senator NUNN. Who can cure that problem now?

Mr. FULTON. Well, we can chip away at some parts of it ourselves in terms of tightening our own turnaround times on the things that are within our control. The question of getting certified candidates and getting qualified certified candidates from the Civil Service Commission really is a matter that has to be worked on by the Commission, I believe.

It is a reality that a lot of registers are referred that no selection is made from, frequently because the judgment of the program people who get the register is that those referred are really not qualified. I am not talking about hiring at the entry level now. I am talking about hiring more experienced people.

Dr. WEIKEL. I would make further comment in reference to something Senator Percy said about exempting jobs. I believe you can exempt jobs and still not make them political. They do not necessarily have to be political appointees. I think they can be exempted so that you have more discretion at the top levels in moving those individuals around, but still not require political appointees.

Senator NUNN. How do you do that?

Dr. WEIKEL. I believe that there are now professionals in the Government. It is important not to have just political appointees who are in these key jobs, so that you have more stability. I think that is important; and I believe that you do have that in some of the areas that you referenced in terms of setting an example for your legislation.

In the Federal Bureau of Investigation they do not have the same protections that we have. So I think there are examples where that has taken place where you have not had the political influence.

Senator NUNN. Thank you, very much.

Mr. FULTON. Thank you, sir.

Senator NUNN. I have a closing statement and so does Senator Percy. Senator Percy, do you have any other questions at this time?

Senator PERCY. No.

Senator NUNN. Thank you, very much, both of you. We appreciate your appearance and we look forward to working with you in a constructive way. I know you have a big program and I know you

have a large job. I am not as optimistic about the manageability of your jobs as you are; but I am glad you are in it and not me.

Mr. FULTON. Thank you, sir. We appreciate the opportunity.

Senator NUNN. For the second time this year, the subcommittee has taken testimony from businessmen who have told us they paid officials of the Department of Health, Education, and Welfare for services directly related to their positions of public trust.

In the first instance, those payments sent the subcommittee into an oversight investigation that led to the discovery of a situation much worse than the activities of a wayward public official. Indeed, we found that the guaranteed student loan program was managed by one man who took \$20,000 and by scores of others who so mis-managed the program that taxpayers may lose as much as \$1 billion.

The thing that was most astounding to me about that was the fact that the Federal Government loss rate in managing the program was about 25 percent whereas State governments were losing up to 10 percent in their own student loan programs.

Likewise, in the hearings of yesterday and today, payments sent the subcommittee into an oversight investigation that led to the discovery of a situation much worse than the activities of another wayward public official. Indeed, we found that the Social and Rehabilitation Service employs a man who took \$12,000 from businesses heavily involved in contracts supervised by his agency.

It appears that the Federal Government is in danger of building a foundation for national health insurance—I am not saying that this is the case in every instance—but it includes the extensive wining and dining of public officials by lobbyists who tell us they need to be tutored by their dinner guests.

The winning of contracts by high bidders in competitions in which the rules are changed after the bids are in. We had testimony from one small company that said they were so discouraged about the situation that they were about to drop out of the MMIS program altogether, which inevitably leads to less competition and more taxpayer costs;

The purchase by a State official of stock in a company following his participation in an award of a contract to the firm;

Federal officials committing taxpayers money to State programs in almost direct contradiction to the congressional intent of the laws from which the funds flow; and

The inability of those same Federal officials to account for the money they spend and authorize to be spent in these programs.

I will leave this hearing today feeling that we have pulled back the curtain ever so slightly on a window on a whole new world of possible potential abuse of Government welfare programs. I want to know more. I want to know more about the people who run these programs and the entrepreneurs who may be partners in an effort to deprive the taxpayers of Government integrity and deplete our programs of taxpayer dollars.

Many of the activities cited in these hearings are not illegal. Nonetheless, reasonable men know in their hearts that some of these activities are wrong. If they are wrong and if there is a social con-

sequence to them, then it is our duty as lawmakers to make a judgment and forbid these practices.

We cannot legislate integrity. This morning Dr. Weikel made that point, and Mr. Fulton made that point also.

We can pass stiffer penalties for those who are caught, but the issues go far beyond the personal integrity of public officials.

The vast majority of HEW employees are dedicated and honest. We had an example this morning by Dr. Weikel, who felt there was a potential conflict of interest, and he took steps to avoid that and I commend him for that.

I believe that the lack of accountability for Government officials who mismanage programs and squander funds creates an atmosphere for acts of personal dishonesty. I believe such an atmosphere exists within the Department of Health, Education, and Welfare. I think it is very dangerous.

The patchwork of overlapping programs, confusing regulations, cumbersome bureaucracies, and conflicting laws make effective management difficult, if not impossible. Moreover, the funneling of \$130 billion this year—more than one-third of our national budget—through more than 50,000 grants, 14,000 contracts, through cities and States, hospitals, schools, suppliers, and consultants creates a breeding ground for abuse.

Quite simply—this is just my own personal view—at the present time, I do not think HEW is manageable. It may never be. The most effective step toward improving the management and clearing the atmosphere of the potential for fraud and abuse within the agency is to restructure it; eliminate the conflicts in the laws, eliminate program overlap; and set firm policies aimed at achieving realistic program goals. At least that is my view.

The revelations of these hearings have been distressing. The lives of several people may be deeply affected by these hearings which have focused on the management of a relatively small division of HEW; but the management of that small agency may deeply affect the lives and the fortunes of more than 200 million Americans, many of whom are asking for a national health insurance program.

I believe the medicaid management information system program may well be the cornerstone of the management system for a national health insurance plan, if it, in fact, comes into being. We have learned in these 2 days that the cornerstone may be made up of Federal concurrence in unfair competition for bids; of apparent conflicts of interest between contractors and State officials spending Federal program dollars; of payments to Federal officials; of naive, loophole-ridden and unsophisticated procurement practices; and program mismanagement.

I would like the staff of the subcommittee to meet as soon as possible with the staff of the Committee on Finance for the purpose of developing by the opening of the next Congress possible legislation to respond to the issues developed in these hearings.

Furthermore, if there are no objections, I want the Chief Counsel of the subcommittee to prepare the materials obtained in this inquiry for certification to the Attorney General of the United States, the

Internal Revenue Service, the Attorney General of the Commonwealth of Pennsylvania, and the Attorney General of California.

Senator Percy?

Senator PERCY. Mr. Chairman, in the parliamentary form of government, I suppose the minority in this case, or a representative of the party that is in the executive branch of Government, would be expected to take the position of defending what is being done to the best of their ability.

We do not have a parliamentary form of Government. There is a separation of powers. We are members of different parties, but we are members of a separate branch and we have to exercise the oversight on the charter given to us by the Senate of the United States. Therefore, it is not my function to defend the Department, other than to give a personal observation that I am impressed with the quality and the integrity and candor of the principal witnesses that we have had in the last three days. We have appreciated very much the way they have given their testimony. I know a great deal of work is involved in preparing for it. I appreciate that very much.

I must say the hearings and the testimony during the last 3 days have not given me a great reason to feel terribly encouraged about the Department of HEW—and certainly not the medicaid program. I couldn't conclude that the medicaid program has been brought under control. We cannot report to the country that all is well with the Department and with that program.

The problems do not originate with this Secretary of HEW. I have had Democratic Secretaries of HEW tell me that they just felt the Department was unmanageable. It was a terribly big bureaucracy. Look at the size of the bill yesterday where we overrode the President's veto—\$58 billion. That is a whale of a lot of money and it is very, very hard to get a handle on it.

I think in our oversight functions, we have to focus in on something that is manageable. This is a manageable program. It should be administered in a way that there is a proper accounting of dollars well spent. I am impressed with the determination of people who have been here. They want to get at this problem and see if they can't control it.

I am concerned about the Department's attitude toward competitive bidding, particularly when we look at one bid which was \$4 million above the lowest offered by a reputable contractor. I think this calls into question HEW's attitude toward competitive bidding as well as the fairness of the control of fraud and abuse.

I think the testimony given us today was an indication that there is a willingness to really get at this problem, and an attitude expressed by our witnesses of a feeling that competitive bidding practices do serve a worthy purpose. They have said that they will attempt to adhere to such practices.

I think we have learned that the very agency created within HEW to encourage and develop systems for detecting fraud and abuse itself now has some serious questions to answer about the integrity of at least some people or an individual in that Department. It is somewhat ironic to find this and we felt it necessary to

bring this to the attention of the Secretary of HEW, David Mathews.

We have an HEW employee who has no qualms about speaking to the press concerning his acceptance of gifts and funds from a private firm seeking a contract with his agency. He has ignored a subcommittee subpoena for his records and disobeyed a directive from his superiors to appear before this panel yesterday as part of his official responsibility. I think we have a serious situation.

The legislative purpose of these hearings is very clear. We have identified some serious defects in the administration of the medicaid program that go to the heart of the future of health care planning in the United States. If the present system is wasteful and ill-managed in some respects—and I have no doubt that it is, and I am sure our witnesses will not dispute that—we can hardly be ready to impose the additional burden on Americans of creating a national health insurance program, modeled on such a flawed system, despite however many political platforms embraces the idea. But the implementation of it is something we really have to see as a possibility before we can go ahead with it.

Senator NUNN. Senator Percy, we have a bipartisan agreement on that.

Senator PERCY. That is right. The issues presented go far beyond the activities of a single HEW employee, however. I did want to make the point that we are not impugning the integrity, the decency, the hard work, and dedication of the thousands of employees, tens of thousands of employees in HEW. I am impressed with the quality of them. You have taken the personnel from us, sometimes we have taken personnel from you; and it turned out that they suddenly have become saints when they came to the Senate. We sought them out because we thought they had a high quality. I want to compliment all those who do their jobs well.

There has been a laxity bordering on negligence in some aspects of the work carried on by the very agency which will be shaping the future of health care in this country. If it is necessary to change the laws or write new ones to ensure that the health care program in the United States is properly managed, I am certain that Senator Nunn and I will work together, particularly with Senator Talmadge, in trying to devise a better way to carry out those programs that are intended to reach those in need without having the whole process corrupted.

I think we have shown conclusively, to my own personal dismay, that HEW still has a great deal of work to do before it can really point with pride to a properly monitored and controlled medicaid management system.

In the meantime, until we have reached that point, Federal funds will be squandered, State governments are cheated and the citizens throughout America are deprived of the quality of health care that they deserve; and that must change. I think we must change it just as soon as we can.

I want to tell our distinguished witnesses that we intend to work closely with you. Although we close this phase of our hearings, this is a permanent subcommittee which continues on and on, and we are

not hit and run artists. We will constantly come back to see whether or not we can report progress. I have been conducting hearings in the Select Committee on the Aging, with Senator Moss, over 7 years now in the nursing home field. We can now report considerable progress has been made there.

If any parents of those in the room ever are unhappily confined to a nursing home, they have a much better chance to have a life of decency and dignity today because of those oversight hearings, which revealed terrible abuses at the outset. Now, through a process of legislation and regulation and oversight, we have squeezed out of that business those who were in it just to make money on the poor, particularly if they are elderly. We have forced them out of it and left far better providers in that field.

So, too, in medicaid and medicare we intend to continue our oversight. We really look forward to working with all of you. It is a common objective I know we share. Thank you very much for being with us.

Thank you, Mr. Chairman, for conducting these hearings.
Senator NUNN. Thank you.

[Whereupon, at 12:30 p.m. the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

ASSISTANT SECRETARY OF DEFENSE,
Washington, D.C., October 1, 1976.

HON. SAM NUNN,
Acting Chairman, U.S. Senate Permanent Subcommittee on Investigations,
Washington, D.C.

DEAR SENATOR NUNN: This letter is being written at the request of a member of your investigative staff to explain the circumstances surrounding the cancellation in June 1975 of a Request for Contract Services to develop a CHAMPUS Management Information System (CMIS).

The CMIS was one of several efforts that were initiated in the last quarter of FY 1975 in an attempt to improve management and contain costs of the CHAMPUS program. The CMIS was announced in the Commerce Business Daily on May 21, 1975 and the Request for Proposals was mailed out on May 23, 1975 with bids due by June 12, 1975.

At the time of the announcement we had not yet clarified the role of the Tri-Service Management Information System (TRIMIS) nor did we know exactly what data needs the recommendations of the OMB-DOD-HHW Military Health Care Study would generate. We were proceeding simultaneously on several issues that were to some extent interrelated. By mid-June we were seriously considering cancelling the CMIS RFP because of these timing programs and interrelationships. While we were attempting to resolve that issue (after the CMIS proposals were received and were being evaluated) the then Assistant Secretary of Defense for Health and Environment expressed some concern that one member of his staff might have been attempting to influence the award process in favor of a particular bidder. Although there was no basis for his concern, other than hearsay, he was hesitant about proceeding with an action that might have given one firm an unfair advantage in the competition.

After considerable deliberation, he decided that the CMIS RFP should be cancelled and readvertised in FY 1976 after we had sufficient time to better define what our CHAMPUS data needs would be and how they would be integrated into the data requirements for the total DoD health care system. This concept would also permit a restructuring of the project without any participation by the employee under suspicion. This action would also allay any fears that we had concerning a contract award under less than ideal circumstances. The RFP was cancelled on June 27, 1975.

Regarding the employee in question there was no evidence on which to take any action against him. He voluntarily terminated his employment in this office on March 20, 1976.

I hope this information will be of some assistance to you in your current investigation.

Sincerely,

VERNON MCKENZIE,
Acting Assistant Secretary.

HASKINS & SELLS,
Seattle, Wash., November 2, 1976.

MR. HOWARD J. FELDMAN,
Chief Counsel, U.S. Senate, Senate Permanent Subcommittee on Investigations,
Washington, D.C.

DEAR MR. FELDMAN: Pursuant to your telephone conversation with Mr. John King of our office, we have obtained a copy of your letter of October 8, 1976, to Mr. James Dwight of the Haskins & Sells Washington, D.C., office, and the transcript which accompanied it. This reply is confined to observations regarding the work we performed for the Idaho Department of Health and Welfare,

which was performed by personnel from the Seattle and Portland offices of our firm.

On page 182, lines 6-8 of the transcript, Mr. Duncan says: "It is my personal opinion that these specifications make it very easy for anyone to vote in favor of an organization that may not be the lowest bidder in terms of price."

We wish to make it clear that the specifications to which Mr. Duncan refers, including the weight accorded each of them, were determined by the Idaho Department of Health and Welfare; approved by the U.S. Department of Health, Education and Welfare; and communicated to all bidders in the request for proposal. Only after the above steps were completed was Haskins & Sells hired to assist in the evaluation process. Haskins & Sells had no part in the establishment of the specifications to which Mr. Duncan refers but merely applied those specifications to the proposals that were received.

On page 182, lines 12 and 13, Mr. Duncan says: "I think in this particular instance the advice by the consulting firm in no way was fair."

There is nothing in the record or the circumstances to support that statement.

On page 183, lines 2 and 3, Mr. Duncan says: "In this statement the consultants quote another bidder as to our capabilities."

The cost proposals of all proposers were made available by the Idaho Department of Health and Welfare to all other proposers for inspection. This was done by the Department without consultation with Haskins & Sells. It is our understanding that such disclosure is the Department's customary practice and that it may even be required by State law. To the best of our knowledge, Mr. Duncan's statement relates to unsolicited opinions offered to our consultants by other bidders regarding Blue Cross of Idaho's cost proposal. Haskins & Sells did not solicit any opinions from other bidders regarding Blue Cross of Idaho, its proposal, or its qualifications to perform the contract with respect to which it was proposing.

On page 331, lines 4 through 9, the following is recorded:

Mr. Statler. Do you know whether Mr. Svahn, since he has gone on with Haskins & Sells, has in any way been associated with the contract you just referred to?

Mr. Weinberg. I don't believe he has. I don't know for certain. I have been told that Jack has not been involved in any way.

Mr. Svahn indeed has not been associated with the Haskins & Sells evaluation for the Idaho Department of Health and Welfare in any capacity whatsoever. All of the Haskins & Sells personnel assigned to the project are permanent members of the firm's Seattle and Portland office staffs, and none of them have ever been employed by the U.S. Department of Health, Education and Welfare.

Very truly yours,

HASKINS & SELLS,
HAROLD A. HOPPER, Partner.

STATE DEPARTMENT OF PUBLIC WELFARE,
Austin, Tex., January 28, 1977.

HON. SAM NUNN,
Acting Chairman, Permanent Subcommittee on Investigations, Committee on Government Operations, U.S. Senate.

DEAR SENATOR NUNN: We in the Texas State Department of Public Welfare understand and appreciate the magnitude of the problems being dealt with by the subcommittee as it investigates Medicaid fraud and abuse. The scope of the program is so vast that sorting out instances of loss of objectivity makes the task of the subcommittee a monumental one.

Therefore, in an attempt to be as helpful as possible, we would like to clarify certain portions of recent testimony before the subcommittee, namely that on the dates of September 29, 30, and October 1, 1976. The purpose of this letter is to present additional facts relative to the approval of the Texas Medicaid Information System (TMIS) and certain other matters mentioned in the hearings.

The Department of Public Welfare (DPW) is the single State agency responsible for the administration of the Medicaid program in Texas. The automated processing systems which support Title XIX services are designed to provide effective, efficient, and economical program control and administration.

There is a division of functions within the Texas Medicaid program. The State operates certain portions in-house and has contracted for certain Purchased

Health Services under a prepaid capitation insuring arrangement. The State-operated portion consists of eligibility determination and maintenance, Nursing Homes, Vendor Drugs, Early Periodic Screening, Diagnosis and Treatment (EPSDT), Hearing Aids, Dentures, management reporting, financial reporting, utilization control, and maintenance for both provider and recipient data bases. These functions account for two-thirds of the Title XIX program payments. The Purchased Health Services consist of hospital, physician, and other ancillary medical services. Purchased Health Services accounts for the remaining one-third of the Title XIX program payments. The State accounts for all Title XIX expenditures in its information systems. There is no duplication in program functions or in development and operational costs of these interactive components in Texas' Title XIX program.

We feel that the subcommittee will want to know the following regarding the Department of Health, Education, and Welfare (DHEW) approval of the Texas Department of Public Welfare for increased Federal financial participation under Section 235, P.L. 92-603:

1. The approval covers only the State-operated portion of the Texas Medicaid program.
2. The approved system was designed, developed, and implemented by DPW staff.
3. DPW operates the approved portion with internal staff.
4. No contractors were involved in the design, development, or implementation of the operational approved portion.
5. No contractors are involved in the ongoing operation of the State-approved portion.
6. Through the approved mechanized claims processing and information retrieval system:
 - (a) Eligible providers are paid promptly and accurately;
 - (b) Only eligible recipients are provided needed health care;
 - (c) Explanations of benefits are provided to recipients on a timely basis;
 - (d) Managers of the program areas are provided with information required to monitor and control the Medicaid programs;
 - (e) The Texas Medicaid program is well administered.

We are presenting our opinion regarding the applicability of the law and regulations to the approved Texas Medicaid Information System (TMIS):

1. TMIS is a total system, developed and operated in full accordance with the statutory requirements of Title XIX of the Social Security Act, its attendant policies, and the Federally-approved State plan.
2. The approved portion (with exception of the new Hearing Aid program) was designed, developed, implemented, and in operation prior to the enactment of the following legislation and attendant policies:
 - (a) Section 235 of Public Law 92-603 (October 30, 1972)
 - (b) 45 CFR 250.90 (May 20, 1974)
 - (c) MSA-PRG-31 (June 10, 1974)

3. TMIS meets or exceeds the total MMIS requirements for the applicable programs. It is the demonstrable conceptual equivalent as per 45 CFR 250.90 (b) (1) (i) as clarified by SRS-PRG 40-37 and published in F.R., Vol. 39, No. 98, dated May 20, 1974.

4. Neither the law nor the regulations require that MMIS be operated as a single entity at a single location.

5. Neither the law nor the regulations include the word "fragmentation."

6. The Texas Medicaid program supported through TMIS represents a total system and is not fragmented.

Texas, by demonstrating effective and efficient administration, met the intent of Congress in enacting Section 235 of Public Law 92-603 providing for financial incentives to states such as Texas. Approving and recognizing quality Medicaid administration would appear to be within the law.

In committee testimony some SRS staff challenged Department of Health, Education and Welfare's approval of the Texas Medicaid Information System (TMIS). We respectfully dispute the testimony for the following reasons:

1. The testimony that materials relative to the approval process were not available to SRS staff is not correct. The complete set of TMIS documentation (over 5,100 pages in 43 binders) was presented to the review team during its visit to Texas. Because the team could not take the material

back on their return flight, it was sent by Air Express and addressed to Mr. James J. Trainor. Receipt of this material was acknowledged. The documentation was thorough. DPW will provide, at the subcommittee's request, a copy of that documentation.

2. Mr. Trainor's comments on multiple, fragmented systems and the use of several contractors, suggest that he might not have been adequately informed of the operation and design of the Texas system. Mr. Trainor's explanation of multiple systems development and his assumptions that several contractors were involved in the approved Texas system were inaccurate. The committee should know these important facts about the 90% development costs which we believe Texas is entitled to claim:

(a) The claim has not yet been made.

(b) The approved developmental work was done by in-house DPW staff.

(c) No contractors were involved.

3. Ms. Rosalie Ryan, previously Director of Automated Data Processing in the Texas Department of Public Welfare, resigned from the Department in May, 1972 following a reorganization of the ADP Division. The reorganization resulted in areas of responsibility being changed, to include a new ADP manager. Ms. Ryan chose not to continue her employment unless she could continue to be manager, even though she was asked to stay on, at no change in salary.

Placing Ms. Ryan on a team to visit and conduct an analysis of the Texas Department of Public Welfare in a data processing context may not have been a sound decision.

Texas has had an insuring arrangement for certain health care services since 1962. The new contract for these Purchased Health Services, effective January 1, 1977, is with Electronic Data Systems, Federal (EDSF) of Dallas, Texas. Prior to that time, Purchased Health Services were contracted to Group Hospital Services, Inc. (GHSI), also of Dallas, Texas. When Texas entered into a Title XIX program, the decision to retain a prepaid capitation arrangement for certain health care services was reaffirmed and has resulted in effective service delivery and provider reimbursement.

Self-administration of all the Title XIX program was considered as an alternative to the Purchased Health Services portion of TMIS. The use of a prepaid capitation arrangement contractor seems more feasible at this time.

The subcommittee is hereby presented the following facts relating to the new Purchased Health Services contract between DPW and EDSF:

1. Texas' recommendation for DHEW approval of EDSF as the contractor for Purchased Health Services was the result of open, competitive bidding. The procedures involved in the Request for Proposal (RFP) and the subsequent evaluation process are thorough and well-documented. DHEW staff participated throughout the entire process.

2. Texas has consistently provided DHEW with current and complete information required for approval of Federal funding.

3. Substantial documentation, including DHEW approvals of Texas contracts, supports our position.

4. The subcommittee hearings were conducted before the proposed Texas contract with EDSF was in final form, yet some SRS staff indicated they had been denied the opportunity to review and to personally sign off on it.

The Texas Department of Public Welfare has maintained excellent relationships with both Central and Regional DHEW/SRS staff. From time to time, I have personally requested consultative resources and services available through SRS. The expertise and technical advice given the Department by many SRS staff has assisted us in several major issues over the many years. At my direction, the visits of SRS personnel have consistently been requested through, coordinated with, and authorized by appropriate SRS staff.

I want to make certain that the following points regarding Mr. Charles Cubbler and DPW are emphasized for subcommittee consideration:

1. The Texas Department of Public Welfare requested Mr. Cubbler's assistance on several occasions because of his reputed expertise on Medicaid systems.

Each of these requests went through proper channels and was coordinated with Regional and Central SRS staff. There are memoranda to support this. The July 7-9, 1976 visit which was singled out was:

(a) Requested by DPW through the Dallas Regional Office;

(b) Referred by the Dallas Regional Office to Central Office;

(c) Approved and authorized by Central Office ;

(d) Not related to the awarding of a contract ;

(e) Not related to approval of the TMIS review in January, 1976.

2. Statements regarding the use of a Department of Public Welfare airplane are incorrect. The Texas Department of Public Welfare did not authorize or send any plane to Ocean City, Maryland or anywhere else to pick up or return Mr. Cubbler. As Commissioner, I have checked this matter out personally.

3. Mr. Cubbler was not asked to influence the SRS decision to approve the Texas system.

4. His presence and activities in other states are beyond our responsibility and control.

We believe that Texas is headed in the right direction in Medicaid administration. Implications that the Texas case appears to be precedent and that Texas might be going in the wrong direction are neither valid nor justified.

Top level SRS officials stated that approval of outstanding programs should not be delayed or withheld because other programs are not on a par. If Texas' approval for the State-operated part is precedent, all states should benefit.

The cost effectiveness of the Texas Medicaid program is exemplary. Administrative costs when compared with other states are among the lowest in the nation. Since one of the objectives of Section 235, P.L. 92-603 is to provide incentive to reduce administrative costs associated with Title XIX systems, we are confident that Texas is going in the right direction.

Texas accomplished the design, development, implementation and operation of TMIS without duplication of effort or expense, without costly overruns in development cycles, and without interruption of services.

In our opinion, Texas received approval because our system incorporates and demonstrates the objectives and principles embodied in the law and the regulations.

The Texas Medical Information System is the total State system which includes the functions of utilization review and utilization control for contracted portions as well as for self-administered portions. These functions bring all the Medicaid information together so that monitoring and accountability can be accomplished.

An illustration of how the State of Texas has successfully recognized and used its information systems is the Explanation of Benefits System (EOB). The EOB is a monthly notification to recipients of all medical services paid for on their behalf during that month to all types of medical providers. Not only do all Medicaid recipients receive EOBs, but also there is DPW professional staff which review these EOBs. There are numerous other management and administrative reports which we use to effectively control the program. Thus nursing home services, hospital services, physician services, prescription drugs, etc., are analyzed at one time and in one place. Because of this professional evaluation, all Medicaid services, including both the prepaid portion and the in-house portions, are unified. In addition, the recipient receives his monthly Medicaid identification card as a part of the EOB form.

Recipients who abuse the Medicaid program are identified by data analysis through use of the EOB. To effectively implement these findings, a Recipient Health Care Education program has been initiated. This program, upon recognition of certain indications of abuse, doctor-shopping, etc., allows DPW professional staff to monitor and counsel alleged abusers. We feel this program has resulted in better Medicaid consumer consciousness and, correspondingly, Medicaid funds are more appropriately dispensed. Texas continually looks for ways to enhance and improve the Texas Medicaid Information System.

We commend the leadership that high level Department of Health, Education, and Welfare have shown in striving toward more effective internal organization. Successful nationwide implementation of the principles underlying MMIS will depend on the direction and guidance available through dedicated, informed Federal and State administrators working together and within the context and concepts of the law and regulations. Furthermore, we are confident that Texas has demonstrated the level of leadership and quality Medicaid administration required not only by Federal law but by our State Plan and the specific needs of the citizens of the State of Texas.

We are grateful for this opportunity to reinforce our testimony before the subcommittee, and we wish the distinguished members of the subcommittee well in their important work.

RAYMOND W. VOWELL.

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS,
Washington, D.C., February 11, 1977.

Commissioner RAYMOND W. VOWELL,
State Department of Public Welfare,
Austin, Tex.

DEAR COMMISSIONER VOWELL: Thank you for your letter of January 28, 1977 which I will include in the printed record of our hearing. As you know, our respective staffs have met and your staff has agreed to provide the Subcommittee with certain materials that will assist us in developing a more complete record.

We are particularly interested in knowing the extent to which personnel presently in the Department of Health, Education, and Welfare and formerly on loan from DHEW to the State of Texas participated in preparing any communications from your Department to the Subcommittee and DHEW.

In addition, we would appreciate the cooperation of your staff with the staff of the General Accounting Office when they begin the review of the Texas Medicaid Information System.

Furthermore, we would be grateful if you would share with us your experiences from time to time not only with your program, but also with the Department of Health, Education, and Welfare.

Sincerely,

SAM NUNN.

END