Prepared Statement of Senator Charles E. Grassley
Chairman, United States Senate Committee on the Judiciary
Hearing Before the House Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
"Oversight of the False Claims Act"
Thursday, April 28, 2016

Two years ago, I testified at a hearing before this subcommittee, also entitled "Oversight of the False Claims Act." Coincidentally, that hearing took place on July 30, National Whistleblower Appreciation Day, marking the anniversary of a resolution passed by the Continental Congress in 1778 stating:

Resolved,

> That it is the duty of all persons in the service of the United States . . . to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge.

That resolution recognizes the responsibility of Congress to safeguard the public trust. That includes the public fisc.

One of the smartest things Congress has ever done is to empower whistleblowers to help the government combat fraud. They get results. Without whistleblowers, the government simply does not have the capability to identify and prosecute the ever-expanding and creative schemes to bilk the taxpayers. That is not rhetoric. That is history.

In 1943, Congress bowed to pressure to undo the Act's crucial qui tam provisions and essentially block private actions. Congress assumed that the Justice Department could do a good job prosecuting fraud all by itself. They were wrong. In the words of a 1981 report by the Government Accountability Office, "For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . . The sad truth is that crime against the Government often does pay." The GAO was right.

By the time I was working on the 1986 False Claims Act amendments, government and taxpayer-funded programs had ballooned, and so did the fraudsters' targets. Taxpayer dollars became easier and easier to scam, and fraud on the government had skyrocketed. The

Department of Justice estimated at that time that fraud was a drain on 1 to 10 percent of the entire Federal budget. In 1985, that meant fraudulent activity was costing taxpayers $10 billion to $100 billion every year.

The 1986 amendments once again empowered whistleblowers to help the government combat fraud. Thirty years' worth of recoveries shows that we did the right thing. The False Claims Act is, hands down, the most effective tool the government has to fight fraud against the taxpayers. In Fiscal Year 2015 alone, the federal Government recovered more than $3.5 billion under the Act. That makes more than $26 billion since January 2009, and more than $48 billion since 1986. These recoveries represent victories across a wide array of industries and government programs, including Medicare and Medicaid, defense contracts, mortgage insurance, crop insurance, and federal student aid. According to the Justice Department, whistleblowers accounted for $2.8 billion of the $3.5 billion in recoveries in Fiscal Year 2015. As Principal Deputy Assistant Attorney General Mizer has said: "Many of the recoveries obtained under the False Claims Act result from courageous men and women who come forward to blow the whistle on fraud they are often uniquely positioned to expose."

The facts speak for themselves. The False Claims Act works.

One of most significant areas of False Claims Act success is in the healthcare industry. From 1987 to 2015, the government has recovered more than $31.1 billion in healthcare-related False Claims Act actions. It is not surprising that such a large portion of recoveries derive from the healthcare industry, which has seen an explosion in the size of its government-funded programs—and in the fraud against them.

When we revitalized the False Claims Act in 1986, healthcare fraud was definitely on our minds. In a 1985 report to Congress by the Economic Crime Council—an advisory body to the DOJ established by the Attorney General—the Council established health care programs as an "area[] of national significance relating to economic crime." Since then, healthcare fraud has only increased. Recently, the Inspector General for the Department of Health and Human Services reported a 134% increase in complaints against Medicare Part D in the last five years. Clearly, fraud expands in proportion to the size of government spending. The False Claims Act must be as strong as the schemes against the taxpayers are creative.

That is the reason why the 2009 amendments to the Act clarified erroneous interpretations of the law that permitted subcontractors to "escape responsibility for proven frauds" in government funded programs like Medicare and expressly applied the Act to knowing and improper retention of overpayments to which contractors have never been entitled. The massive opportunity for fraud under Obamacare fueled Congress's efforts to recognize in the Affordable Care Act that violations of the Anti-Kickback Law are violations of the False Claims Act. The Administration has also launched task forces designed to investigate and prosecute fraud on these programs, and, with the help of whistleblowers, achieved crucial recoveries for violations of the Stark Law, the Anti-Kickback Law, and other fraudulent schemes. Those schemes include efforts to improperly induce referrals, obtain unlawfully high reimbursements, and bill for medically unnecessary

services at nursing homes. Overall since 2009, the government has recovered $16.5 billion lost to fraud in the healthcare industry.

Again, the facts show that the False Claims Act is working. One of the ways it works is by requiring the filing of cases under seal. The seal protects the parties in the case, including the defendant, while investigators review allegations in a responsible way and without unnecessary damage to a company's reputation. After reviewing the facts, the government may decide not to pursue the case. That is how the Act is supposed to work. It is also the sort of decision investigators and prosecutors make all the time, in civil and criminal cases alike. Even when the government declines to continue or to intervene, however, it is crucial to safeguard a whistleblower's ability to bring the case on his or her own initiative. To deny a qui tam relator the right to pursue a False Claims Act case in the event that the government does not intervene contravenes the basic, essential purpose of the Act, which is to empower private citizens to help the government fight fraud. History shows that the government simply cannot do so on its own. Such a change would also deny the taxpayers the ability to recover funds in meritorious cases. The Department of Justice has made clear that the decision not to intervene is not itself an indication that government does not believe the case has merit. There may be numerous reasons in any given case to decline intervention, including resource constraints, and courts are clear that such a decision does not bear on the merits. Notably, in Fiscal Year 2015, approximately 32% of total recoveries derived from whistleblower suits where the government did not intervene. That is $1.1 billion that the taxpayers would never have recovered.

Whistleblowers are the indisputable key to protecting taxpayer money against fraud. They must be protected. They will not be protected if they are required to report internally before making any protected external disclosure. This is one of several topics I covered at length at the 2014 hearing. Like numerous other proposals I have heard over and over again to "strengthen" or "fix" the False Claims Act, this one is just as nonsensical today as it has always been.

In a perfect world, organizations would value input from their employees, work to fix the problems they identify, and go about their business. We do not live in a perfect world.

For every allegation of a potentially overzealous plaintiff, there is a whistleblower threatened with severe retaliation for raising concerns. These kinds of toxic environments do not magically disappear in the face of the almighty compliance program. The $256 million case of U.S. v. Millenium Health is one example. In this case, the United States alleged the company was engaged in a scheme to bill federal programs for medically unnecessary testing, give kickbacks to doctors, and keep employees from complaining. The complaint gives a taste of the toxic environment existing in that company, stating that during a company presentation on, ironically, the topic of compliance, the company's general counsel displayed slides showing just what the company would do to an employee who raises concerns: the slides show pictures of a shooting range, a former company employee that the company had sued riddled with photo-shopped bullet holes, and a line of body bags labeled with the names of company competitors and the former employee. As stated in the complaint, the speaker notes for this compliance presentation read:

> Don't be a weasel. . . . I don't want to be on the other side of litigation from any of you. I hope you don't want to be on the other side of litigation with Millennium. There is no amount of time or resources we won't spend to hold our employees accountable. . . . [W]e will protect this company.

What employee in their right mind would disclose anything to anyone about this company without a real incentive and assurance of adequate protection? Whistleblowers need to be able to disclose wrongdoing outside of their organizations. They need strong protections regardless of who first receives their complaint. Protecting internal reporting is important, but requiring it only discourages many would-be whistleblowers with evidence of actual wrongdoing from coming forward. Moreover, when they do, they are often subjected to the hostility of the ill-intentioned manager or worse, as in the case of Millenium Health, the company lawyers. Whistleblowers need their jobs to be safe or they will not come forward.

Indeed, if Congress required internal reporting, the evidence shows that companies would wield it as a weapon against whistleblowers. Companies have argued repeatedly in court that internal reports are not protected. Many have used non-disclosure agreements to muzzle whistleblowers. Such practices are rightfully drawing the ire of regulators. In May of last year, the SEC settled charges against KBR for using improperly restrictive language in its non-disclosure agreements. The gag orders threatened discipline and even termination for talking with anyone outside the company without first getting the go-ahead from KBR's lawyers. In a more recent case, a company, Vanguard, is trying to argue that its former in-house attorney cannot benefit from whistleblower protection because he did not first raise concerns externally with the SEC until after he was fired. The SEC has intervened, rightly arguing that whistleblowers are not required to first report wrongdoing to the SEC, but are equally protected for reporting internally and externally.

Moreover, the data shows that equal protections for internal and external disclosures do not dissuade whistleblowers from reporting internally, where they feel comfortable doing so, even if they do have a strong qui tam case. A 2012 report by the National Whistleblower Center found that 89.7% of employees who would eventually file a qui tam case initially reported their concerns internally, either to supervisors or compliance departments.

Requiring internal reporting therefore is not only highly detrimental to whistleblowers and ineffective at uncovering fraud, it is just not necessary.

Companies and industry groups, many of whom either have or represent those who have defrauded the government, also insist that their "gold standard" compliance programs should give them a free pass. As I testified in 2014, compliance programs are wonderful things. When they are implemented effectively and run by the right people, they can flag a lot of potential problems. However, they do not fix everything.

Since I first began working with whistleblowers, I have done everything I can to make sure there are laws and rules in place to protect them. As I have said time and again, the evidence shows that without whistleblowers, significant wrongdoing in the public and private sectors would never be discovered or remedied. However, just as strong laws are not a substitute for oversight,

good compliance programs are not a substitute for accountability. Whatever the rules in place, without a culture committed to compliance and protecting whistleblowers, wrongdoing can still flourish.

A culture of compliance needs to be more than an ever-evolving set of nonspecific best practices that are more empty words than substance. That much is evident in the big-business funded white papers that tout ethics principles but offer no real specifics or helpful examples, and no insight from whistleblowers who, as I have already discussed, often have targets painted on their backs *because* they tried to use these so-called compliance programs. The Department of Justice understands all of this, and is, rightly, not just taking companies at their word that they have a top notch program. As Assistant Attorney General Caldwell has emphasized over and over again in Foreign Corrupt Practices Act cases, the Department is making compliance culture a top priority. The Department understands, as well as everyone here, that culture is not something that can be measured just by checking all the right boxes on a form, or even by claiming adherence to the vague, in-vogue compliance concepts of the moment. Using a so-called "gold standard" program as a shield against liability would not strengthen compliance. It would only create perverse incentives by decreasing the pressure on companies to maintain a truly sustainable compliance culture at all levels of their organization. Simply put, it would reduce accountability to a paperwork exercise.

There are many other wrong-headed proposals and arguments purportedly designed to "fix" the False Claims Act. In the interest of time, I will mention just one more. Last week, the Supreme Court heard oral arguments in the *Universal Health* case. The petitioner in that case, along with a slew of amici largely representing the same interests funding the pie-in-the-sky "gold-standard compliance program" campaign, actually argued that the False Claims Act was only meant to address claims accompanied by express false certifications. That is nonsense. I filed my own amicus brief in that case, showing that nothing, in the text or in the very long history of the False Claims Act, can support that argument. Under the petitioner's interpretation, contractors could escape liability for providing defective or substandard goods and services the government did not bargain for, as long as they did not outright lie about it. As I wrote in my amicus brief, requiring an express false certification for liability would not protect the taxpayer. It would severely weaken the False Claims Act and unduly hamper the government's ability to recover funds lost to fraud.

The modern-day False Claims Act is now 30 years old. It is the most successful piece of anti-fraud legislation in U.S. history, and it has always enjoyed strong bipartisan support. That is because it works, by nurturing that public-private partnership with whistleblowers and by incentivizing integrity.

Upon close inspection, it seems that the heart of many proposals to "fix" the False Claims Act are merely complaints about the strong, necessary penalties it imposes. However, the reality is that the damages provision of the False Claims Act helps the government offset costs without making the government bigger. Moreover, many of these significant fraudulent schemes involve repeat players and very large companies that lobby the government for fat contracts. It makes

perfect sense that Congress has made a determination that companies like that who defraud the taxpayers *should* face steep consequences.

There is necessarily a higher standard that comes into play in government contracting. As Justice Homes once observed, citizens must "turn square corners when they deal with the Government." That is because when citizens contract with the government, they contract with the taxpayers. When they cheat the government, they cheat the taxpayers. Why does this matter so much? It matters because fraud on the government costs much more than money. A Government Accountability Office report we reviewed as we wrote the 1986 amendments put it best: "[F]raud erodes public confidence in the Government's ability to efficiently and effectively manage its programs." I urge my colleagues to fight for the public's trust that the laws we pass and the programs they pay for actually work as intended. We cannot do that without the False Claims Act.