Prepared Statement of Senator Charles E. Grassley
Ranking Member, 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"
Wednesday, July 30, 2014

Mr. Chairman, thank you for allowing me to come here today to testify on the False Claims Act.

Today is National Whistleblower Appreciation Day. On this day in 1778, the Continental Congress passed the first whistleblower law in the United States. It read:

> *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.

This resolution was passed by the Congress without any recorded dissent. Then and now, Congress's control of the purse strings has given it an obligation to guard against wasteful or fraudulent spending.

Today, whistleblower groups are meeting as we speak to honor some of our colleagues on the Hill for their support of whistleblowers who report waste or fraud. It's too bad that this hearing was scheduled for the precise time that many of them are unable to be here.

Of course, I'm always wary when I hear the biggest violators of a law hire people to talk about "strengthening" it. Last fall, the Chamber of Commerce announced that it was launching a full-fledged campaign to reform the False Claims Act. It called its report "Fixing the False Claims Act." It claims the Act "plainly is not getting the job done" since "the government has recovered only $35 billion since 1987." The current number is actually $42 billion. Either way, that's nothing to sneeze at where I come from. The fact is that no other law in existence has been more effective in battling fraud than the False Claims Act has in the past 25 years. Before the 1986 amendments, it brought in a tiny fraction of what it does today, only about $40 million a year. At that rate, it would have recovered only $1 billion in the past 25 years. Thanks to the 1986 amendments, it's brought back 42 times that much. Clearly, the False Claims Act is working, and it's working fantastically.

This report says that the law is "ineffective at preventing fraud." Yet my staff have met with the authors of the report, and they don't have any concrete proposal for preventing fraud more effectively. They talk about a "gold-standard compliance certification program," but it's just a pie-in-the-sky idea with no specifics. As they put it to my staff, "We had to come up with something, so we just put that in." They are vague on who would create the program, who would enforce the program—basically, everything about it. But they want you to believe that once this pipe dream is in place, it will magically increase the amount of taxpayer dollars the government recovers.

In exchange for this castle in the air, the report proposes hefty concessions for its big corporate sponsors. For starters, they want to eliminate the use of exclusion or debarment, surrendering one of the government's strongest tools for deterring fraud. They want to lower the damages multiplier for those who self-report. And they repackage a detrimental proposal to whistleblowers that has been recycled again and again.

Large corporations have long argued that whistleblowers should be forced to report wrongdoing internally before going to the government. Yet when whistleblowers try to do exactly that and get retaliated against, these large corporations change their stance in court and argue that whistleblowers only have protection if they report *externally*. Those kinds of inconsistent positions make it hard to believe that either argument is made in good faith. This report proposes requiring internal reporting 180 days before any whistleblower can file a False Claims Act suit. Yet in most corporations, reporting internally just puts a huge target on your back. We should trust whistleblowers to use their common sense to know the safest place to report. Anything else would dramatically weaken the False Claims Act and result in fewer whistleblowers coming forward.

Besides, it's ludicrous to think forcing whistleblowers to report internally would add to corporations' incentive to self-report. Instead, the first calculation any corporation would make is whether they could get away with muzzling the whistleblower and paying *no* damages. This report says we need to move from a stick to a carrot approach for corporations, but they're asking for a stick to use against whistleblowers. Internal reporting and a six-month head start on retaliation before the whistleblower gets a chance to be heard in court is a recipe guaranteed to reduce disclosures of fraud. Even when a corporation does come forward, the company line is never going to be the complete picture. That's why the False Claims Act incentivizes whistleblowers—and it's worked.

Now all that I've just discussed is predicated on the mythical gold standard compliance certification. While I believe companies *should* have strong internal compliance programs, nothing is worth the 'get out of jail free' pass this report asks for in exchange. Presumably we are supposed to believe that the model for certification would be the report's multinational corporate sponsors, who are already required by law to have compliance programs. No small- or mid-sized businesses would have the kind of money for a gold standard compliance program that these corporate colossuses do. Since many corporate giants already spend large amounts on compliance, yet still routinely bilk millions in taxpayer dollars, it's hard to imagine how these perks would motivate them to stop. Because this program has no specifics, there is no research showing how it would increase recoveries or prevent fraud.

Yet the specifics that are in the report contradict its assertion that the False Claims Act has failed by not recovering enough money. The report makes multiple proposals to *limit* government recoveries across the board. These limitations would apply regardless of whether the corporation involved participated in any compliance certification program. That just makes no sense.

Further, as the testimony that Stephen Kohn has submitted for today's record illustrates, corporations have already been using compliance programs as a trap for whistleblowers. By making their compliance program an arm of their legal department, anything a whistleblower reports is protected as confidential by attorney-client privilege. Back in March, the Chamber joined others in submitting a strongly-worded *amicus* brief arguing for such confidentiality for whistleblowers who take the internal compliance route. Many corporations also require employees who provide tips to their compliance departments to then sign non-disclosure agreements. In addition to the chilling effect this has on whistleblowers contemplating filing a False Claims Act suit, any whistleblower brave enough to file then finds *themselves* the subject of legal action claiming they have violated attorney-client privilege or non-disclosure agreements. Is this how we want to treat whistleblowers? Internal compliance is *not* the one-size-fits-all solution this report would have you think it is.

In the last five years, the federal government has grown larger and larger and spending has gotten more and more out of control with laws like the stimulus package and Obamacare. The federal government now spends $1 trillion dollars in contracts and grants each year. Inspectors general, the Government Accountability Office, and congressional oversight committees simply haven't been able to keep up. Yet whistleblowers coming forward under the False Claims Act have played a key role in checking fraud and wasteful spending when other oversight resources have failed. Annual recoveries under the False Claims Act have increased dramatically in the past five years. Last year the Justice Department recovered $2.6 billion in health care fraud alone through the False Claims Act. The False Claims Act is clearly doing *exactly* what we intended it to do: recover taxpayer money.

State attorneys general around the country have used state False Claims Acts to successfully recover billions of dollars for their states. For example, last October, then-Virginia Attorney General Ken Cuccinelli recovered $37 million for the State of Virginia from a drug company that was inflating its prices to scam taxpayer dollars from Medicare. The next month, Cuccinelli recovered $21 million in two health care fraud settlements with multinational pharmaceutical giant Johnson & Johnson. One of those settlements related to millions of dollars in kickbacks Johnson & Johnson paid to the nation's largest pharmacy.

Yet just days before Cuccinelli's announcement of the settlements, Health and Human Services Secretary Kathleen Sebelius also made an announcement. She revealed that this Administration did not intend to treat Obamacare health exchanges as a federal health care program, *exempting* them from anti-kickback laws. Precisely because of the fraud opportunities under Obamacare, one provision that Congress added to the law made a violation of the Anti-Kickback Law an automatic violation of the False Claims Act. This Administration has chosen to ignore that part of the law. Given that Obamacare constitutes the biggest expansion of federal health care in our lifetimes, it's alarming that the Administration would try to simply ignore a key anti-fraud provision added by Congress. This is a ripe area for Congress to step forward and

reiterate that Obamacare is no less subject to the anti-kickback law and False Claims Act than other federal health care programs.

Health and Human Services isn't the only part of this Administration that has set this law aside when it didn't suit its interests. As those who sit on this Subcommittee will remember, in May 2013 the full Committee held a joint hearing with the House Oversight and Government Reform Committee. At that hearing I testified about how the Department of Justice had sacrificed taxpayers' interests under the False Claims Act to an ideological agenda. A report I released with Chairman Goodlatte and Chairman Issa found the Justice Department let the City of St. Paul off the hook for false claims worth as much as $200 million to the Treasury. It's extremely disappointing when those who work at the Justice Department don't put the interests of the taxpayer first.

This issue is really about law and order. The real question is: Why is it that some corporations swindle the federal government out of millions upon millions of dollars, yet we allow them to keep coming back for more? This subcommittee should strongly consider strengthening the False Claims Act's connection with suspension and debarment. That would keep repeat offenders away from taxpayer dollars and strengthen the law's deterrent effect. A couple of years ago, the nonpartisan Government Accountability Office (GAO) discovered serious weaknesses in the suspension and debarment programs of numerous government agencies. Six agencies, including the Department of Health and Human Services, "had virtually no procurement-related suspensions and debarments" in 2009. Now remember, 2009 was the same year that this Administration pushed through its $831 billion stimulus package, causing federal spending to skyrocket. The federal government gave out $200 billion more in grants in 2009 than it did in 2008. 2010 also included $50 billion more in grants than usual. Yet remarkably, even with all the billions of dollars being shoveled out the door by the federal government, GAO found that those six agencies again had almost no suspensions and debarments in 2010.

Chairman Issa and Ranking Member Cummings have joined together with some proposals on this issue. Along with several others, including Congressman Jason Chaffetz, who sits on this full committee, they introduced a bill last fall to strengthen the tools of suspension and debarment. Chairman Issa stated at the time: "The current process for keeping taxpayer dollars out of the hands of criminals, tax evaders, and the chronically incompetent is stove-piped, fractured, and inadequate." If we really want to improve the False Claims Act, I believe a judgment or settlement under the law should result in an automatic review for suspension or debarment. That would capitalize on the success of the law while increasing its deterrent effect.

The False Claims Act has already provided a crucial check during a time of growing government and out of control federal spending. No matter what we do to deter waste and fraud, whistleblowers are the key to the government finding out about it when it happens. We have to do all we can to protect them from those who resist the role they play. Today on National Whistleblower Appreciation Day, I hope we can honor whistleblowers for the patriotic service they provide to taxpayers.