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Debate: Should the False Claims Act be Revised?

Opening Statement

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The Federal False Claims Act has been a fantastic success. The modern FCA came to life with a 1986 amendment. So that's a pretty good benchmark. How were we doing before that? Prior to 1986, the Department of Justice recovered less than \$50 million a year. In the ten years following 1986, the DOJ recovered \$1 billion. But most significantly, last year alone, DOJ recovered more than \$5 ½ billion, bringing the total recoveries in the last five years to \$22 ¾ billion, more than half of the recoveries since the 1986 amendment.

How should we view that? My dad would say: "Nothing succeeds like success." The Federal FCA, at a time when people question government efficiency and effectiveness, has a twenty to one return in fighting health care fraud. What does that mean? It's very simple. For every dollar that the federal government spends on Federal FCA health care enforcement, it recovers \$20 in return. Does anyone know of any government program, federal, state or local, that can boast those results? That is a twenty-to-one return on investment. What this is doing is creating the basis for structural reform: rooting out, punishing and deterring fraud, promoting integrity, and, most importantly, allowing the free market to operate freely by creating a level playing field where fraud and corruption are not a competitive advantage, and where honest business becomes smart business.

While my fellow debater and I come from similar backgrounds in the law, we come to today's debate from different places. He is the principal spokesperson for the U.S. Chamber of Commerce on the Federal False Claims Act. I am the Chairman of Taxpayers Against Fraud & the TAF Education Fund, the leading educational and advocacy organizations for False Claims Acts and other whistleblower laws. Indeed, at a Congressional hearing on the FCA last July, the Chamber, through David, and TAF, through a colleague of mine, faced off much the same way we do today.

The revisions being offered by the Chamber then and now may be viewed by the big corporations that fund it be in their interest, but they are not in the best interest of effective FCA enforcement. Let me quote to you at length from one critic of this approach:

. . . I'm always wary when I hear the biggest violators of a law hire people to talk about 'strengthening' it. [In] Fall [2013], 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.' . . . The fact is that no other law in existence has been more effective in battling fraud than the False Claims Act in the past 25 years. . . . Clearly, the False Claims Act is working, and it's working fantastically.

The 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. . . .

. . .

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.

And who is this outspoken critic that I have quoted to you today? It is none other than U.S. Senator Charles Grassley, a conservative Republican from Iowa, who co-sponsored the FCA 1986 amendments, and who this month was elevated to Chairman of the U.S. Senate Judiciary Committee. And this was not some casual sort of statement, but rather it was central to his testimony at the House FCA hearing last July. Here is the bottom line: the Chamber's proposed revisions are not in the best interest of effective FCA enforcement, they have been rejected by the Republican Chairman of the Senate Judiciary Committee, and they are not likely to get off the drawing board.

The Chamber purports to take a "big picture" approach to the FCA. The problem in my view is that picture is out of focus: emphasizing "compliance" rather than integrity; missing the new paradigm that is developing around the current tapestry of whistleblower laws; and failing to appreciate how by using whistleblower laws to reform markets, the business community may prove to be their biggest beneficiary. That is what I plan to discuss with you during the remainder of my opening remarks."

Business Driven Integrity

"As we have discussed, at the end of July, the House Judiciary Committee held a hearing on the Federal False Claims Act. The U.S. Chamber of Commerce representative called for a weakening of FCA enforcement mechanisms, emphasizing instead 'gold standard' compliance programs to be the primary focus for fighting fraud. But, we have seen time and time again that major company legal compliance programs have met with spectacular failures.

An underlying problem is that companies typically rely on 'law-driven' compliance rather than 'business-driven' integrity programs. Law-driven programs seek to avoid punishment by meeting the letter of the law without developing a deeply rooted culture of integrity. In many cases, law-driven programs are only grudgingly tolerated by executives and employees, and they often fail as a result.

By contrast, a business-driven integrity program is much more likely to prove effective because business people from the top down (not just the legal department) embrace and promote it as essential to the long-term success of the enterprise. A business-driven program is viewed throughout the company as a profit center and a competitive advantage, rather than a cost center or an obstacle.

This approach makes a fundamental difference when employees confront real-life issues such as kickback arrangements, price fixing, or insider trading. Their responses become less a matter of consulting a legal guidance memo than fulfilling the company's basic mission and business

model. The core principle is that good ethics is good business. Integrity and honest dealing lead to an enhanced business reputation and long-term success, for individuals and corporations alike.

One of the best tests of a corporate compliance program is how the company responds to internal whistleblowers who report misconduct. If the company is serious about business integrity, it will welcome the report, investigate it vigorously, and shield the whistleblower against retaliation. Here, again, good ethics is good business. When whistleblowers are ignored and penalized, often their next stop is a prosecutor's office.

In the end, the overriding goal should be the reform of corrupt industries and markets, not just individual companies. That goal can be achieved only by combining powerful business-driven integrity programs with effective law enforcement.

New paradigm of whistleblower laws

What is that new paradigm? What defines it? One of the most important characteristics is the reliance on a public-private partnership. When I speak on this topic, I always stop and say: With all the criticism that we find about government in the United States, it is very interesting to understand that we all take it for granted that whistleblower laws can provide for a public-private partnership. But I can tell you, as many of you know yourselves, from your international work, we in the United States are unique in that we can take certain things for granted, because a public-private partnership implies at least two things: First, honest government. A citizen can go to the Justice Department and turn over such information, and a Justice Department official is not going to corruptly take advantage of that information for his or her own agenda, reporting back to that whistleblower's company for some private deal. It's almost shocking to us to even think about such things, but as we know full well, they do go on elsewhere. Not here. And the second is an active and engaged citizenry. With all the criticism about apathy in our society, the fact of the matter is that our citizenry is sufficiently engaged to come forward and bring these cases, knowing that there is a structure to do so, and that there is a track record of these cases going forward and being successful with rewards being paid to the individuals who bring them.

This captures the genius of America at its best: bipartisan support; simultaneously recognizing the potential and the limits of government; and a synergy of governmental resources, coupled with engaged citizens and their counsel.

Reforming Markets

What I am about to describe to you, I submit, is the New Era. Beyond reforming companies and industries, we will now aim to reform whole markets. Why must we do that? Because corruption distorts the free market, rewarding dishonesty, opaqueness, inefficiency, and ineffectiveness.

We all know that anti-corruption laws seek to remedy that. But, to the extent they come up short, and so often they do, honest businesses are at a competitive disadvantage. So we

should ask ourselves: Why do they come up short? Here is why in my view: lack of information; lack of resources; and lack of will. That is particularly true when you get outside the borders of the United States and are relying on international enforcement mechanisms. Whistleblower laws can be the great equalizer, developing reliable information, matching it up with public resources, and incentivizing integrity. That is exactly what is needed to make economic sense out of our international anti-bribery laws. That will help honest companies throughout the world to compete effectively in the global marketplace. It will help U.S. companies, in particular, that adhere to the U.S. Foreign Corrupt Practices Act.

To date, the U.S. Chamber of Commerce has spent its capital opposing whistleblower laws, including the SEC whistleblower law. But I predict that that narrow and shortsighted view is about to be overtaken by events. First, these laws are here to stay. Second, applied effectively, these laws will prove to be the great friend of U.S. business. We have seen this before.

We have seen this with the antitrust laws. When the antitrust laws first appeared, business was askance and opposed, but they learned that it can be a very helpful law in the face of unfair competition. By now, business has come to rely on private anti-trust lawsuits as an important remedial tool. We have seen it in the case of civil RICO. When civil RICO, the civil anti-racketeering law appeared, it too was looked upon askance and opposed by the business community. But consider what the insurance industry has done since, and how it has used civil RICO effectively when dealing with complex fraud in the industry, involving arson for profit rings, no-fault rings, and the like. That industry has used that statute to expose those enterprises. I believe we are about to see it again with whistleblower laws. As I say, that fight will go beyond simply reforming companies or even industries; it will settle for no less than reforming whole markets.

The FCA is in no need of revision by false friends. It doesn't just simply work. It works fantastically.