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“Whistleblower Retaliation at the FBI: Improving Protections and Oversight”

Chairman Grassley, Ranking Member Leahy, and members of the Committee, thank you for inviting me to testify about improving protections for FBI whistleblowers. FBI and Justice Department officials often pay lip service to protecting whistleblowers, but the byzantine, protracted procedures they employ all but ensure that FBI employees who report misconduct will not be protected from retaliation. New reports by the Justice Department and Government Accountability Office (GAO) make clear that the current system isn't working.¹ But the incremental improvements the Justice Department proposes are inadequate, and would keep FBI employees trapped in a system with substandard protections. A legislative solution is necessary to finally give FBI employees the protection they deserve.

When Congress provided whistleblower protections to federal employees through the Civil Service Reform Act of 1978 and the Whistleblower Protection Act of 1989, it exempted the FBI and other intelligence agencies.² Instead, it required the Attorney General to establish regulations designed to provide FBI employees with a system of protection “consistent with” those provided by statute to other federal employees.³ When the Justice Department finally promulgated such regulations in 1997, they failed to meet this standard.⁴ By choosing not to protect the most common form of whistleblower complaints – those made to direct supervisors through the chain of command – the Justice Department regulations function more as a trap for the unwary rather than a shield of protection.

The regulations divide investigative responsibility over reprisal claims between the Justice Department Inspector General, the FBI Office of Professional Responsibility, and the FBI Inspection Division, which inserts ambiguity and delay into the process. Further, the regulations establish an adjudication process through the Justice Department Office of Attorney Recruitment and Management (OARM) that lacks the appropriate administrative law standards and transparency necessary to ensure due process. In practice, as the GAO report makes clear, FBI

whistleblowers have little chance of being heard, much less receiving timely relief from reprisals, or corrective action to make them whole. The three cases GAO documented in which OARM ordered some corrective action for FBI whistleblowers took between eight and ten years to adjudicate – almost half of a typical agent’s career.⁵

The costs, both fiscal and emotional, of such prolonged litigation against one’s employer certainly dissuade many FBI employees from reporting internal misconduct. Many others who start the process ultimately withdraw their complaints, or cut their losses and settle at disadvantageous terms.

I know the toll exacted on whistleblowers because I resigned from the FBI after this system failed to protect me from retaliation for internally reporting a mismanaged terrorism investigation. I provided detailed accounts of what happened to me in previous testimony in the House of Representatives.⁶ Today I would like to focus on how Congress can improve the chances of future FBI whistleblowers by giving them effective and enforceable rights to report wrongdoing to their supervisors, a timely, independent investigation of their complaint, effective administrative due process, and access to federal courts once they have exhausted administrative procedures.

Congress must ensure FBI employees are protected for chain of command disclosures and disclosures to Congress.

At his nomination hearing, FBI Director James Comey said whistleblowers were critical to a functioning democracy. He argued that “[f]olks have to feel free to raise their concerns, and if they are not addressed up their chain-of-command, to take them to an appropriate place.”⁷ This sounds good, but any agents who follow his advice would not be protected under the Justice Department regulations governing FBI whistleblowers. These regulations require FBI employees to bypass the normal chain of command and report misconduct only to a handful of high-level officials in order to receive protection. In the field, the lowest ranked official authorized to receive protected disclosures is a Special Agent in Charge (SAC).

I can’t overstate how difficult it would be for an agent to break protocol and report directly to an SAC. I served as an FBI agent for 16 years, was assigned to three different field offices, and worked undercover investigations in at least three more. In all that time, I had no more than ten personal audiences with an SAC, none of which occurred at my request. If I asked for a meeting with the SAC, he or she would immediately call the Assistant Special Agent in Charge to find out what I wanted, who would then call my supervisor with the same question, who would then call me in to ask what the heck I thought I was doing. My experience as an FBI whistleblower demonstrates how difficult it is to follow these procedures, and how illusory the protections are in reality.

In 2002, I was assigned to the Atlanta Division, but was asked to work undercover in a Tampa counterterrorism investigation. As the operation began, I learned the informant in the case had illegally recorded a portion of a conversation between two subjects earlier in the investigation, imperiling any possible prosecution. When the Tampa supervisor refused to address the matter and told me to just “pretend it didn’t happen,” I felt duty bound to report it.

Luckily, I researched the proper procedure, and realized I should make the report to the Tampa SAC. But I also knew that failing to provide notice to my chain of command in Atlanta would cause problems for them, which would ultimately cause problems for me. So I called my supervisor to tell him I was going to call my ASAC, to tell him I was going to call the Tampa SAC to make a whistleblower report.

When I talked to my ASAC, however, he asked me to write the complaint in an email to him, which he would forward to the Tampa SAC. This seemed reasonable, especially because I had little confidence the Tampa SAC would take my call. The FBI would later argue, however, that by transmitting the complaint through my ASAC, I forfeited my right to be protected from the reprisals I faced for sending that email. My experience isn't unusual. The GAO and Justice Department reviews confirm that a significant portion of retaliation complaints are closed because the whistleblower reported to the wrong FBI official.⁸

The Justice Department argues that it doesn't need to amend its regulations to protect whistleblower reporting to direct supervisors because it has no evidence that FBI employees are inhibited from reporting because of the short list of authorized recipients.⁹ But I provided the Justice Department review group a 2009 Inspector General survey that showed 42 percent of FBI agents said they didn't report all the misconduct they witnessed on the job.¹⁰ Eighteen percent said they never reported such wrongdoing.¹¹ These statistics would be troubling for any government agency. But for our nation's premier law enforcement agency they are simply astonishing. Reasons for not reporting included fear of retaliation (16 percent), a belief the misconduct would not be punished (14 percent), and lack of managerial support for reporting misconduct (13 percent).¹² Tellingly, 85 percent of those surveyed said if they did report wrongdoing it would be to their direct supervisor.¹³

Compelling the Justice Department to protect whistleblower disclosures to supervisors is an essential reform necessary to ensure FBI employees will report internal waste, fraud, abuse, mismanagement, and illegality that might threaten both our security and our civil liberties. Likewise, explicitly protecting disclosures to Congress will ensure that FBI employees will feel comfortable providing their elected representatives with information necessary for them to satisfy their constitutional oversight obligations.

Congress should ensure FBI whistleblowers receive a timely, independent investigation of their retaliation complaints.

The current Justice Department regulations give the Inspector General discretion to hand responsibility for whistleblower retaliation investigations back to the FBI Office of Professional Responsibility or the FBI Inspection Division. A 2009 Inspector General audit of the FBI's disciplinary processes "found problems with the reporting of misconduct allegations, the adjudication of investigations, the appeals of disciplinary decisions, and the implementation of discipline that prevent us from concluding that the FBI's disciplinary system overall is consistent and reasonable."¹⁴ FBI whistleblowers should not have to depend on inconsistent and unreasonable investigations of their complaints.

In my case, I gave the Inspector General and OPR a signed, sworn statement alleging retaliation in December 2002. In February 2003, I gave both offices a second sworn statement after learning Tampa managers falsely denied the meeting in question had been recorded. I again alleged retaliation. The Inspector General investigator advised me that OPR would take the lead, but that the Inspector General would reserve the right to initiate a new investigation once OPR was through. Then I was told the FBI Inspection Division had taken the investigation away from OPR, and was conducting interviews in Tampa. When the Inspectors interviewed me months later, they informed me that they investigated allegations made by the Tampa managers that I spent \$50 without authorization, though they found this wasn't supported by the facts. In effect, the Inspectors had performed a retaliatory investigation against me on behalf of the Tampa managers involved in my complaint. I believe the only reason they told me they did this investigation was to warn me they would entertain even the pettiest allegations against me if I continued pursuing the whistleblower complaint. Finally, in December 2003 the Inspector General investigator told me the Inspectors found no wrongdoing and closed the case. The Inspection Division investigation was a whitewash that allowed the reprisals against me to continue and delayed action on my complaint for a year.

This is not to say Inspector General investigations of FBI whistleblower complaints are always timely, fair, and objective. This wasn't true in my case, or in several others I identified in previous testimony, and have learned of since. In my case the Inspector General did not begin an investigation in earnest until after I reported the matter to this committee, resigned from the FBI, and went public with my story. In January 2006, the Inspector General issued an unpublished report confirming FBI officials mismanaged the Tampa terrorism investigation and falsified records to hide their misconduct.¹⁵ No one was held responsible for these offenses. The report also found the FBI retaliated against me, but this was a year and a half after I resigned from the FBI, more than three years after my initial complaint, and four years after the events took place. All intelligence and investigative opportunities posed by the original terrorism investigation were forfeited to protect the FBI and Justice Department from embarrassment.

Despite several problems with the Inspector General investigation of my case, which Chairman Grassley detailed in a 2006 letter, I was far better off *because* this investigation took place than I would have been if it had not.¹⁶ This process should be improved, rather than abandoned. To his credit, Inspector General Michael Horowitz, who took office in 2012, has made FBI whistleblower issues a higher priority. He appointed Robert Storch, a member of his senior staff, as an official whistleblower ombudsperson assigned to ensure whistleblower cases are handled promptly.¹⁷ Mr. Storch has held several meetings with whistleblower advocates, and his presence should add a level of accountability over these cases going forward. Fostering a strong working relationship with the ombudsperson may help the committee improve its oversight of these matters.

Congress should require the Justice Department to utilize Administrative Law Judges and procedures in adjudicating whistleblower retaliation complaints, subject to judicial review.

The Justice Department's regulatory process for adjudicating FBI whistleblower complaints is insufficient to meet its statutory requirements to provide relief "consistent with" the WPA. The Office of Attorney Recruitment and Management (OARM) simply is not an

independent and impartial adjudicator, and its processes lack the transparency and regularity necessary to ensure due process. As the American Civil Liberties Union and the National Whistleblower Center argued in a 2013 briefing memo to the Attorney General, FBI whistleblowers should be afforded a full, on-the-record hearing before statutory Administrative Law Judges, and all proceedings should comply with Administrative Procedures Act (APA) standards.¹⁸ Reasonable time periods for adjudication and rulings should be established. All decisions should be published, subject to redactions necessary to protect the privacy of claimants and witnesses, so that litigants have equal access to precedential opinions. The adjudication delays the GAO documented and the lack of transparency under the current regulatory procedures amount to an effective denial of due process for too many FBI whistleblowers.

The Justice Department may argue that providing APA procedures may be too resource intensive, but there is a simple solution to this problem. Easily more than half of the FBI workforce does not have access to sensitive national security information that would require a departure from the Office of Special Counsel (OSC) and Merit System Protections Board (MSPB) procedures afforded other federal employees, including those working for other federal law enforcement agencies and the Department of Homeland Security. Congress could mandate a system for the Justice Department to quickly vet FBI whistleblower claims and disseminate those without national security implications to the OSC and MSPB. This could significantly relieve the workload for the Justice Department's regulatory process, and could improve outcomes for a majority of FBI whistleblowers who do not need to be in a closed system.

Like other federal employees, all FBI whistleblowers should also have the right to go to federal court to enforce their rights once administrative appeals are exhausted. FBI employees reporting violations of their rights under Equal Employment Opportunity laws regularly adjudicate their cases in federal court without imperiling national security. There is no reason to believe federal courts couldn't take adequate measures to protect sensitive information during FBI whistleblower cases as well.

Concerns regarding the Justice Department's proposed amendments to FBI whistleblower regulations.

While several of the Justice Department's proposed amendments to the FBI whistleblower regulations are welcome and may significantly improve outcomes for FBI employees reporting misconduct, a few raise concerns. For instance, giving OARM the power to sanction litigants who violate protective orders is unnecessary and potentially risky, given the lack of transparency and accountability over OARM decision-making in FBI whistleblower claims.¹⁹ In a worst-case scenario, OARM sanctions against a litigant might even amount to an unlawful reprisal against a whistleblower seeking relief. Where litigants before OARM engage in misconduct related to OARM proceedings, OARM can simply refer the allegations to the appropriate disciplinary authority.

Likewise, Congress should examine closely the Justice Department's proposal to establish a mediated dispute resolution program for FBI whistleblower cases.²⁰ While exploring alternative dispute resolution options is always attractive, and may provide an avenue for addressing some whistleblowers' concerns, such positive outcomes require good faith that is too

often absent in these cases. FBI officials should not need a mediator to tell them they shouldn't retaliate against FBI employees who conscientiously report waste, fraud, abuse, mismanagement or illegality within the Bureau. It is the law. If FBI and Justice Department leaders allow agency managers to ignore the law in favor of misplaced institutional loyalty, it is hard to imagine mediators can convince them to follow it. However, if combined with effective investigatory and adjudicatory reforms, a mediation process could afford all parties with an alternative to litigation. For mediation to work, FBI managers and employees must have confidence that the FBI whistleblower protection mechanisms are effective, timely, and accountable.

Without effective reforms, FBI whistleblowers would be at a distinct power disadvantage during dispute resolution, in that they have few enforceable rights and little chance of prevailing through the existing regulatory process. Whistleblowers who agree to mediated dispute resolution might feel compelled to accept less than they deserve, and less than they would receive in an adjudicatory system that fairly and vigorously enforced their rights. Such a procedure could simply add one more delay to the already long and drawn-out regulatory process, and could provide FBI officials the opportunity to probe the strength of the whistleblower's case and identify FBI employee witnesses who could then be targeted for reprisals themselves.

While these concerns might seem cynical, I experienced two years of sustained and collaborative retaliation that pushed me out of the FBI, despite a career of superior performance and an unblemished disciplinary record. High-level FBI officials who had nothing to do with the original complaint initiated adverse personnel actions against me because they heard I was a whistleblower. While a dispute resolution process that was subject to proper oversight and accountability would be worth consideration, Congress should be careful to ensure this isn't just another weak and time-consuming process within an already ineffective regulatory scheme.

Conclusion

I believe the Justice Department's review of its regulatory performance in FBI whistleblower matters provides a unique opportunity for Congress to act. For the first time, the Justice Department is acknowledging its procedures for investigating and adjudicating FBI whistleblower reprisal cases are not as effective as they should be, and need to be reformed. The GAO study adds substantial evidence to support this conclusion. The door is open for Congress to enact legislation that would codify reforms that will finally provide the protections that the hard-working and conscientious FBI employees deserve. Protecting FBI whistleblowers will help ensure the FBI remains as effective and accountable as it possible.

Finally, I would like to thank Chairman Grassley and Senator Leahy for their decades of support for whistleblowers of all kinds, and particularly for FBI employees who too often have nowhere else to turn to when they face retaliation for reporting waste, fraud, and abuse within the Bureau. I benefitted personally from that support when I came to the committee with a sordid tale of a mismanaged undercover terrorism investigation, potentially criminal attempts to cover it up, and the failure of the Inspector General to protect me from retaliation for having reported it. I wasn't able to provide the committee with a single FBI document to prove what I said was true, yet Chairman Grassley and Senator Leahy made television appearances saying they believed me,

and vowed to investigate. I can't tell you how much I and my family appreciated that vote of confidence during a very difficult period. I also want to thank the finest investigator I know, Sen. Grassley's Chief Investigative Counsel Jason Foster. His empathy, professionalism, and diligence in seeking the truth have guided many whistleblowers through dangerous waters. I am proud to have worked with him over the last ten years.

ENDNOTES

¹ See, DEP'T OF JUSTICE, DEPARTMENT OF JUSTICE REPORT ON REGULATIONS PROTECTING FBI WHISTLEBLOWERS (2014), [*hereinafter* Justice Department report] available at <http://www.grassley.senate.gov/sites/default/files/judiciary/upload/Whistleblowers%2C%2010-21-14%2C%20DoJ%20Response%2C%20report%20to%20CEG%2C%20RW%20request%20for%20releas%20of%20PPP19%20report.pdf>, and, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-112, WHISTLEBLOWER PROTECTION: ADDITIONAL ACTIONS NEEDED TO IMPROVE DOJ'S HANDLING OF FBI RETALIATION COMPLAINTS (2015), [*hereinafter* GAO report], available at <http://www.gao.gov/products/GAO-15-112>

² Pub. L. No. 95-454, §§ 1001, 202, 92 Stat. 1111, 1113-8, 1121-31 (codified as amended at 5 U.S.C. §§2301-2306).

³ 5 U.S.C. §2303(c).

⁴ 28 C.F.R. part 27. See also, Letter from Stephen M. Kohn and David K. Colapinto, National Whistleblower Center, and Michael German, American Civil Liberties Union, to Attorney General Eric Holder (Feb. 4, 2013), available at <http://www.whistleblowers.org/storage/whistleblowers/docs/BlogDocs/2013-02-04-memo-changestopart27.pdf>.

⁵ GAO report, p. 22 (only 3 of the 62 FBI whistleblower complaints the GAO reviewed resulted in an OARM order of corrective action).

⁶ See, *FBI Whistleblowers Hearing Before the Subcomm. On Crime, Terrorism and Homeland Security, H. Comm on the Judiciary*, 110th Cong. (May 21, 2008)(written testimony of Michael German) available at:

https://www.aclu.org/files/images/general/asset_upload_file419_35426.pdf; *National Security Whistleblowers in the post-September 11th Era: Lost in the Labyrinth and Facing Subtle Retaliation Hearing Before the Subcomm. on National Security, Emerging Threats and International Relations, H. Comm. On Government Reform*, 109th Cong. (Feb. 14, 2006)(written statement of Michael German), at <http://www.gpo.gov/fdsys/pkg/CHRG-109hrg28171/html/CHRG-109hrg28171.htm> and,

<http://babel.hathitrust.org/cgi/pt?id=pur1.32754076775919;view=1up;seq=1>.

⁷ See, Carl Franzen, *FBI director nominee calls whistleblowers 'critical element of functioning democracy,'* THE VERGE, Jul. 9, 2013, at <http://www.theverge.com/2013/7/9/4507094/fbi-director-nominee-comes-testifies-whistleblowers>.

⁸ GAO report, p. 12-14; Justice Department report, p.7.

⁹ Justice Department report, p. 12-14.

¹⁰ U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL EVALUATIONS AND INSPECTIONS DIVISION REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S DISCIPLINARY SYSTEM, REPORT NO. I-2009-002, p. 188 (May 2009), available at <http://www.justice.gov/oig/reports/FBI/e0902/final.pdf>.

¹¹ *Id.*

¹² *Id.*, p. 120.

¹³ *Id.*, p. 119.

¹⁴ *Id.* p. xii.

¹⁵ U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL REPORT OF INVESTIGATION INTO ALLEGATIONS OF SPECIAL AGENT MICHAEL GERMAN, Jan. 12, 2006, (on file with author).

¹⁶ Letter from Senator Arlen Specter, Senator Patrick Leahy, and Senator Charles Grassley to Department of Justice Inspector General Glenn Fine (Feb. 3, 2006) (on file with author).

¹⁷ U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL PRESS RELEASE, *DOJ Inspector General Announces New Whistleblower Ombudsperson*, (Aug. 8, 2012), available at http://www.justice.gov/oig/press/2012/2012_08_08.pdf

¹⁸ Letter from Stephen M. Kohn and David K. Colapinto, National Whistleblower Center, and Michael German, American Civil Liberties *Union*, to Attorney General Eric Holder (Feb. 4, 2013), *available at* <http://www.whistleblowers.org/storage/whistleblowers/docs/BlogDocs/2013-02-04-memo-changestopart27.pdf>.

¹⁹ *See*, Justice Department report, p. 14.

²⁰ *See*, Justice Department report, p. 11.