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WHISTLEBLOWER RETALIATION AT THE FBI: IMPROVING PROTECTIONS AND OVERSIGHT

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WHISTLEBLOWER RETALIATION AT THE FBI: IMPROVING PROTECTIONS AND OVERSIGHT

WEDNESDAY, MARCH 4, 2015,

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley, Tillis, Leahy, Whitehouse, Klobuchar, Franken, and Blumenthal.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Chairman GRASSLEY. The Committee will come to order. Since Congress passed the Whistleblower Protection Act in 1989, I have been saying that whistleblowers are a very important part of Government operations by exposing waste, fraud and abuse, to help keep Government honest and efficient.

But despite all of our hard work over 25 years, whistleblowers are still fired, still demoted, still discredited, and oftentimes ostracized, all for doing what I consider a very patriotic duty, and that is telling the truth. But sometimes the truth hurts.

Today we are going to focus on whistleblower retaliation at the White House. And you may ask why. The FBI's whistleblower policies need special scrutiny because the legal protections for its employees are weaker than at any other agency, and there is a reason gave them to be different. I am not sure I agreed with it at the time, but it is probably necessary to get a Whistleblower Protection Act passed for the rest of Government. That is because the FBI is not subject to the Whistleblower Protection Act.

So as the law allowed, it has its own rules, very special rules, and, consequently, employees have no ability to appeal for an independent judgment outside of the Justice Department.

Back in 2012, President Obama issued a directive that established limited protection for whistleblowers in the intelligence community. He required the Department of Justice to report on how effective the FBI regulations actually are in protecting whistleblowers.

The Department submitted that report April 2014, a year late. In May 2013, I also asked the Government Accountability Office to look into the Department's handling of FBI whistleblower complaints. That report was published last week and the Government Accountability Office is here to testify about those findings.

Now, unfortunately, the Justice Department failed to identify a witness from the Attorney General's or Deputy Attorney General's office to talk about its report and the recommendations for reform.

The GAO and the Justice Department reports have several important findings in common. I will mention just two of them now.

First, both reports recognize that unlike every other Federal agency, the FBI employees are not protected from retaliation when they report wrongdoing to their direct supervisors. This ought to be cause for anybody to scratch their head.

The FBI culture requires a deep respect for the chain of command. The FBI encourages employees to report wrongdoing to their supervisors within the chain of command, but it does not tell those same people they have no recourse if they experience retaliation for doing so.

It is not surprising then that the Department found a significant portion of FBI whistleblower complaints have been rejected because the whistleblower blew the whistle to the, quote-unquote, "wrong person."

Two of our witnesses today tried to disclose waste or wrongdoing only to be told that their whistleblowing was not protected under FBI rules.

Mr. Kiper went to the assistant director of the Training Division. That was the most senior person in his office at Quantico and actually ranked higher at the FBI than the special agent in charge. But that official is not listed in the FBI whistleblower regulation.

Similarly, Special Agent Mike German tried to blow the whistle to a special agent in charge, as required under the rules, but the FBI said that it did not count because the initial contact went through the assistant special agent in charge.

So the FBI's so-called whistleblower protections did not protect these whistleblowers simply because of a technicality. That is my first point.

Now, the second point, both the GAO and the Justice Department reports confirmed that the Department subjects FBI whistleblowers to delay after delay in these cases. For instance, it took the Department more than 10 years to finally uphold Jane Turner's retaliation claim after she was fired for reporting that FBI agents took souvenirs from the Ground Zero after 9/11.

It took more than 9 years to resolve another case, that of Robert Kobus. His claim of retaliation for reporting time and attendance fraud, just in time for him to plan his retirement.

As we know, however, justice delayed is justice denied. And even after finally winning vindication was anyone ever held accountable for the retaliation against these whistleblowers. I am not aware of any accountability.

If no one pays a price, then it will happen again.

In addition to the findings of these two reports, the FBI appears to be engaged in a pattern of stonewalling the Inspector General, including two investigations of FBI whistleblower complaints.

On February 3, the Inspector General reported to Congress that the FBI failed to comply with its legal obligation to provide timely access to all records requested. The FBI said that it needed to review the records before it decided whether to provide access to the IG.

Now, it took 4 months from the initial request for the FBI to cough up the documents. That is not how the law is supposed to work. It should not take months of negotiation and it should not taking notice to Congress for the Inspector General to get access to documents in FBI whistleblower cases.

That does not instill then much confidence in the Department's willingness or its ability to protect whistleblowers. The FBI needs to commit to cooperate with the independent oversight of its treatment of whistleblowers.

Now, I conclude with this. I am pleased that the Department has made recommendations in its 2014 report to improve FBI whistleblower protections. Those recommendations are a start, but they do not go far enough.

Last week's report from the Government Accountability Office made that very clear. If every other law enforcement and intelligence agency can protect disclosure of waste, fraud or abuse to a direct supervisor, then why cannot the FBI? Whistleblowers should not have to fear retaliation for speaking up and they should not have to wait a decade for relief, and they should not have to apply to Congress to see justice done.

I will proceed with the introduction of the first panel and then if Senator Leahy comes, I am going to interrupt and let him make his statement.

Steve Kohn has represented FBI whistleblowers for decades, including Dr. Frederick Whitehurst, a former supervisor special agent, who began blowing the whistle on the FBI crime lab way back in 1989. Mr. Kohn also represents former Special Agent Jane Turner, Supervisory Special Agent Bassem Youssef, and non-agent, FBI employee Robert Kobus. Each of these cases dragged on for years.

Richard Kiper currently works in the Miami field office, but previously worked in the training division, formerly known as the Academy in Quantico. He reported mismanagement to the highest ranking official in the training division.

His reports included allegations that the FBI misled OMB, Office of Management and Budget. However, the FBI regulations did not protect his disclosure because the training division is technically not a field office.

Following his disclosure, Mr. Kiper was demoted from a GS–15 position to a GS–13 through the loss of effectiveness order. Then Mr. German is a fellow with the Brennan Center for Justice at New York University School of Law and a former FBI special agent.

Mr. German spent 16 years as an undercover agent at the Bureau, risking his life to infiltrate White supremacists and neo-Nazi hate groups across the United States. Some of these groups had ties to foreign terrorist groups.

When he reported that a portion of a meeting between two such groups had been illegally recorded by mistake, he was removed from investigation, targeted for retaliation. So much for putting his life in danger.

Now, unless some lawyer tells me otherwise, you just stay seated, but I am going to ask you to swear.

[Witnesses are sworn in.]

Chairman GRASSLEY. Each of them nodded their heads.

I think my staff probably—did we tell them 5 minutes for testimony? So will you kind of stay to that 5 minutes. I do not care if it is 5 minutes and 30 seconds or even 6 minutes, but after 6 minutes, it kind of drags on.

Mr. German, would you start, please?

STATEMENT OF MICHAEL GERMAN, FELLOW, LIBERTY AND NATIONAL SECURITY PROGRAM, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, FORMER SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION, NEW YORK, NEW YORK

Mr. GERMAN. Thank you, Chairman Grassley, for inviting me to testify about improving protections for FBI whistleblowers. FBI and Justice Department officials pay lip service to protecting whistleblowers, but the byzantine procedures they employ all but ensure that FBI employees reporting misconduct will not be protected from retaliation.

New reports by the Justice Department and the Government Accountability Office make clear that the current system is not working, 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.

At his nomination hearing, FBI Director James Comey called whistleblowers critical to a functioning democracy. He argued that, quote, "Folks have to feel free to raise their concerns and if they are not addressed up their chain of command, to take them to the appropriate place," end quote.

This sounds good, but any agents who followed his advice would not be protected under the Justice Department regulation governing FBI whistleblowers.

These regulations require FBI employees to bypass the chain of command and report misconduct only to a handful of high level officials in order to receive protection.

In the field, the lowest ranking official authorized to receive protected disclosures is the special agent in charge.

I cannot 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 did not have more than 10 personal audiences with an SAC, none of which occurred at my request.

If I had 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 to ask me 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 really are.

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 that 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 pretend it did not 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 assistant special agent in charge to 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 my through my ASAC, I forfeited my right to be protected from the reprisals I faced for sending that email.

My experience is not 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.

The Justice Department argues that it does not need to amend its regulations to protect whistleblower reporting to direct supervisors because it has no evidence that FBI employees are inhibited from such reporting.

But I provided the review group a 2009 Inspector General survey that showed 42 percent of FBI agents said they did not report all the misconduct they saw on the job; 18 percent said they had never reported such wrongdoing. Reasons for not reporting included fear or retaliation 16 percent; a belief that misconduct would not be punished 14 percent; and, a lack of management support for such reporting 13 percent. Tellingly, 85 percent said if they did report wrongdoing, it would be to their direct supervisor.

FBI employees often take great risks to protect our security. We should protect them when they report waste, fraud and abuse that undermines their important missions.

Compelling the Justice Department to protect whistleblower disclosures to supervisors is one of several potential reforms I recommend in my written testimony, which I will be happy to discuss in response to questions.

Thanks again for holding this important hearing.

[The prepared statement of Mr. German appears as a submission for the record.]

Chairman GRASSLEY. Thank you very much.

Senator Leahy said that we will finish the panel, then he can make his opening statement. I will let you ask questions first.

Mr. Kohn?

STEPHEN M. KOHN, EXECUTIVE DIRECTOR, NATIONAL WHISTLEBLOWERS CENTER, WASHINGTON, DC

Mr. KOHN. Thank you, Senator Grassley, Senator Leahy, for holding this hearing.

The Department of Justice's program for protecting FBI whistleblowers is broken, in large part due to the devastating impact caused by prolonged delays in deciding cases.

I want to focus my remarks on three heroic Americans who faced severe retaliation simply for reporting serious misconduct. Robert Kobus worked at the FBI New York field office for 34 years as an FBI operations manager. His commitment to law enforcement is both professional and profoundly personal.

His sister was murdered by al Qaeda on September 11, 2001. Mr. Kobus reported budget and time card fraud. It was a simple case, fully documented, but the retaliation was swift, stripped of his duties and literally isolated in a vacant floor among 130 empty desks, and we have the pictures.

The Inspector General's investigation found retaliation, ordered corrective action. Instead of fixing the problem, it went on for 9 years, his case. The FBI spent untold taxpayers' money frivolously fighting Mr. Kobus.

In the end, Kobus won, but ask him about his victory and the 9-year process he lived through. The FBI's uncontrolled bullying tactics which went on continuously while the DOJ reviewed his very simple case ruined a very promising career.

Jane Turner's case is even worse. She was one of the first female agents in the FBI and had a stellar career. After disclosing to the Inspector General that property of victims of 9/11 attacks at the crime scene had been taken illegally by agents, she was swiftly retaliated against, subject to brutal retaliation, in the FBI's words, because she embarrassed the Bureau.

Eventually she was—she filed her claim, but while her claim was pending, with no relief, they gave her a notice of proposed removal and she was forced to resign.

After she passed mandatory retirement age, the Department of Justice procedures finally ruled, 11 years later, and found the notice of proposed removal improper. But what did that do for her? She already passed mandatory retirement age. Her career was already ruined.

Finally, there is Supervisory Special Agent Bassem Youssef. Before blowing the whistle, he received the highly prestigious DCI award from the director of Central Intelligence for his spectacular contributions against terrorism.

He also served as the FBI's first legal attache in Riyadh, Saudi Arabia and in the 1990s he successfully infiltrated the organization we now know as al Qaeda and developed a direct source with contacts with the blind sheik and Osama bin Laden.

His efforts actually prevented real terrorist attacks. He blew the whistle and his case has been pending for 9 years, no end in sight.

The OPR, they investigated it and within about 6 months found retaliation and ordered him back to work in counterterrorism operations, using his language and his skills. But for 9 years the case is pending.

And Mr. Youssef, regardless of the outcome of that case, will never win because he retired in September 2014, about 1 year to mandatory date. So he will never be assigned to counterterrorism again, and the United States lost his services forever and that is

a major loss for all Americans and a major loss in our counterterrorism efforts.

The prolonged delays in processing the whistleblower claims sends a clear message to all FBI agents: Do not blow the whistle; if you do, the messenger is shot. The law needs to be fixed and it is up to Congress to do that job.

Thank you.

[The prepared statement of Mr. Kohn appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Kohn.

Mr. Kiper?

STATEMENT OF J. RICHARD KIPER, Ph.D., SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION, MIAMI, FLORIDA

Mr. KIPER. Thank you, Chairman Grassley, Senator Leahy and other Members of the Committee, for holding this important hearing on whistleblower retaliation at the FBI.

As a victim of unjustified adverse actions, I am grateful for the opportunity to share my experience with you. Like thousands of other FBI employees, I work hard at my job every day. I have been rewarded for my efforts over the past 15 years not only in terms of statistical accomplishments, but I have also been honored with several incentive and recognition awards, including outstanding law enforcement of the year in the southern district of Florida.

I take seriously my responsibility to keep the American people safe, but I also recognize the importance of effectively managing the resources they have entrusted to me. Whether it is helping to define the requirements for the FBI's new case management system or creating a data base to manage human sources in Miami, I have always raised my hand when I believed FBI processes and products needed to be improved.

However, I never imagined that my desire to promote excellence would be used against me. In 2011, I accepted a position as chief of the investigative training unit at the FBI Academy. This was a position for which I was especially well suited due to my investigative experience in the FBI as well as my four degrees in education.

At the FBI Academy, I continued to push for ethical and efficient solutions to problems and I brought problems to the attention of the highest ranking leaders at the FBI Academy.

Specifically, I brought to light the following issues: the training division's intentional misleading of the Office of Management and Budget regarding the training of new agents and new analysts; training division's wasteful decision to install SCION, the FBI's top secret computer system, in the intelligence and investigative training center building; and, training division's mismanagement of the October 2011 realignment as it lacked any business process definition or sound instructional design principles.

When I raised these issues with the training division leadership, I did not retain an attorney or study the whistleblower statute to ensure I was making a disclosure of wrongdoing to a, quote-unquote, "appropriate recipient." I was just trying to do the right thing, like I have always done.

I have made these disclosures to the highest ranking officials at my work site, hoping these executives would, at least, consider

making positive changes. Instead, I was removed and demoted two GS levels.

The tool used to retaliate against me was the FBI's loss of effectiveness, or LOE, process. From April 22 to May 3, 2013, an FBI inspection team traveled to the FBI Academy to conduct an inspection. On the last day of inspection, training division executives told me I was being removed from my position as a result of an LOE finding.

The news was shocking to me, as I had earned outstanding evaluations from my supervisors, enjoyed nearly perfect climate survey results from my employees, and received four awards during my tenure at the training division.

At the time I was told of my removal, the training division executives refused to tell me why I had received the LOE finding or why they had agreed with it. Five weeks after I was told of my removal, they finally provided to me the written justification for my LOE finding.

Although the inspectors found absolutely nothing wrong with my unit, they documented several accusations against me that were demonstrably false.

As Senator Grassley effectively articulated in a letter to Director Comey on September 26, 2014, the justification for my removal was, quote, "contradicted by the FBI's own documents," unquote.

It is worth noting that if I had been accused of actual wrongdoing, say, driving under the influence, vandalism or soliciting prostitutes, I would have been given a chance to challenge the investigation and appeal the adverse action.

However, with the FBI's LOE process, the accused have no avenue to appeal the findings, no chance to prevent the outcome, no recourse whatsoever.

In light of the irregular inspection activities and false statements used to justify my LOE finding, the only explanation for my removal and demotion is that of retaliation for having made the disclosures I mentioned earlier.

While no one in the FBI has disputed the fact that my LOE was based on false information, what they are contesting is that my whistleblower disclosures were not protected because they were not made to a, quote-unquote, "qualifying individual" listed in 28 CFR 27.1(a).

While conceding that my disclosures were made to the highest ranking official at the FBI Academy, the FBI insists the disclosures were not made to the, quote, "highest ranking official in any FBI office," unquote, as the statute requires.

According to this logic, the adverse actions taken against me could not have been taken in retaliation for my disclosures because my disclosures were not protected under the statute.

I have no doubt that my removal and demotion was retaliation for having made whistleblower disclosures. I made these disclosures in good faith and I made them to the highest ranking officials at the FBI Academy, who outrank the highest ranking official in any FBI field office.

Thank you for considering the expansion of the FBI whistleblower protections so that the FBI is held accountable for its ac-

tions and held to the standard of its motto—fidelity, bravery and integrity.

Thank you again for holding this hearing and I would be happy to answer any questions you may have.

[The prepared statement of Mr. Kiper appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Kiper.

Now, Senator Leahy both for his opening statement and you can ask questions first.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. I want to thank you for holding this hearing. You have had a long and well documented interest in whistleblowers and I have been happy and proud to work together with you on a lot of these issues.

We have a very large Government and, for the most part, it works very well. But when it does not, those of us who have to make decisions on budget and everything else may not know about it and we have to rely a lot of times on those who are in the Government to know what is going on.

A lot of times, they are whistleblowers and I their role is essential in providing accountability. I do not care if it is a Democratic or Republican administration, we want that kind of accountability, one of the same reasons why I push for an updated FOIA, Freedom of Information Act.

But it is also if you have an employee who knows about wrongdoing, I think that they have to have real avenues where they can come forward and tell about it and not be punished for actually letting taxpayers and everybody else know what is going wrong. But they have to be protected from retaliation.

Now, Mr. German and I have talked before on this and I know the retaliation that he has gone through. I know it all too well. Frankly, I do not know how you even keep your sanity from what you went through. You had a distinguished career at the FBI, but—it was 10 years ago, more than a decade ago, you were forced to end that.

Mr. Chairman, he chose to do this after making, as he said in his testimony, a whistleblower disclosure at the FBI that went nowhere. Instead of the Bureau acting on the problems he pointed out, the same kind of insularity and mismanagement identified by the 9/11 Commission as a major failing, he was marginalized and mistreated.

You think they would have learned. We know, after the fact, at least, we could have prevented 9/11 if people had corrected some of these failings.

Look at the effective counterterrorism work you did to get criminal convictions against terrorists. That is just brushed aside and you would think that the FBI would be applauding that.

We have had two recent Government reports, one by the Department of Justice, another by the Government Accountability Office that highlight the obstacles that remain for FBI employees.

Our country, our Government has got to do better.

Let me ask you this, Mr. German. Do you believe it is necessary for the FBI to have a separate whistleblower regime simply because the Bureau handles national security and intelligence information?

Mr. GERMAN. I do not think it is necessary that they have a separate one and to the extent they can make an argument that they do, there are only a few FBI employees who would ever need to be part of the process. The vast majority of FBI employees do not have regular access or work in national security issues. They work on regular law enforcement issues, and those could easily be put into the Office of Special Counsel and MSPB system without risking any security issues, just like many other Federal law enforcement agencies are and just like many Department of Homeland Security employees are.

Senator LEAHY. The reason I ask that, I look at what happened 9/11 and hindsight is always 20/20, but you look at the mistakes made where people were not listened to, where dots were not connected.

I recall going down to the FBI a day or so after 9/11 and they were working very hard getting—somebody would call in with some information from some part of the country and somebody would write it down and hand it to somebody else who would rewrite it, hand it to somebody else who would put it in a pile.

I am looking at this and sort of had visions of Dickens' time and they were going to fly some photographs out, getting airplanes to fly some photographs. I said why do you not just email them. We do not have that facility. I said, well, my 12-year-old neighbor can do it for you, if you want. But I did know that a number—the FBI had been urged to update this.

If you have—and I realize this sounds like I am answering my own question—but if you have strong whistleblower protection, do you believe that would also give us better national security, not less national security?

Mr. GERMAN. Absolutely. I think it would improve security in a number of different ways. Number one, you would correct problems very quickly that were identified, but number two, it would give FBI employees and other intelligence employees less incentive to go around the system and leak to the press.

And if we can correct these problems internally, there would be less need to go outside the system.

Senator LEAHY. The Department of Justice has recommended expanding the number of persons who whom a protected disclosure could be made. Would that limited expansion be enough to protect whistleblowers?

Mr. GERMAN. I do not believe so. As the Inspector General survey suggested, 85 percent of FBI employees said they would report to their direct supervisor. There is no reason why that should not be protected when the vast majority of complaints are going to be made through that system, and it seems that it is only to create a trap that disqualifies a large number from protection.

Senator LEAHY. Mr. Kohn, I was thinking, late last night I was reading your testimony and maybe this is my Irish-Italian background, but I could feel my temper growing. You talked about the

three FBI whistleblowers that faced these lengthy delays seeking resource after being retaliated against.

What is the most important reform that we could have to ensure greater efficiency in processing claims of retaliation? If you could do one single thing, what would it be?

Mr. KOHN. The one thing is you need the carrot and the stick. The carrot would be the requirements, but the stick is real consequences if they do not adhere to strict time limits. And the proper kickout in that would be, in my view, to permit the FBI employee to go to Federal court for a de novo hearing if reasonable time limits were not adhered to.

If the FBI and the Justice Department knew that the employee could go to Federal court, mark my word, they would honor those time limits.

Senator LEAHY. You do not believe that the right to judicial review would jeopardize national security.

Mr. KOHN. Not at all, because in Title VII cases, FBI agents can go to Federal court right now and many of the exact same issues—a whistleblower case is almost always a human resources and personnel case. They are debating whether there were legitimate reasons for an adverse action.

The details of the national security issues or the confidential issues almost never have to go in front of a court and if they did, the Federal courts have very good procedures for guarding secrets and holding people extremely accountable if they were to violate it.

Senator LEAHY. For both Mr. German and Mr. Kiper, would you both agree with that?

Mr. GERMAN. Yes, I would agree.

Mr. KIPER. I would, too.

Senator LEAHY. Thank you.

Mr. Chairman, thank you very much. I am glad you are having this hearing. I know when we talk with Mr. Comey later on, we will be raising some of these same questions.

Chairman GRASSLEY. I want to thank you for your cooperation on this hearing, as well. Thank you.

I did not ask questions, so I am going to ask my first round of questions. Then I will go to the Senator from Minnesota and then the Senator from North Carolina.

Mr. German, Senator Leahy covered the first question I had for you. So I will follow up with the Inspector General eventually found that several FBI agents and officials retaliated against you. What happened to them?

Mr. GERMAN. There was a March 27, 2007 hearing where Director Mueller suggested there was some action taken against one individual, a unit chief at the undercover unit, but the Tampa officials that were directly involved with mishandling the counterterrorism investigation, falsifying documents to cover it up, and retaliating against me, I am not aware that they received any punishment.

And, in fact, the direct supervisor and the ASAC both later became special agents in charge at the FBI.

Chairman GRASSLEY. Then I wanted to ask you if you hear from FBI employees who are considering blowing a whistle on internal misconduct and if you do, what do you tell them?

Mr. GERMAN. I regularly hear from FBI employees who are thinking of reporting some problem that they have seen, because I am in the media somewhat as an FBI whistleblower and looking for advice. And typically the first question I ask them is whether they are willing to lose their job over this issue and often they are surprised. Many of them I never hear from again. But I feel that the chances are they are going to lose their job if they press forward. So they need to go forward knowing that the protections are not there for them.

Chairman GRASSLEY. Mr. Kiper, on 26 September last year, I wrote Director Comey concerning you. Six months later, after you were listed as a witness at this hearing, I finally received a reply and I want to put copies of these in the record. Without objection.

[The information referred to appears as a submission for the record.]

Chairman GRASSLEY. The FBI's response does not address the truthfulness of the allegations that were used to demote you, even though my September letter provided three exhibits that appeared to disprove those allegations against you.

So my question to you. Why did the FBI claim that none of your disclosures entitled you to protection from retaliation and why do you disagree? Then I will have another question for you.

Mr. KIPER. Thank you for the question, Senator. As I alluded to in my opening statements, the FBI's position is not that the disclosures I made were not disclosures in content. They are saying that I did not make them to the correct personnel according to the statute and that is the highest ranking official in any FBI field office.

There are many reasons I disagree with that, but I would like to go to the Federal Register, if I may, which describes comments and the reasons why the phrase, "highest ranking official in any FBI office," was constructed and that is, to give employees a broader access to local leaders without specifying the precise job title of those leaders.

And here is a quote from the Register: "The highest ranking official in each FBI field office is generally a special agent in charge, or SAC. These senior officials are generally in a position to take action against and to correct management and other problems within their respective field offices. In addition, designating the heads of field offices as recipients of protected disclosures permits employees in the field to have an opportunity to make disclosures to officials with whom they may be more familiar and without the necessity of contacting officials at FBI headquarters."

They go on to say, that is, the Federal Register comments emphasize the need for a whistleblower to have access to an onsite contact for making disclosures, and this is another quote: "Designating the highest ranking official in each field office, but not all supervisors, as recipients of protected disclosures provides a way to channel such disclosures to those in the field who are in a position to respond and to correct management and other problems while also providing an onsite contact in the field for making protected disclosures."

So the reason why I believe they are wrong, from the Federal Register, is that the highest ranking official serving as the onsite

contact at the FBI Academy is the assistant director or his designee.

Chairman GRASSLEY. My last question to you is you have had a chance to review the FBI's March 2 letter that describes its new policies on loss of effectiveness orders. Do these new policies sufficiently protect whistleblowers and if not, would you tell me why not?

Mr. KIPER. No, Senator. I do not believe they adequately protect FBI whistleblowers for three reasons. I am not sure if I am going to have time to get to all of them.

But very quickly, in Section 9.2 of this policy, it states that, "This policy applies only to management directed reassignments, which, because of the circumstances under which they are initiated, are designated as LOE transfers, that is, transfers not so designated are not within the scope of this directive, even if they are otherwise management directed."

And to me, that says, they are giving themselves a blank check again and all they need to do is—if they want to take retaliation against a whistleblower, all they have to do is not designate it as an LOE transfer and then none of this policy applies. That is the first problem that I see with it.

Chairman GRASSLEY. If you have that written down, why do we not just put that in the record? And then I will go to Senator Franken. You have some reasons written down, right?

Mr. KIPER. Yes, Senator, and some other papers. But last night when I received this, my notes are kind of sketchy. But I can—I can get that to you.

Chairman GRASSLEY. Senator Franken. And then I have got questions of Mr. Kohn, but I am going to respect yours and Senator Tillis'.

Senator FRANKEN. Why do you not use some of my time, because actually you asked the main question I had for Mr. German, which was if anything had happened to the people that retaliated against him. So go ahead, use my time. You are the Chairman, but I grant you it.

[Laughter.]

Chairman GRASSLEY. I am very appreciative.

Mr. Kohn, what have been the costs of these prolonged cases that you talked about being so costly and taking so long, both financially and non-financial, and will the Department's recommendations result in fewer delays by FBI whistleblowers?

Mr. KOHN. Well, first, the Department's recommendations will not. They are not mandatory and there is no sanction if these cases are endlessly delayed.

In terms of the costs, first is monetary. We know it has cost millions of dollars. We know they have paid hundreds of thousands of dollars, well over $1 million in attorney's fees to the whistleblower lawyers. It is a complete waste of taxpayer money.

So those litigation costs, but the real costs are the loss of the agents, like Jane Turner, who was a spectacular agent, they lost her. Mr. Kobus, who was a brilliant manager, they lost him. And Bassem Youssef, whose work in counterterrorism was second to none, who was the highest ranking Arabic-speaking agent in the Bureau, but after he was retaliated against and for about 12 years,

was not permitted to use his Arabic language, despite being the highest ranking official fluent in that skill and a skill we needed.

The retaliation at the FBI reflects a culture and that culture needs to be reformed both legally through actions of Congress and I would hope through the leadership of the FBI being pushed to do the right thing.

Chairman GRASSLEY. You have represented a lot of whistleblowers in different agencies. So I want to know those other agencies handling of whistleblowers compares to the FBI.

Mr. KOHN. The delays are far longer in the FBI process than any other Federal employee process. The Office of Special Counsel is under certain requirements to conduct investigations and complete them in a limited time period and if it goes to the MSPB, those judges are under specific performance indicators and they follow them.

So it is not like we need a law for the other Federal workers because those judges follow their requirements. That is completely unlike the FBI.

And there is another point there, the mandatory retirement age of 57. When we say these cases go on for 10 years, 12 years, like in Jane Turner's case, she passed mandatory retirement.

So the traditional order of a reinstatement is meaningless. So if the traditional relief given to whistleblowers, reinstatement, cannot be given in an FBI whistleblower case, essentially you lose the case by delay.

Chairman GRASSLEY. Thank you.

Senator Franken, you have got 30 seconds of your 5 minutes.

Senator FRANKEN. Mr. German, as an outside observer of the DOJ and GAO investigations and the reports issued, how would you characterize the Department's and the Bureau's response to the reports' recommendations? Do you find their response genuine?

Mr. GERMAN. I think this has been a longstanding problem at the FBI and the Justice Department, a problem that they could have solved very easily by simply prohibiting their managers from retaliating against whistleblowers.

So this is not an issue of good faith. They have shown they do not have good faith in these cases. I think it is time for a legislative action to compel them to do what they should have done from the beginning.

Senator FRANKEN. Well, I see I am out of time. Thank you, Mr. Chairman.

Chairman GRASSLEY. Senator Tillis, and then we will go to Senator Blumenthal.

Senator TILLIS. Thank you, Mr. Chairman.

Gentlemen, thank you for being here and thank you for your service, and I regret that you have had to go through what you have gone through.

One question I have, and I honestly do not know, how many people are employed by the FBI?

Mr. KOHN. I think it is 35,000.

Senator TILLIS. Thirty-five thousand? So we have an organization with some 30,000 people and nine people with whom we can report issues like you have discussed. I understand that we have access to sensitive information, but that seems like a ridiculous ratio.

Given our role on oversight, and this could be for any of the three of you, what kinds of additional steps, what specifically do you think, either in an oversight role that we perform of what specific elements of legislation do you have in mind that could address some of these problems?

Mr. GERMAN. I think that there are two problems, one on the investigation side and one on the adjudication side. And I think with the investigation side, part of the problem is there is some ambiguity between who is responsible for doing the investigation.

In my case, I reported to the Inspector General, but then the FBI's office of professional responsibility started the investigation. After not hearing from them for weeks, I found out the FBI inspection division had actually taken over the investigation and then ultimately, after I came to Congress, the Inspector General finally did an investigation.

But by that point, by the time the investigation was over, 4 years had passed. So some clarity of who is responsible and, as Mr. Kohn has suggested, time limits in those investigations.

On the adjudication side, requiring, if there is an internal process, that they use Administrative Procedures Act standards and administrative law judges. That is the way that both litigants can have an equal opportunity in the investigation and ultimately an opportunity to get judicial review in Federal court.

Mr. KIPER. Thank you, Senator, for the question. If I could just add to that a little bit.

One of the problems that I see in the list that is provided in the statute right now is that none of the individuals or offices listed are directly responsible for taking adverse action against employees.

And so, for example, the inspection division's office of inspections are the ones that actually write loss of effectiveness communications and establish that, but they are not on the list.

Also, human resources division are the ones that look at those LOE findings and they are the ones that make the decisions to actually remove and demote people. They are not, also, on the list.

And so when you try to make the connection between those that knew about the whistleblower disclosure and those that take adverse action, that is very, very difficult.

Mr. KOHN. Senator, legislatively, three fixes are absolutely essential. One, you must protect reports to supervisors. Every other whistleblower law does it and it is fundamental given how most employees report concerns.

Two, strict enforceable time limits. We know left to their own devices, these cases have gone on for years and years.

Third is judicial review. You need someone of independent authority looking over the process. That is on the legislative side. But just as important is culture. The FBI has a culture that is very hostile to whistleblowers. And what you need is a change from the top, from the director on down. And I represent employees. Of the three that one their cases, I represent two, but what was missing in both of those cases was any recognition from the top down that anything wrong happened; not just sanctioning the wrongdoer, but saying anything positive about whistleblowing, saying this was wrong.

It is one thing getting an order of enforcement from the Justice Department that is not circulated throughout the FBI and it is another thing to have the top leadership say it was wrong. Whistleblowing is right. We have to change the culture. I would call for, administratively, an independent, top-down review of how the FBI reacted to these cases and what steps the FBI took to eliminate the chilling effect.

Senator TILLIS. In my remaining few seconds. The question I have really is if we take action, how do we make sure that we strike a balance so that we are able to be able to do the right thing in the case where you all did the right thing, but maybe get into a scenario where you will have a disgruntled employee or someone else who is using this, I think, for improper purposes.

Have you got an idea of how you kind of strike that balance?

Mr. KOHN. I would like to address that because it comes up a lot in whistleblower cases. But I will say this, and I have represented whistleblowers for 30 years and also other employees.

No one wants to be declared a whistleblower. If you are a bad employee and you are looking for some type of employment thing to keep your job, FBI employees can use EEO, they can use other processes. They can even go to Federal court on an EEO.

No one wants to be branded a whistleblower. So that is not what employees utilize. They do not utilize whistleblower procedures in that manner on the whole.

Senator TILLIS. Thank you, Mr. Chair.

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. And thank you for holding this very important hearing.

I want to focus on the specifics that can change the culture, because at the end of the day, as you have just articulated very well, the culture at the top is important. Changing regulations maybe critical, as well. But how does an agency like the FBI, the Nation's premier law enforcement agency, change culture so that there is respect for the law and folks who complain that internally the law may have been neglected or disregarded?

Is it training? Is it workshops? Is it sessions where the FBI director participates and talks about this issue, as Director Comey did in this very room in response to questions that I asked and others?

As you cited, Mr. German, in your testimony, the talk is fine, but what do we do to change the culture?

Mr. GERMAN. Thank you. I believe that holding the managers responsible is a key part. I mean, it is somewhat ironic to suggest that the FBI, the Nation's premier law enforcement agency, does not have a culture of upholding the law internally. That is problematic and I think that does come from leadership, but it also is part of everything the agency is supposed to be doing.

So I think the problem is larger than just one of culture. If people are held responsible to the law, there will be——

Senator BLUMENTHAL. And how is that going to be done? For example, you have recounted the experience with the Tampa SAC.

Mr. GERMAN. Right.

Senator BLUMENTHAL. Nobody wants to hear bad news.

Mr. GERMAN. Right.

Senator BLUMENTHAL. He might not have wished to hear bad news, no matter how good an agent he was, bad news about his people. And by the way, I have the utmost of respect for the FBI, having worked with them as a U.S. Attorney and afterward as Attorney General of my State.

The exceptions are indeed rare exceptions, but they are very, very important. So how specifically do we hold accountable the managers and make sure that they have respect for whistleblowing?

Mr. GERMAN. So one of the recommendations I have long had that the Inspector General put in place was an ombudsman, because part of the problem is when there is not an appropriate reaction, the whistleblower has nowhere to go except to make another whistleblower complaint. So now it is two complaints. And then when there is another type of retaliation, there is a third complaint and it starts to look like the employee is the problem rather than the failure of management to respond to the complaint appropriately.

But I think having strong regulations set in statute that requires the FBI to respond appropriately or pay a price is what will change the culture.

Mr. KOHN. And I would just like to add, and I agree with everything Mr. German has said, but I was at a panel and a leading corporate lawyer, and this is in the corporate context, and he said on this panel "whistleblowers are assets." And that is the beginning of the change of the culture to recognize that when an employee has the courage and the intelligence to risk something by reporting obvious wrongdoing, that is to be celebrated. That person is an asset.

I think one place to start is by asking the director of the FBI what did you do to celebrate Jane Turner's whistleblowing. We now know she reported large-scale theft at 9/11. The FBI changed its policies on taking, quote-unquote, "souvenirs" from the crime scenes. She was retaliated against, fully adjudicated. What did you do to celebrate her contributions to this country and the fact that she did put her entire career on the line, what did you do?

Senator BLUMENTHAL. What you are suggesting, in effect, is at the kind of awards ceremony that the Attorney General of the United States has, put aside director of the FBI, there should be recognition of whistleblowers in the same way we do the enormously courageous and valuable efforts of FBI agents who risk their lives.

Whistleblowers risk their reputations and careers and sometimes even put their lives in jeopardy when they report wrongdoing within the Government and perhaps celebrate it the same way.

Mr. KOHN. And I will say just that I think that would have a major impact on the culture, but I will also tell you it would have a tremendous healing effect on the whistleblowers who really go scarred for the rest of their life, never having that. I think it is what is deserved.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

Chairman GRASSLEY. Senator Whitehouse. And I want to thank Members that participate. Usually, whistleblower hearings do not get this kind of participation. Thank you very much.

Senator WHITEHOUSE. Well, thank you, Chairman. I share with Senator Blumenthal the experience of having been a United States Attorney and having worked with the FBI and having developed a very high regard for our Federal Bureau of Investigation.

But even more specifically, Mr. Chairman, I served as United States Attorney in Rhode Island at a time when Special Agent Michael German was serving in the FBI office in Rhode Island. And so I have had the personal experience of his work. He did very, very impressive work as an FBI agent, including some rather dangerous undercover agents that I do not think we can discuss any further here, but it was very impressive. So I am delighted to welcome Michael to this hearing and express my pride in the service that he gave to his country as a special agent of the FBI.

This may have been gone over before, but back when the whistleblower protections were set up under the Civil Service Reform Act, the FBI was exempted. There were various, I do not know, law enforcement reasons or whatever for doing that. They were subject to DOJ regulation instead.

Is it time to revisit that and just put everybody under the same Civil Service Act?

Mr. GERMAN. I believe so. I believe the national security questions would come up in a rare few cases and the system is developed well enough to protect the information that needs to be protected.

And, also, I think it is important to keep in mind that the agents want it protected. The employees of the FBI protect this information every day. So the idea that they would go into a process and willy nilly leak important national security information I think is specious.

Senator WHITEHOUSE. And how much should we rely on the recent GAO and DOJ reports' recommendations? Do they form a good foundation? Are they a complete prescription for the solution to this problem? Do they go in the wrong direction? How would you steer us with respect to those two reports?

Mr. GERMAN. There are certainly several important improvements that could be made to the existing system, but I think much more needs to be done and I think it needs to be done through statute.

With the Justice Department recommendations, there are a few that raise my concerns. Providing OARM with the authority to sanction litigants. There are already systems for disciplining people. This is an adjudicatory process and office that does not have the appropriate independence or transparency to give that kind of authority to. And in the worst case scenario, they could actually be contributing to the retaliation against the whistleblower through that type of a process.

I also have concerns about the Justice Department recommendation for mediated dispute resolution. While that always sounds positive, if the underlying regulation is not changed to give FBI whistleblowers a real shot, that mediation could just be another trap where the agent or FBI employee is not holding any cards to compel the FBI management to stop the retaliation.

Senator WHITEHOUSE. Are there any lessons that we should learn from the qui tam type actions that can be brought for disclosure of fraud by individuals in this context?

Mr. KOHN. On that, as I think the Senate Judiciary Committee, a number of years ago, voted out the False Claims Corrections Act and it had a part that never became law which would have applied explicitly the False Claims Act to Federal employees and set up a procedure that was extremely reasonable requiring the employee to go internally, requiring the employee to work with the Inspector General, setting time limits for the Government to fix itself, but then opening up those qui tam laws if the internal governmental process did not work.

And what we know about the False Claims Act and its qui tam procedures——

Senator WHITEHOUSE. Qui tam is a fallback to it.

Mr. KOHN. Correct. It would be—it would be—again, it would be the—it would force the Government to do the right thing and hold them accountable under the qui tam provisions if they do not.

Senator WHITEHOUSE. If I could ask one last question. I can remember an employment lawyer talking to me once and saying that if they had a Government employee client who was in trouble at work, their first piece of advice to them would be to find some whistle to blow and now you are a whistleblower instead of a problem employee.

That I do not think is a frequent problem, but it is one that we have to make sure we can separate out from the legitimate whistleblower.

Do you have any advice on that?

Mr. KOHN. First off, employees do not become whistleblowers to seek sanctions for bad performance, for one reason: There are a lot of other laws that are even more powerful. The Title VII is far more powerful than the current Whistleblower Protection Act. So why would someone want——

Senator WHITEHOUSE. So the lawyer who told me that was giving their clients bad advice.

Mr. KOHN. Yes. They should go to Title VII. But more important is, no one wants the stigma of being a whistleblower. That will last a long time and it will have detrimental consequences for years to come. It is something that people do not court.

In fact, most of my clients over the last——

Senator WHITEHOUSE. If we do this right, however, we will be lifting that stigma, if your recommendation will be celebrating it.

Mr. KOHN. I certainly hope so.

Senator WHITEHOUSE. Thank you, Chairman.

Chairman GRASSLEY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you. Thank you so much for your work in this area, Senator Grassley. And thank you to the witnesses. I had another hearing and I just came here at the tail end.

Mr. German, you discussed some of the complicating factors that may impact how whistleblowers engage with mediators. Why do you think that whistleblowers would face these dynamics?

Mr. GERMAN. I think part of it is because they do not have a lot of power in this situation. So their alternative, if they cannot work

out a deal in mediation, is to go into a broken system. So they would have to accept something less than what they might deserve.

I think the other part of the problem, as Special Agent Kiper has described, the FBI has many different levers that it can pull to act in a retaliatory manner, whether it is your regular performance reviews, there are regular inspections of FBI field offices, there are 5-year background investigations.

So even if you worked out a deal in mediation, when that 5-year background investigation comes up and they find something and hold you responsible for something they would not have otherwise held others responsible for, how do you then say, well, that is another form of retaliation.

With my case, I was being—there were people retaliating against me who had absolutely nothing to do with the original claim. These were people who were just piling on because they had heard I was a whistleblower and could look good to the people who were part of the group that I had reported against.

So the idea that an agreement could be hammered out and the FBI would have any incentive to follow that agreement in the future I think would concern me. Again, if the system is corrected and the agent really does have strong protections, then I would change my mind.

Senator KLOBUCHAR. Mr. Kohn, I understand you are interested in placing some strict time limits on the adjudication process for these kinds of complaints.

Do you think there would ever be situations that would need to fall outside of the strict timelines?

Mr. KOHN. It is hard to imagine that there would be given the types of issues. These are employment issues.

In my recommendation, I do say that if the employee consents to enlargement, then that is excluded from the mandatory time limits. But having done employment cases for 30 years, these types of cases can be handled.

If the resources and the commitment are put to it, they can be handled clearly within a year.

Senator KLOBUCHAR. Mr. Kiper, I know this has come up, but which of the—I know there has been a report and other things. And which things do you think should be the highest priority if there are going to be changes to the process?

Mr. KIPER. Thank you for the question, Senator. I think one of the problems is illustrated in the fact that 3 days ago, on Sunday, was the first time that the FBI has documented any sort of policy regarding loss of effectiveness transfers. That is a problem because they use the management directed reassignments at will and without any recourse and it says in the policy supervisors who are removed via that process do not have access to the performance appraisal system's performance improvement plan or any other resource.

And to add to that, inspection division also does not have a documented policy guide that governs how inspectors are actually conducting themselves at inspection. And so that leaves it up to them whether or not they want to actually fact check what they are documenting in these loss of effectiveness findings that they are writing.

Senator KLOBUCHAR. Thank you very much, all of you. I appreciate it.

Chairman GRASSLEY. We will have—I am done asking questions—up to 1 week for any Members to submit questions for answer in writing. You might get some of those questions. You probably will from me.

I want to suggest one other thing that I am sure you have heard me say, but the word culture of the FBI, and I suppose you could say the culture of a lot of agencies, is just like you said, Mr. Kohn, being a whistleblower, you really put your professional life on the line.

I have suggested to five Presidents individually and it has never been done and I do not imagine it will ever be done, but you have heard me suggest that if you really want to change this culture, if you really want—as every President said, we need whistleblowers. Every Cabinet person comes here and says we need whistleblowers, et cetera, et cetera. The way they act, then you find out they do not respect whistleblowers.

But anyway, I have always suggested that until a President has a rose garden ceremony once a year honoring whistleblowers and send from the top of the administration down to the bottom, that that is the only way to say that the culture needs to be changed if the President says it needs to be changed.

Now, none of them have said that or will do that, but I am chagrined that one President told me, well, if we did that, we would have 3,000 whistleblowers coming out of the woodwork. Well, that is exactly what we want if you want to change things here in this Government.

Thank you all very much for participating.

While the other panel is coming up, I am going to introduce the other panel.

David Maurer is Director of the U.S. Government Accountability Office, Homeland Security and Justice Team, where he currently leads GAO's work reviewing justice and law enforcement issues. And I think everybody at GAO knows, I hope they know that I respect that organization very much and rely upon them a great deal for oversight activity.

Kevin Perkins was appointed Associate Deputy Director of the FBI June 2012. He has oversight over FBI personnel, budget, administration and infrastructure matters. Mr. Perkins has served the FBI since he became a special agent in 1986.

Michael Horowitz is the Inspector General of the Department of Justice. Mr. Horowitz also has previously served on the Sentencing Commission and spent many years in the Justice Department as an Assistant U.S. Attorney, Deputy Assistant Attorney General, Chief of Staff. And just a few months ago, after being sworn in as Inspector General, Mr. Horowitz implemented a whistleblower ombudsman program within OIG to educate Justice Department personnel about whistleblower protections.

Also, what I said about GAO I can say about not only Mr. Horowitz as IG, but many other IGs, but especially you, Mr. Horowitz. We rely upon you a great deal to help us with our oversight work.

Now, would you stay seated, please, but I would like to have you be sworn.

[Witnesses are sworn in.]

Chairman GRASSLEY. Affirmative by all. Thank you.

I am going to start with Mr. Maurer.

STATEMENT OF DAVID C. MAURER, DIRECTOR, HOMELAND SECURITY AND JUSTICE ISSUES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, DC

Mr. MAURER. Thank you, Chairman Grassley, other Members and staff. I am pleased to be here today to discuss the findings from our recent report on DOJ's handling of FBI whistleblower retaliation complaints.

As you know well, Federal whistleblowers are a valuable source of information on Government waste, fraud and abuse. Their disclosures can help improve how well the Federal Government serves the people.

Unfortunately, whistleblowers can also take a risk when they step forward. As we heard earlier, some have been demoted, reassigned or fired because they saw a problem and they reported it.

There are few places where whistleblower protection is more important than the FBI. The FBI has a unique set of responsibilities including protecting the Nation against terrorists, criminal and intelligence threats. Protecting FBI whistleblowers against retaliation helps the Bureau be as effective as possible.

Mr. Chairman, you asked us to look at the DOJ's efforts to protect FBI whistleblowers. And during our review, the Department of Justice and the FBI repeatedly stated their commitment to whistleblower protection and began working to improve how they handle allegations of retaliation.

But they clearly need to do more. I would like to briefly mention three key areas of concern from our report. First, FBI employees are less protected against retaliation than other Federal employees. DOJ regulations require FBI employees to report alleged wrongdoing to specific high ranking officials or offices, including the Attorney General, the director of the FBI, or the DOJ Office of Inspector General.

This is unique. Everywhere else in the executive branch, employees can report to anyone in their chain of command, including their immediate supervisor.

At the FBI, if an employee does not make his or her initial disclosure to the right person, they are not protected against retaliation and will not receive corrective action, such as back pay for a retaliatory demotion.

We found that DOJ terminated 23 of the 62 complaints we reviewed, in part, because the employees made the disclosure to the wrong person. By dismissing retaliation complaints in this way, DOJ could permit retaliatory activity to go uninvestigated and create a chilling effect for future whistleblowers.

As we reported, Congress may wish to amend the law to address this problem.

Second, we found inconsistencies in DOJ's whistleblower guidance. In some cases, DOJ and FBI provided accurate information to employees. However, some training and guidance could mistakenly lead FBI employees to believe that reporting wrongdoing to a supervisor would be a protected disclosure.

DOJ should clarify its guidance so FBI employees clearly understand to whom they can report concerns while remaining protected against potential retaliation.

Third, we found that the amount of time DOJ takes varied widely. DOJ resolved most retaliation complaints within a year largely because there-quarters of the time, DOJ dismissed the case after determining it did not meet the Department's regulatory requirements.

DOJ took the longest for those cases where it found the FBI had retaliated against a whistleblower. Out of the 62 cases we reviewed, DOJ found retaliation had occurred three times. These three cases lasted from 8 to over 10.5 years. This lengthy and expensive process could discourage others from even bothering to come forward.

Recently, DOJ has taken a number of steps, such as developing a mediation program and procedures with stricter timeframes. These measures could help resolve complaints more quickly.

We recommended that DOJ track the impact of these changes to determine whether that is actually the case.

We also recommended that DOJ provide whistleblowers an estimate of how long it will take to process their claims; similar to current practice, at the Merit System Protection Board and the DOD Inspector General.

It is also worth pointing out that it has been nearly a year since the Department of Justice issued a report with a number of other potential changes that could enhance whistleblower protection. DOJ has yet to implement many of these changes, and we will keep track of what they do in the coming weeks and months.

In responding to our report, DOJ concurred with all of our recommendations and committed to improving how the Department handles FBI whistleblower complaints. Implementing our recommendations will better position DOJ to fulfill its commitment and protect FBI whistleblowers from retaliation.

We will keep you apprised of the Department's efforts to enhance whistleblower protection and address the findings from our report.

Mr. Chairman, that concludes my opening remarks. Thank you for the opportunity to testify today.

[The prepared statement of Mr. Maurer appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Maurer.

Now, Mr. Perkins? Thank you.

STATEMENT OF KEVIN L. PERKINS, ASSOCIATE DEPUTY DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. PERKINS. Good morning, Chairman. Thank you again for inviting me here to testify, and to Members of the Committee.

I appreciate the opportunity I have to be here today before you to discuss the issue of whistleblower retaliation within the FBI.

The FBI recognizes the important role played by whistleblowers in our law enforcement efforts and takes very seriously our responsibilities with regard to FBI employees who make whistleblower complaints.

As Director Comey has told this Committee, whistleblowers are a critical element of a functioning democracy and employees have

to feel free to raise their concerns and if they are not addressed up through their chain of command, to take them to the appropriate place.

As you know, all FBI whistleblowers are protected by Federal law from retribution. Any FBI employee who believes he or she has suffered a reprisal for making a protected disclosure may report the reprisal to the Inspector General, who is here with me today, to the DOJ Office of Professional Responsibility, to the head of their particular field office, or to other senior FBI officials at FBI headquarters, or the internal investigative section within the FBI's inspection division.

There is an independent administrative process for adjudicating those claims. As you would expect, the FDA does not have responsibility for deciding those claims, as it is important that there be an independent adjudication of any claims of retaliation.

The reports of reprisal are investigated either by the DOJ Inspector General's Office or the DOJ Office of Professional Responsibility, who interview witnesses, collect relevant documents, and make their findings.

The complainant is then notified of their findings and permitted to continue their complaint with the Office of Attorney Recruitment and Management, or OARM, and engage in an administrative litigation that affords qualified complainant discovery, briefings, and a hearing before making a final determination.

In addition, a complainant may ask for a review by the Deputy Attorney General after the OARM process has concluded.

To the extent that there have been concerns raised by the witnesses earlier today regarding this process, we share the desire for the process to be improved and expedited. We have and will continue to work with the Department as they take additional steps that can be taken to make the process better.

Now, in response to the Presidential Policy Directive PPD–19, the Justice Department undertook a comprehensive review of their process for handling FBI whistleblower reprisal cases between 2005 and 2014. This process was led by the Deputy Attorney General and focused on improving OARM process and making employees more aware of the process through training.

Based on this review, the Justice Department has proposed a number of recommendations which the Department and the FBI have since begun implementing. These include providing access to alternative dispute resolution, expanding the resources of OARM, improving training for FBI employees, expediting the OARM process, awarding compensatory damages, publishing annual reports, and expanding the list of persons to whom a protected disclosure may be made.

The FBI continues to work with the Justice Department in these recommendations and we have made progress on those directed to the FBI.

The FBI now has a process for offering mediation to whistleblowers alleging retaliation, and the process just recently completed its first case successfully. Also, OARM has enhanced their resources to support the process and claims are being processed more effectively.

As for training, the FBI requires all employees to take whistleblower training once every 2 years as part of the No Fear Act. In addition, we have informational materials on the whistleblower process available on our internal Websites for all employees who can be accessed from any FBI workstation.

These materials include frequently asked questions that review the process and can explain what steps an employee must take.

In the coming year, the FBI and the Office of the Inspector General are developing new training on whistleblower protections and we will expect these additional materials will be used to supplement those in the No Fear Act training already provided.

In addition, we are aware of and fully cooperated in the GAO's report on additional actions necessary to improve the Department's handling of FBI retaliation complaints. We would note that none of the recommendations in the GAO report were directed to the FBI as they were focused on DOJ's handling of the retaliation claims.

As noted above, DOJ has taken steps to improve their process for handling these claims.

Chairman Grassley and Committee Members, I thank you again for this opportunity to be here to discuss whistleblower protections within the FBI, and I will be happy to answer any questions you may have, sir.

[The prepared statement of Mr. Perkins appears as a submission for the record.]

Chairman GRASSLEY. Thank you.

General Horowitz?

STATEMENT OF HON. MICHAEL E. HOROWITZ, INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

General HOROWITZ. Thank you, Mr. Chairman, Members of the Committee. Thank you for inviting me to testify today.

Whistleblowers perform an important service when they report potential wrongdoing and they must never be subject to reprisal for doing so.

We need to do all we can to foster and support a culture where Department employees are encouraged to make such reports. For these reasons, I have made whistleblower rights and protections one of my highest priorities as Inspector General.

To advance this work, I established a whistleblower ombudsperson program before such positions were required by the WPEA and going well beyond the requirements of that statute.

To lead the program, I assigned a senior attorney from my front office with whom I consult regularly. Our ombudsperson created a video entitled, "Reporting Wrongdoing: Whistleblowers and Their Rights," and is working with the FBI to create a specialized training program for FBI whistleblowers.

We also are providing training to other Department components and we have dedicated a whistleblower protection page on our Website.

We also have reached out to the whistleblower community so that we can hear from them firsthand about issues of concern. And as a result of our internal training and education, the OIG was certified by the Office of Special Counsel pursuant to Section 2302(c).

In addition, we helped create and we continue to chair the Working Group of Federal Whistleblower Ombudspersons established by the Council of Inspectors General.

As the new chair of the Council of Inspectors General, I look forward to working to enhance whistleblower protection programs across the IG community.

I am proud of the dedication of the OIG staff that handles these matters and care so deeply about them. While we have always pursued FBI whistleblower matters with the utmost dedication and commitment, we regularly critically assess our efforts in order to improve our program.

And we also very much appreciate the recent report of the GAO. As an independent oversight entity ourselves, we fully appreciate the difficulty of the GAO's work and we value its recommendations.

So let me highlight some concrete steps we have taken over the past 2 years. We are working to process complaints faster by conducting initial reviews within 1 or 2 days of receipt, when possible.

We are also improving our compliance with the 15-day requirement for providing written notice to a complainant following receipt of a complaint.

Similarly, we are documenting the periodic status notifications that our investigators are providing to complainants, as well as the agreement of complainants to extend the time for making reasonable grounds determinations.

We also created a specialized access data base and SharePoint site to facilitate case tracking and adopt model report language to make report-writing more efficient.

We also modified our procedures with respect to decisions not to initiate an investigation. In the past, we closed such complaints in a brief declination letter. In the interest of enhancing transparency and giving whistleblowers the fullest possible opportunity to provide relevant information, our declination letters now identify deficiencies in complaints and provide complainants an opportunity to submit additional information prior to the declination becoming final.

These changes go beyond the regulatory requirements and are consistent with our desire to provide maximum possible support for whistleblowers.

In addition, we were an active participant in the Department's PPD–19 working group. One particularly important proposed change recommended by that group was expanding the definition of persons to whom a protected disclosure can be made, which the OIG endorses. This recommendation needs to be addressed promptly.

Let me conclude by discussing a development that hinders our ability to complete investigations in a timely manner: the FBI's practice of reviewing documents requested by the OIG in order to determine whether they believe the OIG is legally entitled to access them.

In FBI whistleblower retaliation cases, this raises two significant concerns. First, it creates, at a minimum, a significant appearance of a conflict of interest. This is particularly the case in light of the FBI Office of General Counsel's direct involvement in both the document review for us and in any subsequent adjudication before

OARM, where the FBI's OGC defends the FBI and its managers against the claim of reprisal.

Second, these document reviews seriously delay our reviews. This occurred recently in two whistleblower retaliation reviews that we were conducting and after 3 to 4 months of delays, we finally received production of most of the responsive emails in February 2015.

A major factor in the delays was the FBI's practice of reviewing emails before producing them to us, and in both cases, we understand the FBI has withheld materials given its legal reviews, pending what we believe is an authorization from the Attorney General or the Deputy Attorney General to provide them to us.

However, the IG Act clearly provides that the OIG is authorized to have access to all records in the Department's possession.

Further, Section 218 of the Appropriations Act does not permit the Department to use funds to deny the OIG access to records unless in accordance with an express limitation in the IG Act, which is not the case in these instances.

The Department chose to refer this issue and the FBI's narrow legal interpretation of the IG Act to the Office of Legal Counsel in May 2014. Nine months later, we are still waiting for that decision. Every day that goes by without a decision results in a waste of FBI and OIG resources, delays OIG audits and reviews that uncover waste, fraud, abuse and mismanagement, and harms FBI whistleblowers who rely on the OIG to review their retaliation allegations in a timely manner.

It is long past time to issue the OLC opinion so this dispute can finally be resolved.

Thank you for the Committee's continued support for our office and I am pleased to answer any questions.

[The prepared statement of General Horowitz appears as a submission for the record.]

Chairman GRASSLEY. Thanks to all three of you.

First of all, a pretty simple question to Mr. Perkins. Could I have your commitment that the FBI will not take adverse action against Special Agent Kiper for his testimony here today or for his previous communications with this Committee?

Mr. PERKINS. You have my commitment and you have Director Comey's commitment on that, sir.

Chairman GRASSLEY. Thank you. Can I also follow up with this question? The Justice Department's regulations do not explicitly protect his communications with the Committee staff or his testimony here today; is that correct?

Mr. PERKINS. Sir, I am not—I believe that he is—he is protected in that, I believe. Yes, I believe so. I will follow up with you on that, sir.

Chairman GRASSLEY. Thank you very much.

Mr. PERKINS. Yes, sir.

Chairman GRASSLEY. Thank you. Now, to each of you, but I hope you can give short answers because we may have a vote coming up here shortly.

Starting with Mr. Maurer and then go across the table to the first question. Should DOJ's regulations be amended to clearly protect FBI employee disclosures to Congress and if not, why not?

Mr. MAURER. I think that is a fantastic idea. It is a valuable source of information and it could assist in congressional oversight.

Chairman GRASSLEY. Mr. Perkins?

Mr. PERKINS. I think it falls within the realm of—if someone is disclosing in a whistleblower type of role and discloses to Congress, certainly, it is something that they should be protected with.

Chairman GRASSLEY. Mr. Horowitz?

General HOROWITZ. Yes.

Chairman GRASSLEY. To all of you again. The Justice Department proposed to sanction whistleblowers for violating gag orders issued in its internal appeals process unless there are exceptions for disclosures to Congress or the Inspector General.

What prevents these sanctions from thwarting oversight of whistleblower cases? Mr. Maurer?

Mr. MAURER. Mr. Chairman, we did not really review that as part of our report for you. So I do not want to get too far off in the deep end on that one. So we are not going to take a position on that one.

Chairman GRASSLEY. Mr. Perkins?

Mr. PERKINS. Mr. Chairman, as well, I believe the sanctions they are discussing in those lines is something that would be handled within the Department of Justice and not necessarily with the FBI.

Chairman GRASSLEY. Mr. Horowitz?

General HOROWITZ. We would certainly support whistleblowers in that context, Senator.

Chairman GRASSLEY. Thank you. Before I ask this question, I want to refer to the Washington Times reported that an FBI whistleblower has alleged that the FBI assigns surveillance teams based upon nepotism and personal preferences, not based on need.

My office has obtained an internal FBI email to the whistleblower. Without objection, that will be placed in the record.

[The information appears as a submission for the record.]

Chairman GRASSLEY. The whistleblower asked whether his report would meet the technical requirements for protected disclosure, and then the answer was shocking to me. The FBI Office of Integrity and Compliance said that it was protected, but that, quote, "this does not guarantee that you will not be retaliated against, with emphasis upon even though retaliation for making a protected disclosure is illegal," end of quote.

After the whistleblower made his report, he received a poor performance review. So a question for each of the panel. What does it say about the state of whistleblower protections at the FBI when its own Office of Integrity and Compliance warns whistleblowers that they could be subject to retaliation even if they follow the rules and even though the retaliation is illegal?

Mr. MAURER. I think it points to a potential area of concern in the overall culture at the FBI, something which the first panel talked about. Clearly, this is just one document out of many, but I would have hoped that the response would have been more in the positive sense of welcoming the whistleblower rather than mentioning the fact that he could be retaliated against.

Chairman GRASSLEY. Mr. Perkins?

Mr. PERKINS. Senator, I have only seen what has been written in the paper. I do not have the context of which that was taken

out of. But I will say, speaking for myself and Director Comey, as well, we will not and do not tolerate retaliation against whistleblowers in the FBI, period.

Chairman GRASSLEY. Mr. Horowitz? Mr. Horowitz. I just saw that email this morning and, obviously, it is very concerning that that would be the comment to an individual who wanted to come forward and presented information and that is something that reflects a concern about the culture, as Mr. Maurer said.

Chairman GRASSLEY. Referring to the same whistleblower I just spoke about, when the Washington Times reported on this email, the whistleblower reported to me this very morning that he was subject to further retaliation. So I am sending a letter to the FBI about this issue.

I better call on Mr. Tillis. My time is up.

Senator TILLIS. Thank you, Mr. Chair. Actually, I just may continue the line of discussion there.

I think this is probably for Mr. Maurer or General Horowitz. You have looked at the agency. You have seen some things that are working, clearly some things that are not working.

What, in your view—some of these things may just be negligence or inconsistencies, but do you see any examples where maybe some of this behavior seems to be intentional and even organized?

Mr. MAURER. From looking at the 62 cases that we did as part of our assessment, we think it derives from a couple of different fundamental things.

One, I think that the statutory carve-out that the FBI has had for so many years contributes to a different culture for whistleblowers at FBI than may be the case in other agencies and departments.

If, for example, FBI employees had a clearer understanding of who they could report to and not risk retaliation or if they could report to anyone——

Senator TILLIS. More than just nine.

Mr. MAURER. More than just nine, right. Exactly. If they are treated the way other Federal employees are in the executive branch, that could help with that.

That said, we did not take an independent assessment of the individual cases that we reviewed. So we are not in a position to say whether anything was intentional or not, but we think that changing who FBI employees can report to, doing a clearer job of providing training and guidance on whistleblower protection would certainly help.

Senator TILLIS. General Horowitz?

General HOROWITZ. That is a concern that we generally keep in mind as we look at these cases and it is something we are looking at in response to Senator Grassley's questions to us about the loss of effectiveness questions and the EEO issues that he has raised, the more systemic issue which is obviously just as important of a concern to us.

Senator TILLIS. Mr. Perkins, in the earlier panel, we were talking about how we really do need a top-down cultural change with respect to how we—I think that whistleblowers play a very important role and many of them—most of them probably should be lauded for what they are attempting to do.

How do you think that we go about, in a meaningful way, a systematic way, if you agree that there needs to be some change in culture—I guess I should ask that question first—then how would you go about doing it in a meaningful, tangible way? Easy to say, hard to do.

Mr. PERKINS. Yes, Senator. I think the term change in culture has such a broad spectrum, a lot longer than we have to discuss. But let me tell you some of the things that I think would be very important to, again, bring that knowledge and awareness to FBI employees.

I mentioned in my opening statement the No Fear Act, 98 percent of our employees have taken it successfully this year. In there, it tells you exactly what you need to do and the importance of being a whistleblower.

We are working with the Inspector General's office to increase training in the coming years so that we have something, at least, on an annual basis where employees know that.

There could be more discussion—for instance, yesterday I went to my FBI terminal, looked up on our internal Website, I searched the term whistleblower. The very first document that popped up was a short, 3-page policy statement that told you as an employee exactly what your rights were and exactly what you needed to do. That is available to all 35,000 employees.

So it is a combination of education and awareness, maybe not so much a cultural change, depending on the definition of what someone define culture as. But I think you go back to education and awareness.

We have very highly skilled, wonderful employees within the FBI. We take the best. And you have those employees they want to be the best. And so give them that education, give them that awareness, and I think you will see a shift in what has been described as a cultural issue.

Senator TILLIS. Any comments, Mr. Maurer or Mr. Horowitz?

Mr. MAURER. Just real quickly, on the training piece, I would agree with Mr. Perkins that there were examples of training and information that are available to FBI employees that clearly spells out what their rights are and what they need to do to ensure they are protected.

But there are other key documents that FBI employees access where that is not clearly spelled out. So, for example, the FBI's domestic investigations and operations guide talks about the need to report potential wrongdoing directly to supervisors and chain of command. It is not within the context of whistleblowers, but an FBI employee could read that and draw some mistaken assumptions about what is protected and what is not.

Those are the kind of things that I think the Department and the IG specifically need to work with FBI on, ensuring that there is consistency.

General HOROWITZ. Senator, I think there are several things that can be done. I think first and foremost, messaging from the top, but also, frankly, from the middle. Mid-level managers touch far more people in every day—in day-to-day interactions. And having done compliance work with private organizations before becoming Inspector General, that is one of the things you work very hard to

do, which is to get that message out throughout the organization and make sure your mid-level managers are echoing what the top managers and the director, in this instance, are saying.

The key is if you look at every study on whistleblowers and employees generally, they want to report internally and they want to see action taken. They do not necessarily want to run to an Inspector General, to an independent organization. They want to see their organization fix their problems.

So there needs to be responsiveness when they do report. There needs to be an addressing of the issue we have talked about, about to whom those reports should be made and can be made, and then there needs to be remediation when problems are found, both holding people accountable, but then broadly fixing the problems, and those are several steps I think have to be considered.

Senator TILLIS. Mr. Chair, if you do not mind, I just have one follow-up.

In the prior panel we were talking about what sort of action we may need to take or what additional oversight activities we should have. I am curious as to your comments on that.

Then specifically I think in terms of the suggestions for maybe legislative action had to do around protecting the report to supervisors, focusing more on timeliness and execution, and also some sort of independent judicial review.

The panelists did not get into specifics, but have you all heard similar proposals and what are your thoughts on that?

Mr. MAURER. I think generally those are good topics for Congress to consider in amending legislation to address the problem.

Mr. PERKINS. Senator, I really cannot take a position one way or another. We report these issues to the Department. They are the ones who actually handle the investigation and the process overall.

We want to uphold the law as it is stated. So whatever position that the Congress feels would fit in that, we will carry those duties out.

General HOROWITZ. I do think, Senator, that there are two clear issues that need to be addressed. One is to whom the disclosure can be made. That is something we have long supported addressing. And then from the report of GAO, it is clear, and from our work, that the adjudication process after we finish our work needs to be addressed. It cannot take years for people to get their rights vindicated. It just cannot.

Senator TILLIS. Thank you. Thank you, Mr. Chair.

Chairman GRASSLEY. Senator Tillis, I want to thank you for participating, as well. I believe I know that you joined the Whistleblower Protection Caucus and I want to thank you for doing that.

Senator TILLIS. This is a great Committee, very important subject, and I like it when I can go around the horn really quickly and get my questions asked. So thank you.

[Laughter.]

Chairman GRASSLEY. I am going to have to go probably in 3 or 4 minutes. So we will adjourn at that point, because of the vote that started at 11:38.

Mr. Perkins, my first question to you, and my lead-in is that you have heard me say many times that we cannot expect change if people who retaliate against whistleblowers face no consequences.

So two questions, but I will ask them separately. Is whistleblower retaliation defined as misconduct at the FBI and has anyone ever been punished for it?

Mr. PERKINS. I believe it is defined as misconduct. Our inspection division, as well as the Office of Professional Responsibility, will do investigations and adjudications of those.

I will have to get back to you as far as has anyone ever been held accountable in those ways. I do not know at this point.

Chairman GRASSLEY. And I would ask, at the same time you get back with a written response there, a follow-up. Could you please provide the written policy, the recommended punishment for retaliation, and a description of each time the FBI imposed discipline for retaliating against whistleblowers?

Mr. PERKINS. Yes, Senator. We will provide that.

Chairman GRASSLEY. Now, I suppose of that is hundreds of them, I am not sure I want you to list 100, but I do not think there has been very much of it, if any.

Mr. PERKINS. We will be in contact with your staff and provide that, sir.

Chairman GRASSLEY. Thank you. And for you, Mr. Horowitz, even when your office finds that there has been retaliation against a whistleblower, as far as I know, that is not the end of it.

So how often has your office substantiated a claim, but the case continues in internal appeals because the Department disagrees? Mr. Horowitz. If I recall correctly, since 2005, we have found—if you give me a minute, I think I may have the numbers. I believe it is about six, but I will double check those numbers and get back to you.

Chairman GRASSLEY. And then a follow-up. Should the Department have to defer to your independent investigative findings and if not, what is the point of having your office do an independent review?

General HOROWITZ. Well, I have asked that question on a number of occasions in a number of areas and, obviously, the reason we do an independent review is so that there is an independent arbiter or fact-finder, but there is a disciplinary process and an adjudicative process that goes on after that. And under the rules, we hand it off at that point. Chairman Grassley. Mr. Maurer, this will probably have to be my last question. The Department has recommended protecting disclosures made in second in command of a field office, but has declined to protect disclosures to others in the chain of command. What reasons did the Department and the FBI give for refusing to protect disclosures made to direct supervisors and did you find any evidence to support that reasoning?

Mr. MAURER. During the course of review, we asked this question many times and what we heard from the Department of Justice was that they felt that by proposing to add additional members to this list of the nine that is already existing would give FBI employees sufficient numbers to report potential retaliation complaints.

Our perspective is that we still remain concerned that FBI, even if this is implemented, and it has not been implemented yet, even if it is implemented, it still makes FBI an exception to the rest of the executive branch.

There are other law enforcement agencies, there are other intelligence agencies where their staff can report to front line supervisors potential retaliation, and it is just not clear to us really why FBI is different.

Chairman GRASSLEY. And then a follow-up to you. How are the protections for FBI whistleblowers different from other Federal employees and did you find any compelling reason to justify giving FBI whistleblowers weaker protections?

Mr. MAURER. I think the biggest area where there is a difference is this issue of who they can report to and still remain protected against retaliation. That was the central issue. It was cited in a number of the reasons why potential claims of whistleblower retaliation were not acted upon was because they simply talked to the wrong person.

That is not the case with the intelligence community and it is not the case in the rest of the executive branch.

Chairman GRASSLEY. I am going to have to adjourn the meeting now. I thank you for participating, but also since you have heard the word culture used and it does not apply just to the FBI, it applies to a lot of—maybe every agency, to some extent, against whistleblowers. They are kind of treated like a skunk at a picnic. I hope you will do all you can to reverse that.

Thank you all very much.

[Whereupon, at 11:48 a.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

UPDATED Witness List

Hearing before the
Senate Committee on the Judiciary

On

"Whistleblower Retaliation at the FBI: Improving Protections and Oversight"

Wednesday, March 4, 2015
Dirksen Senate Office Building, Room 226
10:00 a.m.

Panel I
Mr. Michael German
Fellow
Liberty and National Security Program
Brennan Center for Justice at New York University School of Law
Former Special Agent
Federal Bureau of Investigation

Mr. Stephen M. Kohn
Executive Director
National Whistleblowers Center

Mr. J. Richard Kiper
Special Agent
Federal Bureau of Investigation

Panel II
Mr. David C. Maurer
Director
Homeland Security and Justice Issues
U.S. Government Accountability Office

Mr. Kevin L. Perkins
Associate Deputy Director
Federal Bureau of Investigation

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice

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Testimony of Michael German, Fellow,
Brennan Center for Justice at New York University Law School;
Former Special Agent, Federal Bureau of Investigation

Before the
United States Senate Committee on the Judiciary

March 4, 2015

"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%20release%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-109hhrg28171/html/CHRG-109hhrg28171.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-comey-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.

Office of the Inspector General
United States Department of Justice

Statement of Michael E. Horowitz
Inspector General, U.S. Department of Justice

before the

U.S. Senate Committee on the Judiciary

concerning

"Whistleblower Retaliation at the FBI: Improving Protections and Oversight"

March 4, 2015

Mr. Chairman, Senator Leahy, and Members of the Committee:

Thank you for inviting me to testify today about how to improve protections for FBI whistleblowers and oversight of whistleblower retaliation matters. Whistleblowers perform an important service to their agency and the public when they come forward with information about potential wrongdoing, and they must never be subject to reprisal for doing so. We need to do all we can to foster and support a culture where Department employees are encouraged to report information they have about waste, fraud, abuse, and misconduct. In my tenure as Inspector General, I have seen first-hand how important whistleblower information is to our work. For these reasons, whistleblower rights and protections have been one of my highest priorities since becoming Inspector General in 2012.

To advance this work, we established a Whistleblower Ombudsperson Program, created at my direction shortly after my arrival as Inspector General – before such positions were required by the Whistleblower Protection Enhancement Act and going well beyond the requirements of that statute. To lead this program, I assigned a senior attorney from my Front Office staff, with whom I consult regularly regarding whistleblower issues. Our Whistleblower Ombudsperson created, with the help of Special Agent John Dodson, a video entitled "Reporting Wrongdoing: Whistleblowers and their Rights," which discusses whistleblower rights and protections applicable to all DOJ employees, and specifically points out where the rules for FBI employees differ from those applicable to others. The OIG is working with the FBI to create a specialized training program that highlights the specific requirements and procedures for FBI whistleblowers, and we also are providing training to employees of other Department components on these issues. The OIG also has a dedicated "Whistleblower Protection" page on its website, available to FBI employees and others at http://www.justice.gov/oig/hotline/whistleblower-protection.htm, with a section on FBI Whistleblowers that we have enhanced to include additional links to the applicable regulation and other information specific to FBI employees. We have reached out to the whistleblower community, so that we can hear from them first-hand about issues and challenges that concern them, and to ensure that they can provide us with constructive feedback on our work. And as a result of our internal training and education efforts, in the fall of 2013, the OIG was certified by the Office of Special Counsel pursuant to Title 5, United States Code, Section 2302(c).

In addition, we helped to create and we continue to chair the government-wide working group of federal whistleblower ombudspersons established through the Council of the Inspectors General on Integrity and Efficiency. In my capacity as Chairperson of the Council of IGs, I look forward to working with my fellow Inspectors General to enhance the prominence of whistleblower protection programs across the IG community.

I am proud of these efforts, and of the tremendous dedication of the OIG staff that handles these matters and cares so deeply about them. Nevertheless, like any organization, in order to continue to improve, we need to critically assess our efforts, and improve them as necessary. The OIG has implemented several reforms recently in order to improve the effectiveness and timeliness of our handling of our responsibilities under the FBI Whistleblower Regulations. And we very much appreciate the report of the Government Accountability Office (GAO). As an independent oversight entity, the OIG fully appreciates the difficulty of the GAO's work and value of its conclusions. We have and will continue to implement reforms, in our ongoing effort to improve our work in this important area.

Overview of the FBI Whistleblower Retaliation Regulations

The protection of civilian federal whistleblowers from reprisal began with the enactment of the Civil Service Reform Act of 1978 (CSRA), and was expanded by the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA). These statutes generally make it illegal for federal agency supervisors to engage in an adverse personnel action against an employee in reprisal for revealing agency misconduct. While most federal employees can challenge alleged reprisals via the Office of Special Counsel and the Merit Systems Protection Board, Congress established separate procedures for FBI employees by providing for an administrative remedy within the Department of Justice. These procedures are contained in 28 CFR Part 27, known generally as the "FBI Whistleblower Regulations."

The FBI Whistleblower Regulations prohibit Department employees from taking or failing to take, or threatening to take or fail to take any personnel action against any FBI employee as a reprisal for making a protected disclosure. The regulations define a "protected disclosure" as information that the employee reasonably believes evidences (1) a violation of law, rule, or regulation; or (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. To be protected from being a source for reprisal under the regulations, the disclosure must be made to one or more of nine enumerated individuals or entities: the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, the highest ranking official in any FBI field office, the OIG, the Department of Justice Office of Professional Responsibility (OPR), the FBI OPR, or the Internal Investigations Section of the FBI Inspection Division. A "personnel action" includes a decision about hiring, termination, promotion, transfer, pay or benefits, or any significant change in duties, responsibilities, or working conditions. If the complainant shows by a preponderance of the evidence that the protected disclosure was a contributing factor in the personnel action taken against him, the burden shifts to

the agency to show by clear and convincing evidence that it would have taken the personnel action in the absence of the protected disclosure.

Role of the OIG as "Conducting Office"

The FBI Whistleblower Regulations establish a two-phase procedure for addressing allegations of illegal retaliation against FBI employees: an investigation phase and an adjudication phase. Either the OIG or the Department's OPR investigates, and the Department's Office of Attorney Recruitment and Management (OARM) adjudicates.

The process begins when an FBI employee or applicant who believes he or she has suffered an illegal reprisal submits a complaint, which the regulation indicates should be in writing, to either the OIG or OPR. The OIG and OPR consult to determine which of them will serve as the "Conducting Office" for the investigation phase. The Conducting Office begins by analyzing the complaint to determine whether it satisfies threshold regulatory requirements, including whether the facts alleged in the complaint, if accepted as true, would meet the requirements for establishing a prohibited reprisal for making a protected disclosure. If the complaint satisfies these threshold requirements, the Conducting Office commences an investigation to determine whether there are "reasonable grounds" to determine that a reprisal has been or will be taken for a protected disclosure. The regulations allow 240 days for the completion of this investigation, which may be extended with the agreement of the complainant. The investigation typically involves collecting and analyzing relevant documents, including e-mails, and interviewing the complainant and other witnesses with knowledge of relevant facts.

At the conclusion of the investigation, the Conducting Office prepares a draft report, which is provided to the complainant for comment. If the Conducting Office finds a reasonable basis to conclude that there has been or will be a prohibited reprisal, it reports that to OARM, which is responsible for adjudicating. If the Conducting Office does not find a reasonable basis to conclude that a reprisal has occurred, the complainant may nonetheless file a request for corrective action with OARM. (Alternatively, a complainant may file a complaint with OARM at any time 120 days after the complaint was filed with the OIG or OPR, even if the Conducting Office has not yet completed its investigation. In practice, however, complainants have rarely bypassed the investigation phase in this manner.)

The adjudication phase is a more formal, adversarial process to which both the complainant and the FBI are parties, the latter represented by the FBI's Office of General Counsel. The OIG, however, has no role in the adjudication phase or in any appeal of an OARM determination.

Data regarding FBI whistleblower retaliation cases processed by the OIG

In its capacity as the Conducting Office, the OIG has processed a total of 73 FBI whistleblower retaliation complaints that were received in the six years since January 1, 2009. Of these, the OIG closed 52 of the 73 complaints without conducting an investigation, usually because a complaint failed on its face to state a claim – which means that the facts alleged in the complaint, even if accepted as true, did not meet the regulatory requirements for establishing a prohibited reprisal. The OIG has completed investigations of 10 of the 73 complaints. With regard to 2 of the 73 complaints, the complainant withdrew the complaint before the OIG completed its investigation. And as to the remaining 9 complaints, the OIG's investigation was still underway as of December 31, 2014.

Our review of available data relating specifically to the OIG's performance of its discrete role in addressing FBI whistleblower retaliation complaints confirms that the OIG has a record of timely completion of its responsibilities. Since January 1, 2009, the median time it took for the OIG to determine that a complaint should be closed without an investigation was 23 days. The longest was 142 days. The median time for the OIG to complete an investigation (including writing a report of investigation or final termination report) was 363 days. The longest was 478 days. We are committed to continued improvement, but these numbers reflect the strong commitment of the OIG to complete its role as Conducting Office efficiently and expeditiously.

OIG efforts to improve the FBI whistleblower retaliation process

The OIG is fully committed to furthering the rights and protections of whistleblowers throughout the Department of Justice. While we have always pursued FBI whistleblower matters with the utmost dedication and commitment, we have been making important improvements to our process for handling such matters, and we will continue to make every effort to improve our processes. These improvements have grown out of our own continual self-examination of our processes and recommendations from external sources such as the GAO's recent review of the Department's handling of FBI whistleblower retaliation complaints, as well as the independent outreach we have done with leading whistleblower organizations.

Since I became Inspector General in 2012, I have given high priority and personal attention to FBI whistleblower retaliation matters. My senior staff and I are regularly and directly involved in the discussion of these matters, and I personally review and approve every declination decision, termination report, and report to OARM. I firmly believe that any additional time required by such

involvement is well spent to ensure that these important matters receive the attention and priority that they deserve.

We have determined that there are areas for potential improvement in our processing of these complaints, and we have taken concrete steps to implement such improvements. For example, we recognized that we could process initial complaints faster, by ensuring that they are transmitted to our Oversight and Review Division, which handles these matters within the OIG, more quickly for initial review, and by conducting those initial reviews within 1 or 2 days of receipt when possible. We also recognize that we can improve our compliance with the regulatory requirement to provide a written notice to the complainant within 15 days of receiving the complaint indicating that the allegation has been received and identifying a point of contact. Similarly, while our investigators regularly and routinely have communicated with complainants about the status of our investigations, such communications have most often been through telephone contacts. Accordingly, we have found room for improvement in documenting the periodic status notifications that we provide to complainants, and in documenting the agreement of complainants to extend the time for making our "reasonable grounds" determinations should investigations continue beyond 240 days, as provided in the regulations. We have used technology to assist our efforts to improve the timeliness of investigations and reports by creating a specialized Access database and SharePoint site to facilitate case tracking, and by adopting model report language to make report writing more efficient.

In addition, the OIG was an active participant in the Department's workgroup convened pursuant to Presidential Policy Directive/PPD-19, "Protecting Whistleblowers with Access to Classified Information." Among other things, PPD-19 required the Department to assess the efficacy of the FBI Whistleblower Regulations and to propose revisions to the regulations to increase their effectiveness. The Department's report, which was issued in April 2014, recommended several changes to policies and procedures to enhance the protection of FBI whistleblowers from retaliation. Among these proposals was the creation of a voluntary mediation program for FBI whistleblower cases. We believe that Alternative Dispute Resolution can focus the parties' attention at early stages of the dispute, providing a shortcut to resolution as an alternative to the sometimes lengthy and inefficient multi-phase procedures described above.

Another important change recommended by the Department was expanding the definition of persons to whom a "protected disclosure" can be made. Currently, a disclosure is protected if its content qualifies for protection and if it is made to one of the nine offices and officials designated in the FBI Whistleblower Regulations.

The Department recommended expanding this list to include the second-highest ranking official in any FBI field office (which is typically any of 2-3 Assistant Special Agents in Charge in the field office). The OIG endorses broadening the scope of the individuals to whom a protected disclosure may be made, which will provide FBI employees with a level of protection closer to that granted to most other civilian employees. In this regard, we note that a separate FBI policy, known as Policy Directive 0727, prohibits FBI supervisors from retaliating against an employee for raising a "compliance concern" to any supervisor in the employee's chain of command. This policy may offer broader protection than the FBI Whistleblower Regulations, but it is not enforceable through the procedures provided under those Regulations.

Lastly, the OIG has modified its procedures with respect to decisions not to initiate an investigation. As noted above, many complaints submitted to the OIG do not require or call for the opening of an investigation because the facts alleged in the complaint, even if accepted as true, would not be sufficient to satisfy an essential element of a retaliation claim under the regulation. The OIG has closed such complaints by means of brief declination letters, not more detailed reports. Nevertheless, in the interest of enhancing the transparency of our review process and giving whistleblowers the fullest possible opportunity to provide additional information that may be relevant to our determinations, the OIG is now providing more detailed information in our declination letters identifying the deficiencies in complaints, including identifying the specific element or elements of a claim of reprisal under the regulations that are absent and informing the employee filing the complaint that we are providing them with an opportunity to submit any additional relevant information or comment on the OIG's initial determination prior to the OIG's declination of the complaint becoming final. These changes in practice go beyond the regulatory requirements, and will help the OIG ensure that all complainants have an opportunity to provide additional information or written comments before OIG closes their complaints consistent with our desire to provide the maximum possible support for whistleblowers from the FBI and throughout the DOJ.

The GAO Report

On February 23, 2015, the GAO released a report entitled "Whistleblower Protection – Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints." The OIG reviewed a draft of the report in early January and submitted detailed comments on the report, which are attached as an Appendix to the final GAO report. We appreciate the GAO review, and believe that it made a number of useful observations regarding the procedures for resolving FBI whistleblower complaints, and recommendations for improvements with which the OIG agrees. We also share the GAO's concern about the length of the adjudicative

process, including cases such as the one involving Jane Turner, which the report notes took over 10 years from investigation to final adjudication. As we noted previously, under the regulations, our role in the Department's process concludes once we finish our investigation, and we play no role in the adjudicative phase. Thus, in the Turner case for example, the OIG completed its draft report in a timely manner, within about 10 months from receiving the complaint, while the adjudicative phase (in which we had no role to play) lasted for 9 more years.

We fully support the goal of prompt resolution of whistleblower complaints, and look forward to continuing to improve our processes and to receive ideas and suggestions from all of the stakeholders in this critical area.

Document access issues in FBI whistleblower retaliation cases

I need to discuss another development that concerns me and that is hindering the OIG's ability to complete its FBI whistleblower retaliation investigations in a timely manner: the regular practice of the FBI of reviewing documents requested by the OIG in order to permit the FBI's Office of General Counsel (OGC) to determine whether they believe that the OIG is legally entitled to access them. In the context of FBI whistleblower retaliation cases, this raises two significant concerns.

First, having the FBI review documents that the OIG has requested in order to decide what records it should provide to the OIG regarding reprisal claims made against FBI supervisors creates, at a minimum, a significant appearance of a conflict of interest. This is particularly the case in light of the FBI OGC's direct involvement in the document review, given that in any subsequent adjudication of the whistleblower retaliation complaint before OARM, the very same FBI OGC will be responsible for defending the FBI and its managers against that claim of reprisal.

Second, these document reviews can seriously delay and impair our reviews. Most recently, this occurred in two FBI whistleblower retaliation investigations that are currently underway in the OIG. The document requests in issue were sent to the FBI on September 26, 2014, and October 29, 2014, respectively. After months of delays, the FBI finally produced most of the responsive e-mails to the OIG in February 2015. A major factor in the delays was the FBI's practice of reviewing e-mails requested by the OIG to determine whether they contain any information that the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. The FBI has withheld materials from the OIG in these two whistleblowers cases following such a review, pending authorization from the Attorney General or Deputy Attorney General to produce the information to the OIG. However, Section 6(a) of the IG Act clearly provides that the OIG is authorized to have access to all records available to the agency relevant to the carrying out of our responsibilities, and it

does not contain an express limitation of the OIG's access to these categories of information. Moreover, even if the Department's leadership were to authorize the FBI to give us such records, which it has consistently indicated it would do, a process allowing the OIG access to records of the Department only when granted permission by the Department's leadership is inconsistent with the OIG's independence and results in serious delays for our work.

Further, Section 218 of the Appropriations Act for Fiscal Year 2015 does not permit the use of funds appropriated to the Department to deny the OIG access to records in the custody of the Department unless in accordance with an express limitation of Section 6(a) of the IG Act. Section 6(a) does not expressly or otherwise limit the OIG's access to the categories of information that the FBI maintains it must review before providing records to the OIG. For this reason, on February 3, 2015, we reported the status of document production in these two FBI whistleblower matters to the Appropriations Committees in conformity with Section 218.

The FBI OGC's practice of delaying document productions to complete these unauthorized pre-production reviews threatens to compromise the ability of the OIG to complete its investigations within a timely fashion consistent with the FBI Whistleblower Retaliation Regulations. Department leadership chose to refer the FBI's interpretation of its OIG disclosure obligations to the Office of Legal Counsel (OLC) in May 2014. Although we were told by the Department last year that this was a priority, we are still waiting for that decision so that this unnecessary and wasteful impediment to our work can be removed, whether by OLC or otherwise. Every day that goes by without a decision results in a waste of FBI and OIG resources, in delays in the OIG uncovering waste, fraud, abuse, and mismanagement in its reviews and audits, and in harm to FBI whistleblowers who rely on the OIG to fully and fairly review their retaliation allegations in a timely manner. It is long past time to issue the OLC opinion so this dispute can finally be resolved.

Conclusion

Thank you again for the Committee's continued support for our Office and for our efforts to vigorously pursue the protection of whistleblowers, who perform an essential service to the Department and the public when they come forward with information about potential wrongdoing. I look forward to continuing to work closely with the Committee to ensure the OIG can continue to lead the effort to protect FBI and all DOJ whistleblowers from illegal retaliation. I would be pleased to answer any questions you may have.

Testimony by
J. Richard Kiper, Ph.D.
Special Agent, Federal Bureau of Investigation

To the Hearing Before the
United States Senate, Committee on the Judiciary
Whistleblower Retaliation at the FBI: Improving Protections and Oversight
March 4, 2015

Thank you, Chairman Grassley, Senator Leahy and other members of the Committee for holding this important hearing on Whistleblower Retaliation at the FBI. As a victim of unjustified adverse actions, I am grateful for the opportunity to share my experience with you.

Like thousands of other FBI employees, I work hard at my job every day. I have been rewarded for my efforts over the past 15 years – not only in terms of statistical accomplishments but I have also been honored with several incentive and recognition awards, including the Outstanding Law Enforcement Officer of the Year in the Southern District of Florida.

I take seriously my responsibility to keep the American people safe, but I also recognize the importance of effectively managing the resources they have entrusted to me. Whether it's helping to define the requirements for the FBI's new case management system or creating a database to manage human sources in Miami – I have always raised my hand when I believed FBI processes and products needed to be improved.

However, I never imagined that my desire to promote excellence would be used against me.

In 2011 I accepted a position as Chief of the Investigative Training Unit at the FBI Academy. This was a position for which I was especially well-suited due to my investigative experience in the FBI, as well as my four degrees in education. At the FBI Academy, I continued to push for ethical and efficient solutions to problems, and I brought problems to the attention to the highest ranking leaders at the FBI Academy. Specifically, I brought to light the following issues:

1. Training Division's intentional misleading of the Office of Management and Budget (OMB) regarding the training of new agents and new analysts.

2. Training Division's wasteful decision to install SCION, the FBI's top secret computer system, in the Intelligence and Investigative Training Center building.

3. Training Division's mismanagement of the October 2011 realignment, as it lacked any business process definition or sound instructional design principles.

When I raised these issues with the Training Division leadership, I did not retain an attorney or study the Whistleblower statute to ensure I was making a disclosure of wrongdoing to "an appropriate recipient." I was just trying to do the right thing – as I've always done. I made these disclosures to the highest ranking officials at my work site, hoping these executives would at least consider making positive changes.

Instead, I was removed and demoted two GS levels.

The tool used to retaliate against me was the FBI's Loss of Effectiveness (LOE) process. From April 22 to May 3, 2013 an FBI Inspection team traveled to the FBI Academy to conduct an inspection. On the last day of inspection, Training Division executives told me I was being removed from my position as a result of a Loss of Effectiveness (LOE) finding. The news was shocking to me, as I had earned outstanding evaluations from my supervisors, enjoyed nearly-perfect climate survey results from my employees, and received four awards during my tenure at Training Division.

At the time I was told of my removal, the Training Division executives refused to tell me why I had received the LOE finding or why they had agreed with it. Five weeks after I was told of my removal, they finally provided to me the written justification for my LOE finding. Although the inspectors found absolutely nothing wrong with my unit, they documented several accusations against me that were demonstrably false. As Senator Grassley effectively articulated in a letter to Director Comey on September 26, 2014, the justification for my removal was "contradicted by the FBI's own documents."

It is worth noting that if I had been accused of actual wrongdoing – say driving under the influence, vandalism, or soliciting prostitutes – I would have been given a chance to challenge the investigation and appeal the adverse action. However, with the FBI's LOE process the accused have no avenue to appeal the findings, no chance to prevent the outcome, no recourse whatsoever.

In light of the irregular inspection practices and false statements used to justify my LOE finding, the only explanation for my removal and demotion is that of retaliation for having made the disclosures I mentioned earlier.

While no one in the FBI has disputed the fact that my LOE was based on false information, what they *are* contesting is that my Whistleblower disclosures were not *protected* because they were not made to a "qualifying individual" listed in 28 CFR 27.1(a). While conceding that my disclosures were made to the highest ranking official at the FBI Academy, the FBI insists the disclosures were not made to the "highest ranking official in any FBI field office" as the statute

requires. According to this logic, the adverse actions taken against me could not have been taken in retaliation for my disclosures because my disclosures were not protected under the statute.

I have no doubt that my removal and demotion was retaliation for having made Whistleblower disclosures. I made these disclosures in good faith and I made them to the highest ranking officials at the FBI Academy, who outrank the "highest ranking official in any FBI field office."

Thank you for considering the expansion of the FBI Whistleblower protections so that the FBI is held accountable for its actions and held to the standard of its motto "Fidelity, Bravery, and Integrity."

Thank you again for holding this hearing and I would be happy to answer any questions you may have.

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

"Whistleblower Retaliation at the FBI: Improving Protections and Oversight"

Testimony of Stephen M. Kohn[1]

Executive Director, National Whistleblower Center
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March 4, 2015

Chairman Grassley, Senator Leahy, and Members of the Committee. The Department of Justice's program for protecting FBI whistleblowers is broken. My testimony will focus on the devastating impact caused by the prolonged delays in deciding these cases.

By way of background, since 1993 I have continuously represented FBI employees in whistleblower proceedings. My law firm filed the federal lawsuit that forced President Clinton in 1997 to order the Justice Department to implement the FBI protections contained in the Whistleblower Protection Act, resulting in the formation of the current OARM process.

I want to focus my remarks on the cases of three heroic Americans who faced prolonged retaliation at the FBI for reporting serious misconduct: Former Special Agents Jane Turner[2] and Bassem Youssef[3], and current FBI employee Robert Kobus.[4] Together they have 86 years of exemplary FBI service protecting Americans.

Although working in different FBI offices and on different programs, the whistleblower protection program failed them all.

Robert Kobus has worked in the New York Field Office for 34 years as an FBI operations manager. He is nearing retirement. His commitment to law enforcement is both professional and deeply personal. His sister was murdered by al-Qaeda on September 11, 2001.

Mr. Kobus reported budget and time card fraud in his office. It was a simple case, and fully documented. But retaliation was swift – the FBI stripped him of his duties and literally isolated him by assigning him to work as the only person on a vacant floor amongst 130 empty desks. The DOJ Office of Inspector General (OIG), after a thorough investigation, found that the FBI retaliated against Mr. Kobus and ordered corrective action. It should have ended there and Mr. Kobus should have been restored to his former duties no later than 2007.

Instead, for more than nine years the FBI spent our taxpayers' money frivolously fighting Mr. Kobus. In the end he won. But ask him about this "victory" and the 9-year process he lived through waiting until December of 2014 to finally receive corrective action. The FBI's uncontrolled bullying tactics, which went on continuously while DOJ endlessly reviewed his very simple case, ruined Mr. Kobus' promising career.

Jane Turner's case is even worse. She was one of the first female agents in the FBI and once had a stellar career. However, after disclosing to the Inspector General that FBI agents had illegally stolen property (by taking souvenirs) from those who died in the 9/11 attacks, she was subjected to brutal retaliation, including downgraded performance because she "embarrassed the FBI," stripped of all investigatory duties and was completely isolated (to the point where agents explicitly stated they commenced bringing their guns into the office because Ms. Turner blew the whistle). While her whistleblower case was pending, Ms. Turner resigned from her job after being given a bogus Notice of Proposed Removal.

Ms. Turner filed a whistleblower complaint in 2002, but it languished for 11 years. She finally "won" her case, and the Notice of Proposed Removal was withdrawn. But this happened years after she met the mandatory retirement age. Because of the delays in her case, the relief she obtained did nothing to make her whole or properly correct the abuses she suffered.

Finally, there is Supervisory Special Agent Bassem Youssef. Before blowing the whistle he received the highly prestigious DCI award from the Director of Central Intelligence for his spectacular contributions in counterterrorism. He also served as the FBI's first legal attaché in Riyadh, Saudi Arabia and in the 1990's he successfully infiltrated the terrorist organization now known as al-Qaeda.

His case has been pending before the DOJ for more than nine years, with no end in sight. The corrective action he sought from the FBI was simply to be assigned work on operational counterterrorism cases – an area Mr. Youssef was exceptionally qualified to perform. Although the DOJ Office of Professional Responsibility (OPR) investigated Mr. Youssef's whistleblower complaint and quickly ruled in his favor, ordering him reinstated to operational counterterrorism work, the FBI appealed, and the case remains pending.

Regardless of the ultimate outcome of his case, the OARM process failed. Mr. Youssef's request to utilize his unique skills to fight America's war on terror will never come to pass. This past September, frustrated and humiliated by the prolonged delays and with the continuous stigma whistleblowers face within the FBI, Mr. Youssef finally retired, one year from his mandatory retirement date. Given his background and skills, this was a major loss for all Americans.

The prolonged delays in processing these claims send a clear message to all FBI agents: Don't blow the whistle.

Thank you.

SUPPLEMENTAL WRITTEN TESTIMONY

A. Summary of Needed Reforms

1. The law should be amended to include protections for FBI employees who make disclosures to their supervisors and/or through their chain of command. Without such protections the majority of whistleblowers will not be protected. This recommendation is consistent with the recommendation made by the U.S. General Accounting Office, "Whistleblower Protection: Additional actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints," GAO-15-112 (January 2015), p. 41. http://bit.ly/1M3lJw2

2. Strict time limits must be placed on the adjudicatory process. Currently, if the OIG or OPR does not conclude their investigation in a specific time period, and FBI employee has the right to immediately appeal his or her case to the Office of Attorney Recruitment and Management ("OARM"). This process is appropriate, and puts real pressure on the OIG or OPR to issue timely decisions. A similar process, with real teeth, must be placed on the two adjudicatory offices with responsibility over the FBI Whistleblower Program: the OARM and Deputy Attorney General ("DAG"). We recommend the following:

A. The OARM shall issue its initial decision on the merits and any final decision on remedy within 12 months of the filing of an appeal, not including enlargements of time requested and obtained by the employee. The failure to meet these deadlines will give the employee the right to remove his or her case to U.S. District Court, and have t he case heard *de novo* in that forum.

B. The DAG shall issue the final order of the Department of Justice within six months of the filing of an appeal before the DAG, not including enlargements of time requested by the employee. The failure to meet these deadlines will give the employee the right to remove his or her case to U.S. District Court, and have the appeal heard *de novo* in that forum.

3. In order to clear up any ambiguity in the law, Congress should explicitly clarify the law in order to ensure that any final decision of the DAG is subject to judicial review pursuant to the Administrative Procedure Act. Under 5 U.S.C. § 706 this review would be limited to ensuring that the DAG did not abuse his discretion in issuing the final order, and that the Department of Justice's final order was not arbitrary, capricious or in violation of law. Without such review the DAG could issue final decisions that explicitly violate the law, and the whistleblower would have no avenue to correct that manifest injustice.

4. Other needed improvements in the law are set forth in the Joint Recommendations submitted to the Department of Justice by the American Civil Liberties Union and the National Whistleblower Center on February 4, 2013. A copy of these recommendations can be found at http://bit.ly/ChangesPart27.

B. Background to the Whistleblowers

Former Supervisory Special Agent Bassem Youssef: Background on Mr. Youssef's 27-year career at the FBI, his whistleblower allegations and extensive documentation regarding his concerns can be found at http://bit.ly/Bassem_Youssef.

FBI Employee Robert Kobus: Background on Mr. Kobus's 34-year career at the FBI and copies of the OARM decision ruling in his favor can be found at http://bit.ly/Robert_Kobus.

Former Special Agent Jane Turner: Background information on Jane Turner, her whistleblower allegations, the OIG report finding that her allegations had merit and information on the retaliation she faced can be found at http://bit.ly/Jane_Turner.

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[1] Stephen M. Kohn serves *pro bono* as the Executive Director of the National Whistleblower Center (www.whistleblowers.org). He is a partner in the Washington, D.C. law firm of Kohn, Kohn & Colapinto, LLP (http://www.kkc.com) served in the 1980's as the Director of Corporate Litigation for the Government Accountability Project. His ninth book on whistleblowing is, *The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself* (Lyons Press, 3rd edition, 2013). The *Handbook* retold, for the first time, the history behind America's first whistleblower law, enacted by the Continental Congress in 1778. For over thirty years Mr. Kohn has successfully represented whistleblowers, including FBI employees such as Dr. Frederic Whitehurst, Jane Turner, Robert Kobus and Bassem Youssef. He also represents numerous whistleblowers in tax, securities and government contracting fraud cases. The disclosures made by his clients have triggered over $15 billion in recoveries for the United States. Mr. Kohn has a B.S. in Social Education from Boston University, an M.A. in Political Science from Brown University and is a graduate of the Northeastern University School of Law.

[2] Detailed information on Jane Turner's case can be found at http://bit.ly/Jane_Turner.

[3] Detailed information on Mr. Youssef's case can be found at http://bit.ly/Bassem_Youssef.

[4] Detailed information on Mr. Kobus' case can be found at http://bit.ly/Robert_Kobus.

United States Government Accountability Office

GAO

Testimony
Before the Committee on the Judiciary, U.S. Senate

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WHISTLEBLOWER PROTECTION

Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints

Statement of David Maurer,
Director, Homeland Security and Justice

Chairman Grassley, Ranking Member Leahy, and Members of the Committee,

I am pleased to be here today to discuss our report on the Department of Justice's (DOJ) handling of Federal Bureau of Investigation (FBI) whistleblower retaliation complaints.[1] As you know, whistleblowers play an important role in safeguarding the federal government against waste, fraud, and abuse, and their willingness to come forward can contribute to improvements in government operations. However, whistleblowers also risk retaliation from their employers, sometimes being demoted, reassigned, or fired as a result of their actions. Some FBI whistleblowers who have alleged retaliation have waited several years for DOJ to resolve their complaints. For example, in 2002, former FBI agent Jane Turner filed a whistleblower complaint with DOJ alleging that her colleagues had stolen items from Ground Zero after the September 11, 2001, terrorist attacks. She was then given a "does not meet expectations" rating, placed on leave, and notified of proposed removal. Ms. Turner filed a whistleblower retaliation complaint that DOJ ultimately found in her favor in 2013—over 10 years later. Today I will discuss (1) how long DOJ has taken to resolve FBI whistleblower retaliation complaints, (2) the extent to which DOJ has taken steps to resolve complaints more quickly, and (3) the extent to which the two offices that investigate these complaints—DOJ's Office of the Inspector General (OIG) and Office of Professional Responsibility (DOJ-OPR)—have complied with regulatory reporting requirements. My remarks today are based on our report, entitled *Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Whistleblower Retaliation Complaints*.[2]

In performing the work for our report, we reviewed all DOJ and OIG case files for the 62 FBI whistleblower retaliation complaints closed during the 5-year period from 2009 to 2013, and interviewed whistleblower attorneys, advocates, and government officials—including DOJ and OIG officials responsible for investigating and adjudicating these complaints—

[1]GAO, *Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints*, GAO-15-112 (Washington, D.C.: Jan. 23, 2015).

[2]GAO-15-112.

about the complaint process.[3] More detailed information on the report's scope and methodology can be found in the published report. We conducted this work in accordance with generally accepted government auditing standards.

Background

As established by the Civil Service Reform Act of 1978, federal law generally prohibits retaliation against federal government employees for reporting wrongdoing, or whistleblowing, and provides for most federal employees to pursue retaliation complaints with the U.S. Office of Special Counsel and the Merit Systems Protection Board (MSPB).[4] The FBI was excluded from this process and, instead, the Attorney General was required by law to establish regulations to ensure that FBI employees were similarly protected against retaliation.[5] In response to this requirement, in 1998, DOJ issued regulations setting forth the process for FBI whistleblowers to report complaints of retaliation for their disclosures.[6]

[3]Because of the sensitivity of FBI whistleblowers' identities, to obtain whistleblower perspectives on these issues, we met with representatives of five whistleblower advocacy groups knowledgeable about DOJ's process and attorneys who have represented three FBI whistleblowers through this process. The information we gathered from these groups and attorneys—which we refer to collectively as eight whistleblower advocates and attorneys—is not generalizable, but provides perspectives on whistleblowers' experiences with DOJ's process.

[4]Pub. L. No. 95-454, §§ 101, 202, 92 Stat. 1111, 1113-8, 1121-31 (codified as amended at 5 U.S.C. §§ 2301-2306, 1201-1222, respectively).

[5]5 U.S.C. §§ 2302-2303. Under section 2303, the President is required to provide for the enforcement of whistleblower protections for FBI employees and applicants in a manner consistent with applicable provisions of sections 1214 and 1221 of title 5; the President delegated this enforcement authority to the Attorney General. Minimal legislative history exists explaining the separate statutory provision for the FBI. Comments made by Members of Congress at the time suggest a compromise was adopted given the sensitive nature of the agency but also in recognition of past improprieties and the need to ensure public confidence that there are channels within the FBI to raise whistleblower matters, among other things. See 124 CONG. REC. S14300 (daily ed. Aug. 24, 1978) (statement of Sen. Percy); 124 CONG. REC. H9359 (daily ed. Sept. 11, 1978) (statement of Rep. Derwinski); 124 CONG. REC. H9359-60 (daily ed. Sept. 11, 1978) (statement of Rep. Udall); 124 CONG. REC. H11822 (daily ed. Oct. 6, 1978) (statement of Rep. Schroeder).

[6]Whistleblower Protection For Federal Bureau of Investigation Employees, 63 Fed. Reg. 62,937 (Nov. 10, 1998). DOJ initially issued these regulations as an interim rule effective upon publication in the *Federal Register*; however, DOJ invited postpromulgation comments that were addressed in a final rule issued in 1999. Whistleblower Protection For Federal Bureau of Investigation Employees, 64 Fed. Reg. 58,782 (Nov. 1, 1999) (codified as amended at 28 C.F.R. pts. 0, 27).

These regulations require that FBI whistleblower retaliation complaints be directed to OIG or DOJ-OPR for investigation, and provide specific timeliness and reporting requirements for these offices. The regulations also establish roles for the Director of DOJ's Office of Attorney Recruitment and Management (OARM) and the Deputy Attorney General (DAG) in adjudicating these complaints.

DOJ Closed Majority of Complaints within a Year, Some Because Employees Did Not Report Wrongdoing to a Designated Official; Adjudicated Complaints Took up to 10 Years

In our recent report, we found that DOJ closed the majority of the 62 complaints we reviewed within 1 year, generally because the complaints did not meet DOJ's threshold regulatory requirements.[7] The most common reason these complaints did not meet DOJ's threshold regulatory requirements was that the complainants had made their disclosures to individuals or offices not designated in the regulations. Further, FBI whistleblowers may not be aware that they must report an allegation of wrongdoing to certain designated officials to qualify as a protected disclosure, in part because information DOJ has provided to its employees has not consistently explained to whom an employee must report protected disclosures. The 4 complaints we reviewed that met DOJ's threshold regulatory requirements and OARM ultimately adjudicated on the merits lasted from 2 to just over 10.6 years to resolve. In some cases, parties have waited a year or more for a DOJ decision without information on when they might receive the decision.

[7]A complaint that did not meet threshold regulatory requirements means a complaint where DOJ's decision to terminate the complaint was not based on whether there was a reprisal taken because of a disclosure, but on whether the allegations met threshold requirements. DOJ terminated 55 of the 62 FBI whistleblower retaliation complaints (89 percent) we reviewed and awarded corrective action for 3. (Complainants withdrew 4.) DOJ closed 44 of the 62 (71 percent) within 1 year, took up to 4 years to close 15 complaints, and took up to 10.6 years to close the remaining 3.

DOJ Closed the Majority of Complaints within a Year; Some Because the Employees Did Not Report Wrongdoing to a Designated Official

We found that DOJ closed 44 of the 62 complaints (71 percent) that we reviewed within 1 year, most often because the complaint did not meet DOJ's threshold regulatory requirements.[8] For example, DOJ regulations require that, in order to qualify as an employee making a protected disclosure, FBI employees must report the alleged wrongdoing to one of nine high-ranking officials or offices including the Attorney General, the Director of the FBI, and the highest-ranking official in each FBI field office.[9] In other words, if the employee does not make his or her initial disclosure of wrongdoing to one of these specific entities, the employee cannot later seek corrective action if the employee experiences retaliation. We found that in the 5-year period from 2009 to 2013, DOJ terminated at least 23 complaints in part because the complainant reported to someone not designated in the regulations. In at least 17 of these cases, we were able to determine that the disclosure was made to someone in the employee's chain of command or management, such as a supervisor.[10]

[8]Specifically, for 40 of these 44 cases (91 percent), DOJ found that the complaint did not meet threshold regulatory requirements.

[9]Under 5 U.S.C. § 2303(a), FBI employees may make protected disclosures to "the Attorney General (or an employee designated by the Attorney General for such purpose)." DOJ has designated nine entities as the appropriate officials to receive protected disclosures. These entities include DOJ-OPR, OIG, the FBI Office of Professional Responsibility, the FBI Inspection Division (FBI-INSD) Internal Investigations Section, the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, and the highest-ranking official in any FBI field office. 28 C.F.R. § 27.1(a)

[10]This constitutes 31 percent of all cases we reviewed where we could determine the basis for DOJ closing the complaint.

FBI Whistleblowers Do Not Have Recourse for Retaliation Based on Disclosures to Supervisors

Unlike employees of other executive branch agencies, FBI employees do not have a process to seek corrective action if they experience retaliation based on a disclosure of wrongdoing to their supervisors or others in their chain of command who are not designated officials.[11] This difference is due, in part, to DOJ's decisions about how to implement the statute governing FBI whistleblowers. When issuing its regulations in 1999, DOJ officials did not include supervisors in the list of entities designated to receive protected disclosures, stating that Congress intended DOJ to limit the universe of recipients of protected disclosures, in part because of the sensitive information to which FBI employees have access. In October 2012, the President issued Presidential Policy Directive 19, which established whistleblower protections for employees serving in the intelligence community, including those who experience retaliation for reporting wrongdoing to a supervisor.[12] The directive excluded the FBI from the scope of these protections, but required DOJ to report to the President on the efficacy of its FBI whistleblower retaliation regulations and describe any proposed revisions to these regulations to increase their effectiveness.

In response to this requirement, DOJ reviewed its regulations and in an April 2014 report recommended adding more senior officials in FBI field offices to the list of designated entities, but did not recommend adding all supervisors. DOJ cited a number of reasons for this, including concerns about striking the right balance between the benefits of an expanded list and the additional resources and time needed to handle a possible increase in complaints. By dismissing retaliation complaints based on a disclosure made to an employee's supervisor or someone in that person's chain of command, DOJ leaves some FBI whistleblowers—such as the 17 complainants we identified—without protection from retaliation. This DOJ policy could also permit retaliatory activity to go uninvestigated and create a chilling effect for future whistleblowers. As a result, in our 2015

[11]Under 5 U.S.C. § 2302, employees of executive branch agencies may generally make disclosures of information to supervisors, their agency inspector general, the U.S. Office of Special Counsel, the media, Members of Congress, and others, if the disclosure is not specifically prohibited by law and not required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs. Presidential Policy Directive 19 prohibits reprisals against employees serving in an intelligence community element for disclosures by the employee to a supervisor in the employee's direct chain of command, among others.

[12]The White House, Presidential Policy Directive 19/PPD-19 (Washington, D.C.: Oct. 10, 2012).

report, we concluded that Congress may wish to consider whether FBI whistleblowers should have a means to obtain corrective action if retaliated against for disclosing wrongdoing to supervisors, or others in their chain of command.

Guidance for FBI Employees Is Not Always Clear

We also found that FBI whistleblowers may not be aware that they must report an allegation of wrongdoing to certain designated officials to qualify as employees making a protected disclosure, in part because information DOJ has provided to its employees has not consistently explained this. For example, we reviewed FBI guidance stating that, in general, the FBI requires employees to report known or suspected failures to adhere to the law, rules, or regulations to any supervisor in the employees' chain of command, or others.[13] But this guidance does not clarify that such disclosures are protected—allowing the employee to seek corrective action if retaliation occurs—only if reported to certain designated individuals or offices.

We concluded that, without clear information on how to make a protected disclosure, FBI whistleblowers may not be aware that, depending on how they report their allegation, they may not be able to seek corrective action if they experience retaliation. As a result, we recommended that the Attorney General clarify the department's guidance and communications on this point. DOJ concurred with this recommendation.

[13]The FBI's October 15, 2011, *Domestic Investigations and Operations Guide* states: "In general, the FBI requires employees to report known or suspected failures to adhere to the law, rules or regulations by themselves or other employees, to any supervisor in the employees' chain of command; any Division Compliance Officer; any Office of the General Counsel Attorney; any FBI-INSD personnel; any FBI Office of Integrity and Compliance staff; or any person designated to receive disclosures pursuant to the FBI Whistleblower Protection Regulation (28 Code of Federal Regulations 27.1), including the Department of Justice Inspector General."

Adjudicated Complaints Took up to 10 Years to Resolve, and DOJ Did Not Provide Parties with Expected Time Frames for Its Decisions

The 4 complaints we reviewed in our 2015 report that met threshold regulatory requirements and that DOJ ultimately adjudicated on the merits, took up to 10.6 years to resolve, and DOJ did not provide parties with expected time frames for its decisions throughout these cases.[14] According to DOJ officials, case-specific factors, including competing staff priorities and case complexity, affected the length of these complaints. In 6 of 15 complaints we reviewed that progressed to the point of an OARM decision on whether the complaint met threshold regulatory requirements, parties at some point waited a year or more for a decision by either OARM or the DAG.[15] Officials with these offices told us they do not routinely provide parties with an estimate for returning decisions because time frames can be difficult to judge. However, other federal agencies that handle whistleblower retaliation cases—such as MSPB and the U.S. Department of Defense Office of Inspector General—provide complainants with an estimate for when their cases will conclude.

[14]When OARM receives the complaint, OARM first determines whether the complaint meets threshold regulatory requirements, before proceeding to review the merits of the complaint. For OARM, considering the merits of the complaint entails reviewing the supporting evidence (e.g., documents and testimony), as well as the arguments each party—the complainant and the FBI—submits, and then determining, based on all of the evidence, if the individual substantiated the claim of retaliation. If the complaint is substantiated and the FBI is unable to prove by clear and convincing evidence that it would have taken the same personnel action even if the complainant had not made the protected disclosure, OARM will order that the FBI take corrective action, such as providing the complainant back pay or reimbursement for attorney's fees. OARM adjudicated the merits of 4 of the 62 complaints we reviewed (6 percent), and these 4 cases lasted from 2 to just over 10.6 years, from the initial filing of the complaints with OIG or DOJ-OPR to the final OARM or DAG ruling. In 3 of these 4 cases, DOJ ultimately ruled in favor of the whistleblower. These 3 cases lasted from just over 8 to 10.6 years. In the fourth case, DOJ ruled in favor of the FBI, and this case lasted approximately 2 years.

[15]In 15 complaints we reviewed, OARM made decisions on whether the complaints met threshold regulatory requirements. If we exclude the 2 complaints where the complainant never filed a request for corrective action, parties waited from 4 to 475 days for OARM to issue these decisions. In the 4 cases where OARM made merit decisions, parties waited from 151 to 598 days for OARM to issue its decisions. The DAG took nearly a year or more to make half (3 of 6) of the appeals decisions in the cases we reviewed. The DAG's fastest appeal decision was rendered in 12 days and the longest in 499 days. We calculated these wait times from the day of the last complainant or FBI action on the complaint to the time DOJ provided the relevant decision.

In June 2012, DOJ stated a commitment to making every effort to improve the efficiency of the department's adjudication of these complaints.[16] We concluded that providing parties with estimated time frames for returning DOJ's decisions and providing timely updates when DOJ officials cannot meet estimated time frames would enhance accountability to the complainants and help ensure DOJ management's commitment to improve efficiency. As a result, we recommended that DOJ offices responsible for adjudicating complaints provide estimated time frames for returning decisions in these cases. DOJ concurred with this recommendation.

DOJ Has Taken Steps to Resolve Complaints More Quickly but Has Limited Plans to Assess Impact

We found that in the last 3 years, DOJ has taken some steps to improve timeliness in resolving whistleblower retaliation complaints, but has limited plans to assess the impact of these actions. Specifically, DOJ offices responsible for investigating and adjudicating complaints have taken steps such as developing a mediation program, hiring an additional staff person, developing procedures with stricter time frames, and taking steps to streamline their intake procedures. We concluded that as DOJ implements these changes, assessing the impact would help DOJ officials ensure that the changes are in fact shortening total case length without sacrificing quality, and identify any additional opportunities to improve efficiency. As a result, we recommended that the DOJ offices responsible for handling complaints jointly assess the impact of their ongoing efforts to improve timeliness throughout the full complaint process, and ensure such efforts are having their desired impact. DOJ and OIG concurred with this recommendation.

[16]In June 2012, DOJ stated in questions for the record for the Senate Committee on the Judiciary that "the Department . . . is committed to making every effort to improve the efficiency of the Department's adjudication of FBI whistleblower cases." Internal control standards reinforce the position that agencies need to have ways of ensuring such management directives are carried out. GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: Nov. 1, 1999).

Investigating Offices Have Not Consistently Complied with Regulatory Requirements,Such as Providing Status Updates and Obtaining Approvals for Extensions

We found that the two DOJ offices responsible for investigating whistleblower retaliation complaints—OIG and DOJ-OPR—have not consistently complied with certain regulatory requirements, such as providing complainants with status updates or obtaining complainants' approvals for extensions of time. For example, in 65 percent of the 57 complaints we reviewed where we could determine whether the investigating office met the requirement, the investigating office did not contact the complainant to acknowledge receipt of the complaint within 15 days of receiving it, as required. In addition, we found that neither investigating office was consistent in providing periodic status updates to complainants, as required, throughout the investigations. Additionally, for those cases that required extensions, over half did not contain documentation that the complainant had agreed to an extension, also as required.

In the last 2 years, OIG developed a database to better oversee investigators' compliance with regulatory requirements, but DOJ-OPR does not have a similar mechanism in place. Whistleblower advocates and attorneys we spoke with said that regular status updates are important to reassure complainants that the investigating office is continuing to make progress on their complaints. Further, these whistleblower advocates and attorneys reported that without such updates, complainants can become discouraged and develop a negative view of the process, and thus may be less likely to come forward to report wrongdoing. As a result, we recommended that DOJ-OPR develop an oversight mechanism to monitor compliance with regulatory requirements. DOJ concurred with this recommendation.

Chairman Grassley, Ranking Member Leahy, and Members of the Committee, this concludes my prepared statement. I look forward to responding to any questions that you or other members of the committee may have.

GAO Contacts and Staff Acknowledgments

For questions about this statement, please contact David C. Maurer, Director, at (202) 512-8777 or maurerd@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals making key contributions to this statement include Dawn Locke (Assistant Director), Claudia Becker (Analyst in Charge), Michele Fejfar, Susan Hsu, Erin McLaughlin, Alexis Olson, and Janet Temko-Blinder.

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Department of Justice

STATEMENT OF

KEVIN L. PERKINS
ASSOCIATE DEPUTY DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AT A HEARING ENTITLED

"WHISTLEBLOWER RETALIATION AT THE FBI:
IMPROVING PROTECTIONS AND OVERSIGHT"

PRESENTED
MARCH 4, 2015

Statement of
Kevin L. Perkins
Associate Deputy Director
Federal Bureau of Investigation
Before the Committee on the Judiciary
United States Senate
Entitled "Whistleblower Retaliation at the FBI:
Improving Protections and Oversight"
March 4, 2015

Good morning Chairman Grassley, Ranking Member Leahy and Members of the committee. Thank you for the opportunity to appear before you today to discuss the issue of whistleblower retaliation within the FBI.

The FBI recognizes the important role played by whistleblowers in our law enforcement efforts. We take very seriously our responsibilities with regard to FBI employees who may protect disclosures under the regulations, and we appreciate this Committee's longstanding interest in these important matters. As Director Comey has told this Committee, "[W]histleblowers are ... a critical element of a functioning democracy." Employees "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."

The FBI has taken considerable steps to assure that employees are aware of whistleblower protections and of the whistleblower process. The FBI along with the Department of Justice (DOJ) has worked and continues to work to improve the process and employee's education about the process.

The Process for Making a Claim

All FBI whistleblowers are protected by federal law from retribution. Title 5, U.S.C. Section 2303 provides that:

Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprise for disclosure of information by the employee...which the employee or applicant reasonably believes evidences:

> (1) a violation of any law, rule or regulation, or
> (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The process for making a protected disclosure under the law specifies the set of persons to whom a disclosure of wrongdoing must be made in order to qualify as a protected disclosure. A disclosure may qualify as protected if it is made to the DOJ

Office of Professional Responsibility (OPR), the DOJ Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the FBI Inspection Division (FBI–INSD) Internal Investigations Section (collectively, Receiving Offices), the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office.

Any FBI employee who believes he or she has suffered a reprisal for making a protected disclosure may report the reprisal in writing to DOJ OPR or OIG. Some are also referred by the FBI Inspection Division to the OIG. OPR and OIG will then confer to determine which office will conduct an investigation into the alleged reprisal. The office that eventually conducts the investigation is known as the "Conducting Office." The Conducting Office investigates the allegation "to the extent necessary to determine whether there are reasonable grounds to believe that a reprisal has been or will be taken" for a protected disclosure.

As part of its investigation, the Conducting Office obtains relevant documents from the FBI and from any other relevant source, including the complainant. These documents may include, for example, e-mails and personnel files. The Conducting Office interviews witnesses with relevant knowledge, typically including the complainant, the person(s) who allegedly retaliated against the complainant, and others in a position to have knowledge of the relevant facts and circumstances.

If the Conducting Office finds that there is no reasonable basis to believe that a reprisal occurred, it provides a draft report to the complainant with factual findings and conclusions justifying termination of the investigation, and allows the complainant to submit a written response. Upon termination, the Office must so inform the complainant in writing, and must provide the reasons for termination, a summary of relevant facts ascertained by the Office, and a response to any written response submitted by the complainant.

If the Conducting Office determines that there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure, it reports its conclusion, along with any findings and recommendations for corrective action, to the DOJ Office of Attorney Recruitment and Management (OARM).

Oversight and Review by Office of Attorney Recruitment and Management

In addition, any complainant may file a request for corrective action with OARM within 60 days of receipt of notification of termination of an investigation by the Conducting Office, or at any time beyond 120 days after filing a complaint with the Conducting Office if that Office has not notified the complainant that it will seek corrective action.

OARM's first step is to make a jurisdictional determination. To establish jurisdiction, a complainant must demonstrate exhaustion of Conducting Office remedies and allege in a non-frivolous manner that the complainant made a protected disclosure

that was a contributing factor in the FBI's decision to take or not take (or threaten to take or not take) a personnel action against the complainant.

If OARM's jurisdiction is established, the parties then engage in discovery. OARM typically affords the parties 75 days to complete discovery, but extensions are often granted upon the parties' joint request. After discovery and any hearing, OARM sets a schedule for briefing on the merits, which typically takes two to four months to complete. OARM can grant corrective relief unless the FBI proves by clear and convincing evidence that it would have taken the same personnel action against the complainant even if he or she had not made the protected disclosure. After any merits hearing and filing of the parties' respective merits (or post-hearing) briefs, OARM renders a final determination on the merits.

Within 30 days of a final determination or corrective action order by OARM, either party may request review by the Deputy Attorney General (DAG) which typically involves another round of briefing. The DAG may set aside or modify OARM's actions, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. The DAG has full discretion to review and modify corrective action ordered by OARM. However, if the DAG upholds a finding that there has been a reprisal, then the DAG must order appropriate corrective action.

Presidential Review and Improvements to the Process

In response to Presidential Policy Directive (PPD) 19, DOJ undertook a review of the disposition of FBI whistleblower reprisal cases filed with OIG, OPR, OARM, and the DAG from the beginning of 2005 through March 15, 2014.

This review was conducted by a working group that included the Office of the DAG, the FBI, OARM, OIG, OPR, and the Justice Management Division. In addition, the Department consulted with the Office of Special Counsel and FBI employees, as required by PPD-19, as well as with representatives of non-governmental organizations that support whistleblowers' rights and with private counsel for whistleblowers. The co-chairs of advisory committee representing all FBI employees conveyed two main points, based upon their own prior consultation with various constituents. First, they stated that OARM takes too long to process cases. Second, the co-chairs stated that a better job could be done of making FBI employees conscious of the whistleblower process and its parameters.

Based on this review, DOJ proposed a number of legal, policy and regulatory steps that the Department believes may be warranted. DOJ and the FBI have started implementing many recommendations. Other recommendations require further development, including, where applicable, public notice and comment procedures involved in the rulemaking process. Recommendations that are currently being implemented include:

- **Providing access to alternative dispute resolution**. DOJ created a voluntary mediation program for FBI whistleblower cases. The program utilizes the DOJ Mediator Corps Program, which was created in 2009 to expedite and make more efficient the resolution of workplace disputes. Mediation is now available at all stages in the process at the request of the complainant.

- **Expanding resources for OARM**. Many have expressed concerns about the length of time it takes to adjudicate FBI whistleblower cases. With a consistent average of approximately ten new cases a year, the number of active FBI whistleblower cases on OARM's docket at any one time is relatively small. However, the pendency of several large, complex cases among the more routine cases, along with associated administrative responsibilities, significantly slows overall case processing times. Large, complex cases can slow the adjudicative process due to the multitude of procedural questions that may arise, requests to extend discovery, and extensive factual records that must be reviewed and analyzed after discovery has closed. A number of cases have taken several years to resolve; the longest case took ten years from the filing of the complaint with OIG to the final decision by the DAG. To address this issue, DOJ determined that OARM's resources should be expanded. In November 2013, OARM hired a part-time attorney to supplement the work of its full-time staff attorney. Since then, OARM has improved its case processing time.

- **Awarding compensatory damage**. In light of PPD-19, DOJ will amend its regulations to provide that OARM may award compensatory damages, in addition to other available relief.

- **Expanding the list of persons to whom a protected disclosure can be made.** DOJ recommends a limited expansion of the set of persons to whom a "protected disclosure" may be made. DOJ recommends expanding the persons to who protected disclosures may be made to include—in addition to the highest-ranking FBI field office official—the second-highest ranking tier of field office officials. This expansion would enhance the ability of employees to make protected disclosures within their own office. Such a change would mean that, in 53 field offices, a disclosure to the Special Agent in Charge (the highest-ranking official) or to any Assistant Special Agent in Charge (the second-highest ranking tier of officials, typically 2-3 per office) would be protected, assuming the disclosure's content qualified for protection. In the remaining and largest three field offices – Los Angeles, New York City, and Washington, D.C. – a disclosure to the Assistant Director in Charge (the highest-ranking official) or to any Special Agent in Charge (the second-highest ranking tier of officials, typically 5-6 in these three offices) would be protected. DOJ will amend the regulations accordingly.

- **Improving training for FBI employees.** DOJ believes that it is essential that all FBI employees, as well as non-FBI employees involved in the DOJ's FBI whistleblower program, receive proper training on DOJ's regulations and the rights and responsibilities of all parties. The OIG Whistleblower Ombudsman, in

connection with the FBI and other affected offices, is currently reviewing DOJ's training efforts regarding whistleblowing activities. As a result of this process, DOJ will implement a reinforced training program to ensure that (1) relevant employees receive appropriate training on a regular basis, and (2) that all employees are fully apprised of their rights and responsibilities.

- **Reporting findings of wrongdoing to the appropriate authority.** The whistleblower advocates recommended that any final decision that includes a finding of unlawful reprisal be forwarded to OIG, or other appropriate law enforcement authority, for consideration of whether disciplinary action is warranted against the officials responsible for the reprisal. OARM has recently implemented a policy of sending referrals to the FBI Office of Professional Responsibility, with a copy to the FBI Director. DOJ is amending its regulations to formalize this practice.

- **Providing authority to sanction violators.** DOJ supports revising its regulations to allow OARM to sanction litigants who violate protective orders. OARM would issue a protective order if necessary to protect from harassment a witness or other individual who testifies before it. Because OARM lacks sanction authority, there is currently no recourse available against a party who does not comply with a protective (or other) order, except for possible referral to a bar association. DOJ therefore will revise OARM's procedures or to propose revising its regulations, as appropriate, to include a provision providing sanction authority.

- **Expediting the OARM process through the use of acknowledgement and show cause orders.** At MSPB, within three business days of receipt of an appeal, an administrative judge issues an order which acknowledges receipt of the appeal, and informs the parties of the MSPB's case processing procedures (e.g., pertaining to designating a representative, discovery, filing pleadings, the agency's response, settlement, etc.). In cases where there is an initial question about the MSPB's jurisdiction, the MSPB issues, along with the acknowledgment order, an order directing that the appellant show cause as to why the appeal should not be dismissed for lack of jurisdiction. The show cause order puts the parties on notice of the jurisdictional requirements and their respective burdens of proof. Although MSPB procedures do not apply to FBI whistleblowers, issuing similar orders in FBI whistleblower cases could increase the efficiency of case adjudication at the jurisdictional phase. Through the public notice and comment process the Department will propose modifying its procedures to more closely mirror the MSPB process.

- **Equalizing access to witnesses.** The whistleblower advocates who met with DOJ raised concerns about access to FBI witnesses. They noted that, in some cases, the FBI has been able to call former FBI management officials or employees as witnesses against the complainant, either through affidavits or testimony at a hearing. However, the complainant has been unable to compel the deposition of those witnesses because OARM lacks authority to compel attendance at a hearing

of, or the production of documentary evidence from, persons not currently employed by DOJ. DOJ is considering whether to amend its regulations to prohibit a party from admitting affidavits into evidence from persons who are unavailable for cross-examination at a hearing or deposition, unless an access arrangement has otherwise been made.

- **Publishing decisions.** The whistleblower advocates recommended that decisions entered by OARM and the DAG be made available to the public, with appropriate redactions to protect the identities of employees and claimants. They suggested that publication of opinions would help potential whistleblowers provide information in a manner that would be protected and would assist them in litigating their cases should they suffer reprisal. Traditionally, these opinions have not been published due to the presence of law enforcement sensitive and Privacy Act-protected materials. DOJ is exploring whether it is possible to publish suitably redacted opinions in a manner that would provide useful information.

- **Publishing annual reports.** The whistleblower advocates recommended that DOJ publish the annual reports that the Attorney General submits to the President pursuant to a 1997 Presidential memorandum delegating to the Attorney General responsibilities concerning FBI employees under the Civil Service Reform Act of 1978, as amended by the Whistleblower Protection Act of 1989. The Department has previously disclosed the underlying data contained in the annual FBI whistleblower reports in response to congressional requests, and will publicly release this data annually in the future.

GAO Report on Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints

We are also aware of the GAO's recent report on additional actions needed to improve DOJ's handling of FBI retaliation complaints. The FBI fully cooperated with the GAO's review and supports its recommendations, which were focused on DOJ's handling of claims of reprisal for making a protected disclosure. As noted above, DOJ has taken steps to improve their process for handling of retaliation claims.

Chairman Grassley, Ranking Member Leahy and Committee Members, I thank you for this opportunity to testify concerning whistleblower retaliation within the FBI. We take very seriously our responsibilities with regard to FBI employees who make protected disclosures under the regulations. Furthermore, we appreciate your interest in these matters. The FBI will not tolerate reprisals or intimidation by any FBI employee against those who make protected disclosures, nor tolerate attempts to prevent employees from making such disclosures. I am happy to answer any questions you might have.

Statement of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee
Hearing on "Whistleblower Retaliation at the FBI: Improving Protections and Oversight"
March 4, 2015

Today, the Committee holds an important hearing to examine how the Federal Bureau of Investigation handles whistleblower disclosures. Senator Grassley and I have worked together on these issues for many years, and I look forward to continuing that work.

Government whistleblowers serve an essential role in providing accountability. It is important that *all* government employees are provided with strong and effective avenues to come forward with evidence of government waste, fraud and abuse. To ensure that whistleblowers will come forward when they discover wrongdoing, they must be protected from retaliation.

One of our witnesses today – Michael German – knows retaliation far too well. More than a decade ago, he was forced to end his distinguished career at the FBI by coming to Congress and exposing serious deficiencies in the FBI's handling of counterterrorism investigations. He chose to do this after making a protected whistleblower disclosure at the FBI that went nowhere. Rather than acting on the genuine problems he identified at the Bureau – the very same kind of insularity and mismanagement identified by the 9/11 Commission as a major failing – he was marginalized and mistreated. The effective counterterrorism work done by Mr. German that won criminal convictions against terrorists was cast aside simply because he dared to speak out.

Unfortunately, two recent government reports – one, by the Department of Justice, and another, by the Government Accountability Office -- highlight the obstacles that remain for FBI employees to appropriately blow the whistle and seek protection from retaliation.

In light of these reports, I want to thank both panels of witnesses for being here today to testify about these significant issues. I look forward to hearing their ideas to strengthen whistleblower protections and to ensure that corrective actions are available to the brave men and women who put their livelihoods at risk by exposing government wrongdoing.

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Questions for the Record from Senator Charles E. Grassley
for Michael German
U.S. Senate Committee on the Judiciary
Hearing on "Whistleblower Retaliation at the FBI: Improving Protections and Oversight"
Submitted on March 10, 2015

Justice Department Sanctions Proposal and Disclosures to Congress and the U.S. Department of Justice Office of Inspector General (OIG)

The April 2014 *Department of Justice Report on Regulations Protecting FBI Whistleblowers*[1] recommended that the Department's Office of Attorney Recruitment and Management (OARM), which adjudicates FBI whistleblower complaints, have the power to sanction litigants for violating protective orders. Those protective orders prohibit whistleblowers from speaking about their cases. There are no exceptions.

Does the sanctions proposal pose any threat to FBI whistleblowers? Should there be exceptions to the sanctions authority, such as for disclosures to Congress or the OIG?

[1] Department of Justice Report on Regulations Protecting FBI Whistleblowers (Apr. 2014).

Questions for the Record from Senator Charles E. Grassley
for Inspector General Michael Horowitz
U.S. Senate Committee on the Judiciary
Hearing on "Whistleblower Retaliation at the FBI: Improving Protections and Oversight"
Submitted on March 10, 2015

1. **FBI Cooperation in Whistleblower Investigations**

On February 3, 2015, as required by Section 218 of the 2015 Department of Justice Appropriations Act,[1] your office informed appropriations committee leadership in the House and Senate that the FBI "has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act) to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records."[2] According to that letter, the OIG requested those records in connection with its investigations of two FBI whistleblower complaints.

The letter states that the FBI failed to meet deadlines to produce a portion of these records for the "primary reason" that the FBI "desire[d] to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access."[3] Further, the letter states that the FBI "informed the OIG that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG."[4]

However, as the letter correctly states, Section 218 plainly contemplates that the OIG will have access "to *all* records, documents, and other materials," subject to the sole limitation of Section 6(a) of the IG Act.[5] Section 6(a) does not limit the OIG's access to the categories of records the FBI has identified.

Since February 3, OIG also has issued three additional Section 218 notices regarding the FBI's failure to produce documents in response to the OIG's requests.

Can you please explain how these delays affect your inquiries and describe the problems caused when FBI lawyers conduct their own internal document review before responding to your requests?

2. **FBI Whistleblower Investigations**

According to the Justice Department report examining the FBI whistleblower regulations,[6] the Office of Professional Responsibility and the OIG will frequently "take turns" investigating FBI

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[1] Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014).
[2] Letter from Michael Horowitz, Inspector General, to Rep. Harold Rogers, Rep. Nita Lowey, Sen. Thad Cochran, and Sen. Barbara Mikulski (Feb. 3, 2015).
[3] *Id.* at 2.
[4] *Id.*
[5] *Id.* at 1-2 (emphasis added) (quoting Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014)).
[6] Department of Justice Report on Regulations Protecting FBI Whistleblowers (Apr. 2014), at 5.

whistleblower complaints. The U.S. Government Accountability Office (GAO) report on the Department's handling of FBI whistleblower cases makes clear that the two offices differ in how they handle these cases.[7]

Wouldn't cases be handled more consistently if complaints were reviewed by one independent office? Why or why not?

3. Substantiated FBI Whistleblower Retaliation

During the March 4 hearing, I asked you how often the OIG has substantiated an FBI whistleblower's claim of retaliation, only to see that finding languish in internal appeals because the Department disagreed. You stated that you believed there were six such cases, but indicated you would provide confirmation in written answers after the hearing. Please provide the number of cases, whether they address FBI whistleblower complaints or complaints arising from another Department component, the duration of each stage of the complaint process (your investigation, and, to the extent available, OARM adjudication and appeals), and the findings at each stage of the complaint process (your office's findings, and, to the extent available, OARM findings and the ultimate outcome of the case).

[7] U.S. Government Accountability Office, Report to the Chairman, Committee on the Judiciary, U.S. Senate, Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints (Jan. 2015).

Questions for the Record from Senator Charles E. Grassley
for Stephen Kohn
U.S. Senate Committee on the Judiciary
Hearing on "Whistleblower Retaliation at the FBI: Improving Protections and Oversight"
Submitted on March 10, 2015

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Questions for the Record from Senator Charles E. Grassley
for Associate Deputy Director Kevin Perkins
U.S. Senate Committee on the Judiciary
Hearing on "Whistleblower Retaliation at the FBI: Improving Protections and Oversight"
Submitted on March 10, 2015

1. Department of Justice and Government Accountability Office Recommendations

a. Designated Officials

In its April 2014 report examining the FBI whistleblower regulations, the Justice Department recommended expanding whistleblower protections to disclosures made to the second-in-command of an FBI field office.[1] Despite the urgings of employees, whistleblower advocates, and even the Office of Special Counsel, however, the Department did not recommend expanding protections to disclosures made to direct supervisors or other management within an FBI employee's chain of command.

As the Department notes, "[The Office of Special Counsel (OSC)] believes that to deny protection unless the disclosure is made to the high-ranked supervisors in the office would undermine a central purpose of whistleblower protection laws."[2] The U.S. Government Accountability Office (GAO) report examining the Department's handling of FBI whistleblower cases similarly stresses that employees who report to a "nondesignated entity," whether they intend to officially blow the whistle or not, leaves those employees with "no recourse" against retaliation.[3] GAO explains that it is common for whistleblowers in the FBI to report wrongdoing to their immediate supervisors, and some report concerns without realizing or expecting to make a "whistleblower disclosure."[4] Moreover, internal FBI policy *encourages* reporting wrongdoing within the chain of command.[5] The policy "specifically prohibits retaliation against employees who report compliance risks to any supervisor in the employees' chain of command, as well as additional specified officials, but *does not offer any means of pursuing corrective action if an employee experiences retaliation for such a disclosure.*"[6]

It is not surprising, then, that during the course of its review the Department examined its handling of 89 FBI whistleblower cases, and determined that 69 of them were deemed

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[1] Department of Justice Report on Regulations Protecting FBI Whistleblowers (Apr. 2014), at 12-13 (The current regulations protect disclosures made to the first-in-command of an FBI field office) [Hereinafter "DOJ Report"].
[2] U.S. Government Accountability Office, Report to the Chairman, Committee on the Judiciary, U.S. Senate, Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints (Jan. 2015), at 1 [Hereinafter "GAO Report"].
[3] *Id.* at 18.
[4] *Id.* at 19; Notably, the impulse to report wrongdoing to a direct or immediate superior is common in the private sector as well as in the government. *See* Ethics Resource Center, Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey, at 11 (2012) ("In 2011, 56 percent of first reports were made to the employee's direct supervisor."); *available at* http://www.ethics.org/files/u5/reportingFinal_0.pdf.
[5] GAO Report at 19 n. 41 (citing Policy Directive 0032D, Non-Retaliation for Reporting Compliance Risks (Feb. 11, 2008) and Policy Directive 0727D Update (Sept. 23, 2014)).
[6] DOJ Report at 12-13.

"non-cognizable." A "significant portion" of those involved disclosures that were "not made to the proper individual or officer under 28 C.F.R. § 27.1(a)."[7]

Why shouldn't the law or regulations protect disclosures made to direct supervisors and others within an FBI employee's chain of command?

b. Disclosures to Congress

During the March 4 hearing, I asked the witnesses on the second panel whether the FBI regulations should be amended to clarify that FBI whistleblower disclosures to Congress are protected and you and the other second panel witnesses expressed approval. Will the Department include this recommendation in its proposed regulatory amendments? Why or why not?

c. Training

You state in your testimony that the Department is working with the Office of the Inspector General to improve training so that FBI employees better understand their rights and responsibilities with respect to potential whistleblowing.

1. Will you commit to providing this Committee with complete information regarding any new training programs and materials developed for FBI employees on this subject, including the substance, format, and recipients of such training?

2. During the March 4 hearing, Inspector General Horowitz noted that mid-level managers, in addition to senior management, are important in delivering a message throughout the organization that whistleblowers are valued and protected. What training or guidance does the FBI provide to its mid-level managers concerning their responsibilities in protecting whistleblowers and their role in communicating the value of whistleblowers to their staff?

2. <u>FBI Cooperation in Whistleblower Investigations</u>

On February 3, 2015, as required by Section 218 of the 2015 Department of Justice Appropriations Act,[8] Inspector General Michael Horowitz informed appropriations committee leadership in the House and Senate that the FBI "has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act) to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records."[9] According to that letter, the OIG requested those records in connection with its investigations of two FBI whistleblower complaints.

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[7] *Id.* at 7.
[8] Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014).
[9] Letter from Michael Horowitz, Inspector General, to Rep. Harold Rogers, Rep. Nita Lowey, Sen. Thad Cochran, and Sen. Barbara Mikulski (Feb. 3, 2015).

The letter states that the FBI failed to meet deadlines to produce a portion of these records for the "primary reason" that the FBI "desire[d] to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access."[10] Further, the letter states that the FBI "informed the OIG that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG."[11]

However, as the letter correctly states, Section 218 plainly contemplates that the OIG will have access "to *all* records, documents, and other materials," subject to the sole limitation of Section 6(a) of the IG Act.[12] Section 6(a) does not limit the OIG's access to the categories of records the FBI has identified.

Since February 3, OIG also has issued three additional Section 218 notices regarding the FBI's failure to produce documents in response to the OIG's requests.

How is it appropriate for the FBI to decide which documents it will produce to the independent investigator looking into whether the FBI retaliated against a whistleblower?

I sent a letter to the FBI two weeks ago asking how much in appropriated money was used to conduct these reviews and delay the access to documents. Will you commit to ensuring that the FBI provides a timely and thorough reply?

3. <u>Loss of Effectiveness Orders</u>

Whistleblowers claim that the FBI uses Loss of Effectiveness orders (LOEs) as a tool for retaliation. LOEs can reportedly result in immediate demotion or transfer, without giving recipients notice or an opportunity to appeal. According to the FBI, an LOE order does not result in a loss of pay or a demotion in rank. Rather, "the aim is to improve the employee's performance to the fullest extent possible." However, matters relating to employee *performance* or *efficiency* should be handled through Performance Improvement Plans (PIPs), which provide employees notice of any perceived performance deficiency and an opportunity to improve performance in that area. On the other hand, investigations of employee *misconduct* should be forwarded to the Office of Professional Responsibility (OPR) for adjudication – which affords employees with the due process protections of notice and ability to appeal. Given these existing tools, it's unclear whether LOEs serve *any* legitimate purpose at the FBI.

I sent a letter to FBI in September 2014 and letters to GAO and the Inspector General in February 2015, asking for information on the FBI's use of LOEs.

a. Two days before the hearing, the FBI notified me that it has instituted a new policy that at least provides notice to employees and an opportunity to provide a written response to that claim within 7 days. However, the policy has a loophole. It also says that the FBI

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[10] *Id.* at 2.
[11] *Id.*
[12] *Id.* at 1-2 (emphasis added) (quoting Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014)).

Director or Deputy Director "may order the reassignment of any employee" "in whom he no longer reposes trust or confidence" "without adhering to the process and procedures set forth" in the new policy.

Under what circumstances could the FBI Director or Deputy Director reassign an employee "without adhering to the process and procedures set forth" in the new policy? Can this reassignment authority be delegated to lower level officials rather than the Director or Deputy Director? Will it be delegated? Why or why not?

b. The new suggested LOE policy defines an "adverse action" as "a personnel action that results in a loss of grade or pay (including suspensions without pay and furloughs of less than 30 days) or removal from employment." The policy does not deem an LOE transfer as an adverse action because it "is not initiated to and does not reduce in grade, suspend, furlough, or remove an employee."

Is "adverse action" defined anywhere else in FBI internal guidance or policy? If so, how is that term defined? Does the FBI consider an involuntary removal from an employee's position a "removal"? Please explain why an involuntary transfer—in effect a removal from an employee's position—should not be deemed an "adverse action."

c. The new policy states that an LOE transfer may be recommended by INSD, an ADIC, SAC, AD, or EAD. Why shouldn't disclosures to all of these individuals be protected, if those individuals could retaliate against whistleblowers for disclosing wrongdoing?

d. Are LOEs ever used as an allegation or finding of employee misconduct? If so, shouldn't such cases be forwarded to the Office of Professional Responsibility for adjudication?

e. Why are investigators from the Inspection Division involved in the LOE process?

f. As of March 1, 2015, the FBI claims that it had issued LOEs against a total of 23 FBI employees. Will you provide all 23 of these individuals with a written justification for their LOEs and an opportunity to provide a written response?

g. Two weeks ago, I asked the Inspector General to examine the FBI's use of these orders in depth. Will you commit to cooperating fully with the Inspector General in this review, and to providing him with timely access to all requested records?

4. <u>Accountability for FBI Whistleblower Retaliation</u>

During the March 4 hearing, I asked you whether the FBI defined whistleblower retaliation as misconduct, and whether the FBI had disciplined anyone for whistleblower retaliation. As indicated in our exchange at the hearing, please provide the written FBI policy that defines whistleblower retaliation as misconduct, the recommended punishment for whistleblower retaliation, and a description of each time the FBI imposed discipline for retaliating against a whistleblower. Will you commit to providing these responses by a date certain?

QUESTIONS SUBMITTED TO HON. MICHAEL E. HOROWITZ BY SENATOR LEAHY

QUESTIONS FOR THE RECORD – Ranking Member Leahy
3/4/15 FBI Whistleblower Hearing

Questions for DOJ IG Horowitz

1. In your written testimony, and in recent appearances before several congressional committees, you described significant impediments the IG's office faces in obtaining timely and complete access to documents and materials needed for audits, reviews, and investigations.

    a. Are there any categories of information that the FBI is permitted to withhold from OIG? If so, what types of records?
    b. What are the implications of allowing the FBI to withhold certain records from your office?
    c. What steps does the Inspector General's office take to ensure information it receives from the FBI is properly controlled to prevent inappropriate disclosures?

2. On February 10, 2015, your office transmitted a classified report on the FBI's use of Section 215 authority under FISA entitled, *A Review of the FBI's Use of Section 215 Orders: Assessment of Progress in Implementing Recommendations and Examination of Use in 2007 through 2009*. As you mentioned in your letter accompanying the report, despite the fact that OIG submitted its draft report to the agency responsible for reviewing certain classification markings in June 2014, the classified report contains redacted information. That agency has thus far failed to review significant portions of the report and provide a formal response. With Section 215 set to expire on June 1, 2015, I appreciate the willingness of OIG to transmit the partial report to Congress instead of delaying its release indefinitely.

    However, this unnecessary delay has prevented Congress from reviewing the full report and prevented the release of a public version, inhibiting accountability and oversight. With this provision of the USA PATRIOT Act set to expire in a few months, it is critical that Congress and the American people have the full results of this important review.

    a. Please provide an update on the status of the declassification review by the agency responsible for reviewing the redacted portions of this report.
    b. Please provide a fulsome description of the reasons that the agency has provided OIG for failing to review this report.
    c. Please provide the name of the agency responsible for reviewing the classification markings in this report.

3. In addition to the report on Section 215, your office is also conducting a review of the FBI's use of the pen register and trap-and-trace authority under FISA.

    a. Has your office completed this report?
    b. When can Congress expect to receive a final version of this report?

c. Has the OIG faced similar obstacles in the declassification review of the pen register report?

Questions for the Record from Senator Charles E. Grassley
for Michael German
U.S. Senate Committee on the Judiciary
Hearing on "Whistleblower Retaliation at the FBI: Improving Protections and Oversight"
Submitted on March 10, 2015

Justice Department Sanctions Proposal and Disclosures to Congress and the U.S. Department of Justice Office of Inspector General (OIG)

The April 2014 *Department of Justice Report on Regulations Protecting FBI Whistleblowers*[1] recommended that the Department's Office of Attorney Recruitment and Management (OARM), which adjudicates FBI whistleblower complaints, have the power to sanction litigants for violating protective orders. Those protective orders prohibit whistleblowers from speaking about their cases. There are no exceptions.

Does the sanctions proposal pose any threat to FBI whistleblowers? Should there be exceptions to the sanctions authority, such as for disclosures to Congress or the OIG?

Response of Michael German, Fellow, Liberty and National Security program, Brennan Center for Justice at New York University School of Law:

Yes, the Justice Department proposal to give OARM the power to sanction litigants is dangerous to potential FBI whistleblowers, and Congress should prohibit it. Attempting to craft the necessary exceptions to the sanction authority to allow for disclosures to Congress, the OIG, or other appropriate authorities may prove difficult to enforce, given the lack of independent controls over OARM.

OARM has neither the institutional independence nor proper accountability measures necessary to be trusted with an additional authority to sanction litigants. Indeed, OARM has done far too little with its current authorities to ensure FBI whistleblowers are protected from retaliation as Congress intended when it passed 5 U.S.C. §2303(c). The Government Accountability Office report regarding the Justice Department's handling of FBI whistleblower complaints revealed OARM found in favor of FBI whistleblowers in only 3 of the 62 whistleblower retaliation complaints the Justice Department closed from 2009 through 2013.[2] Additionally, OARM took 8 to 10 years to adjudicate these three cases, leaving these FBI whistleblowers to their fate for far too long for OARM to be considered a fair or effective adjudicator of retaliation claims.

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[1] Department of Justice Report on Regulations Protecting FBI Whistleblowers (Apr. 2014).
[2] 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], p. 22, *available at* http://www.gao.gov/products/GAO-15-112

Over many years OARM has dismissed the majority of cases coming before it due to procedural errors by the whistleblower, such as reporting to the wrong official. Part of the problem is the Justice Department regulation that strictly limits the individuals and offices to which a protected disclosure may be made, which fails to protect the most common reports to direct supervisors through the chain-of-command. Further, the GAO found that the training and instruction FBI employees receive regarding proper reporting procedures are often misleading.[3] Despite overseeing a system that tosses out the vast majority of retaliation complaints due to these arcane and arbitrary reporting rules, OARM has done little (beyond setting up a website which only someone familiar with OARM's obscure role in FBI whistleblower complaints would seek out) to ensure FBI employees receive the appropriate information to report official misconduct in a manner in which they will be protected under the current regulation. Clearly this is not enough.

Tellingly, OARM officials participated in the Justice Department review that failed to recommend the regulations be amended to extend protections to chain-of-command reports to direct supervisors, even though evidence collected in a 2009 Inspector General survey of FBI employees suggests this is the most common form of reporting.[4] Rather than seeing its role as fulfilling Congress's intent to protect FBI whistleblowers from official retaliation, the Justice Department, including OARM, appears content to maintain a system that serves more as a deterrent to FBI whistleblowers than a shield of protection. Giving OARM the additional authority to sanction the whistleblower litigants will only create an additional opportunity to unfairly punish FBI whistleblowers.

Indeed, the proposed sanctions authority would likely impact whistleblowers and their advocates far more than FBI or Justice Department officials appearing before OARM, as these officials would have routine access to the investigative files outside of the OARM process, and therefore where not subject to OARM protective orders or sanctions. The proposed authority appears to be designed as a further means to muzzle whistleblowers rather than protect them. If Congress does allow the Justice Department to give OARM sanctions authority, it must preserve FBI employees right to provide information to members of Congress, the OIG, and other appropriate authorities, and an effective, independent means to enforce such exemptions. Today, there is no independent check on OARM that could provide the appropriate due process to sanctioned litigants, including the whistleblowers themselves, who OARM might punish under the proposed sanctions authority.

Finally, there is no compelling reason to add this new authority for OARM that would justify the additional risks to whistleblowers. The Justice Department already has ample authority to punish FBI employees or their lawyers who improperly release sensitive law enforcement or privacy-protected information. The review does not identify any prior circumstances in which OARM

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[3] GAO Report, p. 20-23.

[4] .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. 118-120 (May 2009), *available at* http://www.justice.gov/oig/reports/FBI/e0902/final.pdf.

protective orders failed to protect such information and the proposed sanctions authority would have provided the only means to sanction the litigants.

There are already too many disincentives for FBI employees to report internal misconduct. Giving the Justice Department additional opportunity for retaliatory action against whistleblowers won't help, and could lead to further abuse. OARM has not served as an effective protector FBI whistleblowers, and should not be given additional authority to sanction litigants.

Questions for the Record from Senator Charles E. Grassley
for Inspector General Michael Horowitz
U.S. Senate Committee on the Judiciary
Hearing on "Whistleblower Retaliation at the FBI: Improving Protections and Oversight"
Submitted on March 10, 2015

1. **FBI Cooperation in Whistleblower Investigations**

On February 3, 2015, as required by Section 218 of the 2015 Department of Justice Appropriations Act, your office informed appropriations committee leadership in the House and Senate that the FBI "has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act) to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records." According to that letter, the OIG requested those records in connection with its investigations of two FBI whistleblower complaints.

The letter states that the FBI failed to meet deadlines to produce a portion of these records for the "primary reason" that the FBI "desire[d] to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access." Further, the letter states that the FBI "informed the OIG that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG."

However, as the letter correctly states, Section 218 plainly contemplates that the OIG will have access "to *all* records, documents, and other materials," subject to the sole limitation of Section 6(a) of the IG Act. Section 6(a) does not limit the OIG's access to the categories of records the FBI has identified.

Since February 3, OIG also has issued three additional Section 218 notices regarding the FBI's failure to produce documents in response to the OIG's requests.

Can you please explain how these delays affect your inquiries and describe the problems caused when FBI lawyers conduct their own internal document review before responding to your requests?

Response: As you reference above, on February 3, 2015, the OIG sent a letter to report to Congress the FBI's failure to provide the OIG with timely access to certain records regarding two investigations being conducted by the OIG under the Department's Whistleblower Protection Regulations for FBI Employees, 28 C.F.R. pt. 27. The FBI has taken the position that its Office of General Counsel must conduct a pre-production review of documents responsive to the OIG's requests, because they have questioned the OIG's legal authority to have access to certain records. As a result, the Department has imposed a process whereby the Attorney General or the Deputy Attorney General must grant permission to the DOJ OIG to access such records if they conclude that specific reviews will assist them in the performance of their duties, and they have done so in each such review so far where the issue has arisen. However, no such permission is necessary under Section 6(a) of the Inspector General Act. Moreover, requiring

an OIG to obtain permission from agency leadership in order to review agency documents seriously impairs Inspector General independence by subjecting our ability to review documents in the course of our oversight work to the approval of Department leadership.

The FBI's current process of reviewing documents prior to production in whistleblower matters raises three main concerns. First, having the FBI conduct a pre-production review of documents that the OIG has requested in order to decide what records it should provide to the OIG regarding reprisal claims made against FBI supervisors creates, at a minimum, a significant appearance of a conflict of interest. This is particularly the case in light of the FBI OGC's direct involvement in the document review, given that in any subsequent adjudication of the whistleblower retaliation complaint before OARM, the very same FBI OGC will be responsible for defending the FBI and its managers against that claim of reprisal.

Second, they have resulted in a failure to timely produce documents to the OIG, thereby seriously impeding our reviews and delaying or preventing our ability to detect waste, fraud, abuse, misconduct, or other mismanagement. Most recently, two FBI whistleblower retaliation investigations that are currently underway in the OIG have been significantly delayed. More than six months after our document requests, the FBI still has not produced the attachments to over one hundred e-mails. A major factor in the delays is the FBI's practice of reviewing e-mails requested by the OIG to determine whether they contain any information that the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information.

Third, these pre-production reviews result in a substantial waste of FBI and OIG resources, and the significant delays erode the morale of the dedicated professionals at the OIG. These consequences are particularly acute in reviews and investigations with statutory or Congressionally-mandated deadlines, such as whistleblower cases. The FBI OGC's practice of delaying document productions to complete these pre-production reviews threatens to compromise the ability of the OIG to complete its investigations within a timely fashion consistent with the FBI Whistleblower Retaliation Regulations.

In May 2014, the Department's leadership asked the Office of Legal Counsel (OLC) to issue an opinion addressing the legal objections raised by the FBI. However, nearly one year later, we are still waiting for that opinion even though, in our view, this matter is straightforward and could have been resolved by the Department's leadership without even requesting an opinion from OLC. I cannot emphasize enough how important it is that OLC issue its opinion promptly because the existing process at the Department, which as described above essentially assumes the correctness of the FBI's legal position, undermines our independence and impairs the timeliness of our reviews by requiring us to seek permission from the Department's leadership in order to access certain records. The status quo cannot continue indefinitely.

2. FBI Whistleblower Investigations

According to the Justice Department report examining the FBI whistleblower regulations, the Office of Professional Responsibility and the OIG will frequently "take turns" investigating FBI whistleblower complaints. The U.S. Government Accountability Office (GAO) report on the Department's handling of FBI whistleblower cases makes clear that the two offices differ in how they handle these cases.

Wouldn't cases be handled more consistently if complaints were reviewed by one independent office? Why or why not?

Response: As you reference above, pursuant to the Department's FBI Whistleblower Regulations, either the OIG or the Department of Justice's Office of Professional Responsibility (DOJ OPR) conducts an investigation of allegations of illegal reprisals against FBI employees. Both offices are bound by the same legal standards outlined in the regulations. The GAO report indicated that the OIG and DOJ OPR had differing records of success in complying with some of the time requirements of the FBI whistleblower regulations, and we agree that both offices should meet the requirement of the regulations.

We also continue to believe that the OIG should have authority to investigate all allegations of misconduct by Department employees, including those by DOJ attorneys acting in their capacity as lawyers. Currently, however, the OIG does not have that authority as to DOJ attorneys; pursuant to the Inspector General Act, this role is exclusively reserved for the Department's own OPR. The OIG has long questioned this special carve-out exception since OPR is managed as a DOJ component, and has no institutional independence. Providing the OIG with the authority to exercise jurisdiction in attorney misconduct cases would also unify the independent review of whistleblower cases in the OIG, which we agree would result in a more consistent handling of these whistleblower retaliation cases.

3. **Substantiated FBI Whistleblower Retaliation**

During the March 4 hearing, I asked you how often the OIG has substantiated an FBI whistleblower's claim of retaliation, only to see that finding languish in internal appeals because the Department disagreed. You stated that you believed there were six such cases, but indicated you would provide confirmation in written answers after the hearing. Please provide the number of cases, whether they address FBI whistleblower complaints or complaints arising from another Department component, the duration of each stage of the complaint process (your investigation, and, to the extent available, OARM adjudication and appeals), and the findings at each stage of the complaint process (your office's findings, and, to the extent available, OARM findings and the ultimate outcome of the case).

Response: Under the FBI whistleblower regulations, the Conducting Office (the OIG or DOJ OPR) makes a determination of whether there are "reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure." 28 C.F.R. § 27.3(f). The next step under the regulations is for the Conducting Office to report its conclusion to the Director of the Office of Attorney Recruitment and Management (OARM) for formal adjudication of the allegations, a process which typically involves fact discovery and in some cases a hearing.

The OIG has compiled data on FBI Whistleblower Retaliation investigations that it has conducted since 2005. During that period, the OIG has sent a total of 6 cases to OARM after making a finding of "reasonable grounds." One of the cases was referred for OARM's information only because the FBI took corrective action on its own initiative after the OIG report. It was never adjudicated. One case settled during the OARM phase. OARM found retaliation in two cases. Two cases remain pending in OARM at this time. The duration of the OIG phase of these investigations are shown in the table below. The OIG does not currently have information about the duration of adjudication or appeal phases of these cases; it would be appropriate to obtain such information from the Department itself.

Case No.	Duration of OIG Investigation	Result after adjudication and appeal
1	616 days	OARM found retaliation.
2	469 days	OARM found retaliation.
3	70 days	FBI took immediate corrective action; no OARM adjudication required.
4	352 days	Adjudication pending in OARM.
5	478 days	Adjudication pending in OARM.
6	390 days	Settled without adjudication.

QUESTIONS FOR THE RECORD – Ranking Member Leahy
3/4/15 FBI Whistleblower Hearing

Questions for DOJ IG Horowitz

1. In your written testimony, and in recent appearances before several congressional committees, you described significant impediments the IG's office faces in obtaining timely and complete access to documents and materials needed for audits, reviews, and investigations.

    a. Are there any categories of information that the FBI is permitted to withhold from OIG? If so, what types of records?

    Response: Pursuant to the plain language of the Inspector General Act, the OIG does not believe there are any categories of information that the FBI is permitted to withhold from the OIG. Section 6(a) of the Inspector General Act authorizes the Inspector General to have access to "all records" and other materials available to the Department related to programs and operations for which the Inspector General has responsibilities under the Act. Prior to 2010, neither the Department nor the FBI raised legal objections to the OIG's ability to obtain records that the OIG requested for its oversight work. As a result, the OIG obtained – including from the FBI – the exact same categories of records that the FBI is now claiming it does not have legal authority to provide to the OIG. Indeed, over the course of the OIG's 27 year history, we have been provided access to some of the most sensitive information available to the Department, including information that allowed us to conduct reviews related to the Robert Hanssen matter, the Aldrich Ames matter, the September 11 attacks, the post-September 11 surveillance program initiated by President Bush, and the FBI's use of its authorities under the Patriot Act and the FISA Amendments Act.

    An Inspector General must have timely and complete access to documents and materials needed for its audits, reviews, and investigations. Access to this information is crucial for the OIG to make the most informed analysis of available data and develop the most useful recommendations.

    b. What are the implications of allowing the FBI to withhold certain records from your office?

    Response: Allowing the FBI to withhold certain records from the OIG imperils our independence, and impedes our ability to provide effective and independent oversight that saves taxpayers money, ensure national security programs are being conducted consistent with civil rights and civil liberties, and improve the operations of the federal government. The process by which the Department reviews and eventually grants the OIG access to documents imposes unnecessary delays and impinges on our independence by requiring permission from agency leadership to conduct our oversight work. These delays impede our work, delay our ability to discover the significant issues we ultimately identify, waste

Department and OIG resources during the pendency of the dispute, and affect our confidence in the completeness of our review. In addition, this process significantly erodes the morale of the dedicated professionals of our OIG staff.

This is not a hypothetical concern. Rather, we have faced repeated instances over the past four years in which our timely access to records has been impeded, including on very significant matters such as the FBI's use of National Security Letters, the Boston Marathon Bombing, the Department's use of the material witness statute, the FBI's use of National Security Letters, and ATF's Operation Fast and Furious. In addition, as we noted in our recent report on Sexual Misconduct by the Department's law enforcement components, not only was our access to documents significantly delayed, but we determined that when we finally did get production of materials from the FBI and DEA, we did not receive all of the records we requested.

The Congress recognized the significance of this impairment to the OIG's independence and ability to conduct effect oversight, and included a provision in the Fiscal Year 2015 Appropriations Act — Section 218 — which prohibits the Justice Department from using appropriated funds to deny, prevent, or impede the OIG's timely access to records, documents, and other materials in the Department's possession, unless it is in accordance with an express limitation of Section 6(a) of the IG Act. Despite the Congress's clear statement of intent, the Department and the FBI continue to proceed exactly as they did before Section 218 was adopted – spending appropriated funds to review records to determine if they should be withheld from the OIG. The effect is as if Section 218 was never adopted. The OIG has sent four letters to Congress to report that the FBI has failed to comply with Section 218 by refusing to provide the OIG, for reasons unrelated to any express limitation in Section 6(a) of the IG Act, with timely access to certain records.

c. What steps does the Inspector General's office take to ensure information it receives from the FBI is properly controlled to prevent inappropriate disclosures?

Response: The OIG has handled some of the most sensitive information in the Department's possession in the course of numerous highly classified reviews. Since 2001, when the OIG assumed primary oversight responsibility for the FBI, the OIG has undertaken numerous investigations which required review of the most sensitive material, including grand jury material and documents classified at the highest level of secrecy, for example:

- *The President's Surveillance Program;*
- *FBI's Handling of Intelligence Information Prior to the September 11 Attacks;*
- *FBI's Performance in Deterring, Detecting, and Investigating the Espionage Activities of Robert Philip Hanssen;*

- *FBI's Performance in Uncovering the Espionage Activities of Aldrich Hazen Ames;*
- *FBI's Handling and Oversight of FBI Asset Katrina Leung;*
- *FBI's Use of Authorities pursuant to the FISA Amendments Act of 2008;*
- *FBI's Use of National Security Letters and Section 215 Business Records orders;*
- *FBI's Use of Exigent Letters and Other Informal Requests for Telephone Records required the OIG to review grand jury information and material classified at the TS/SCI level;*
- *FBI's Use of Authorities pursuant to Section 702 of FISA; and*
- *Department's Use of the Material Witness Statute.*

In all of its reviews and investigations, the OIG scrupulously protects sensitive information and has never made an unauthorized disclosure of information it has received from the FBI. This record is attributable to OIG investigators' and auditors' careful adherence to Department requirements and procedures for handling and storing Department information, and to the OIG's practice with public reports to request that the FBI and Department conduct sensitivity reviews to identify information that the Department determines is too sensitive for public release.

Further, it is the OIG's long-standing practice that before publicly releasing a report, we provide a draft copy to the Department and relevant components to conduct a sensitivity review in order to ensure that national security classified information is properly marked and sensitive information is not inappropriately disclosed. The OIG is not aware of any instance in which it was responsible for an improper disclosure of sensitive or classified material.

Moreover, if the Department has concerns about the public disclosure of one of our reports, the Attorney General may invoke the provision pursuant to Section 8E(a) of the Inspector General Act and restrict the disclosure of OIG reports or prohibit the OIG from carrying out its work. The Attorney General may impose such restrictions in five statutorily-designated areas: (A) ongoing civil or criminal investigations or proceedings; (B) undercover operations; (C) the identity of confidential sources, including protected witnesses; (D) intelligence or counterintelligence matters; and (E) other matters the disclosure of which would constitute a serious threat to national security. If the Attorney General decides to invoke this authority, he/she must notify the OIG in writing, and the OIG will then transmit the notification to Congress. This provision, as enacted by Congress, permits the Attorney General to object to the disclosure of information in an OIG report in these limited instances. The Attorney General has only exercised this provision on one occasion in the 26 years since the establishment of the DOJ OIG, when the provision was invoked to delay the issuance of the OIG report entitled "CIA-Contra-Crack Cocaine Controversy: A Review of the Justice Department's Investigations and Prosecutions" by seven months (from December 1997 until July 1998).

2. On February 10, 2015, your office transmitted a classified report on the FBI's use of Section 215 authority under FISA entitled, *A Review of the FBI's Use of Section 215 Orders: Assessment of Progress in Implementing Recommendations and Examination of Use in 2007 through 2009*. As you mentioned in your letter accompanying the report, despite the fact that OIG submitted its draft report to the agency responsible for reviewing certain classification markings in June 2014, the classified report contains redacted information. That agency has thus far failed to review significant portions of the report and provide a formal response. With Section 215 set to expire on June 1, 2015, I appreciate the willingness of OIG to transmit the partial report to Congress instead of delaying its release indefinitely.

   However, this unnecessary delay has prevented Congress from reviewing the full report and prevented the release of a public version, inhibiting accountability and oversight. With this provision of the USA PATRIOT Act set to expire in a few months, it is critical that Congress and the American people have the full results of this important review.

   a. Please provide an update on the status of the declassification review by the agency responsible for reviewing the redacted portions of this report.

      Response: On April 15, 2015, we received the final results of the classification review from the agency. We immediately incorporated those comments and sent the updated classified version and the final unclassified version of the report to the FBI to obtain the required classification authority block, which identifies the source of the classification decision and the declassification instructions. Once we receive the report back from the FBI with the required classification authority block, we intend to immediately proceed with producing the public, unclassified version of this report, as well as the updated classified version of the report. We have not been given a date by the FBI regarding when we will receive the report back from them.

   b. Please provide a fulsome description of the reasons that the agency has provided OIG for failing to review this report.

      Response: The agency has not provided a full explanation or description of the reasons it has been unable to complete the final classification review we requested. We provided a final draft of the report for classification review in June 2014, but did not receive the results of the classification review until April 15, 2015, as noted above.

   c. Please provide the name of the agency responsible for reviewing the classification markings in this report.

      Response: The agency referenced in the response above is the National Security Agency.

As you may be aware, the OIG has also been reviewing the FBI's use of information derived from the National Security Agency's collection of telephony metadata obtained from certain telecommunications service providers under Section 215. That review has been significantly affected by the FBI's failure to timely produce relevant records to the OIG, especially e-mail communications that were first requested in October 2014. We reported this situation to the House and Senate Appropriations Committees on February 25, 2015, pursuant to Section 218 of the Department of Justice Appropriations Act. Since that time, the OIG has received additional productions from the FBI, but we understand that a substantial volume of responsive material has still not been produced by the FBI, and the FBI has not committed to a date certain for the completion of this production. The FBI's inability to timely produce this information continues to compromise the OIG's ability to conduct a thorough review of this subject matter, and is especially consequential given the June 1, 2015, expiration date for Section 215.

3. In addition to the report on Section 215, your office is also conducting a review of the FBI's use of the pen register and trap-and-trace authority under FISA.

   a. Has your office completed this report?

   Response: Yes, the OIG long ago completed this report. However, similar to our report about the FBI's use of Section 215 authority, its release has been substantially delayed by classification reviews conducted by the FBI and the Intelligence Community. Because of this substantial delay and our inability to obtain a date by which the FBI and the Intelligence Community would complete its review, the OIG agreed to provide a briefing about the completed report to staff from the Committee on the Judiciary on June 20, 2014. That briefing also included summaries of our then-pending reports on the FBI's use of Section 215 authority and National Security Letters.

   b. When can Congress expect to receive a final version of this report?

   Response: On April 8, 2015, we received the final results of the classification reviews. We immediately incorporated those comments and sent the final classified report to the FBI to obtain the required classification authority block, which identifies the source of the classification decision and the declassification instructions. We received the report back from the FBI with the required classification authority block today, April 30, 2015, and are proceeding with producing the classified report to the relevant Congressional oversight and intelligence committees.

   c. Has the OIG faced similar obstacles in the declassification review of the pen register report?

Response: Yes, as stated above, the release of this report has also been significantly delayed by the classification reviews conducted by the FBI and the Intelligence Community. We completed a draft of this report in February 2014. At that time, we provided the draft report to the FBI, Department, and the Intelligence Community for comment and to conduct classification reviews. We circulated a revised draft report in May 2014. As indicated above, we did not receive the final results of the classification reviews until April 2015.

Questions for the Record from Senator Charles E. Grassley
for Stephen Kohn
U.S. Senate Committee on the Judiciary
Hearing on "Whistleblower Retaliation at the FBI: Improving Protections and Oversight"
Submitted on March 10, 2015

Justice Department Sanctions Proposal and Disclosures to Congress and the U.S. Department of Justice Office of Inspector General (OIG)

The April 2014 *Department of Justice Report on Regulations Protecting FBI Whistleblowers*[1] recommended that the Department's Office of Attorney Recruitment and Management (OARM), which adjudicates FBI whistleblower complaints, have the power to sanction litigants for violating protective orders. Those protective orders prohibit whistleblowers from speaking about their cases. There are no exceptions.

Does the sanctions proposal pose any threat to FBI whistleblowers? Should there be exceptions to the sanctions authority, such as for disclosures to Congress or the OIG?

RESPONSE OF STEPHEN M. KOHN, EXECUTIVE DIRECTOR, NATONAL WHISTLEBLOWER CENTER:

The National Whistleblower Center strongly opposes this recommendation.

First, this proposal would prevent Congress and other appropriate authorities from obtaining information from FBI whistleblowers and would serve to silence FBI employees from making otherwise protected and/or non-confidential disclosures.

Second, all FBI employees have executed employment agreements in which they are required to adhere to the FBI's strict prepublication review procedures. These procedures have specific rules governing the release of information, and set forth procedures for internal FBI review of information for which an agent may want to disclosure, and has specific appeal processes. These procedures are consistent with long-standing judicial precedent on censorship rules. There is simply no need to place FBI whistleblowers under a new set of restrictions that do not apply to all other FBI agents.

Adding to this otherwise complex and extensive structure, a new layer of restrictions would not serve the public interest and would undermine the whistleblower program. The OARM does not have the statutory or regulatory authority for these powers, and should not be given such authority.

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[1] Department of Justice Report on Regulations Protecting FBI Whistleblowers (Apr. 2014).

Third, we have worked with whistleblowers who have utilized the OARM process since the inception of the program. There has never been any example for which we are aware in which a whistleblower violated a protective order entered into between the parties. Why propose to fix a problem that does not exist? If FBI employees violate classification or privacy rules, there are numerous regulations and laws already in place for which these employees can be sanctioned. These rules have appeal procedures and some due process protections.

Finally, this proposal would have a real chilling effect on whistleblowers. It would discourage them from using the OARM process. FBI agents would not want to give the DOJ OARM authority to sanction them. Agents are already under strict disciplinary review from the FBI Office of Professional Responsibility and the Department of Justice's Inspector General.

RESPONSES OF KEVIN L. PERKINS TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Responses of the Federal Bureau of Investigation to Questions for the Record Arising from the March 4, 2015, Hearing Before the Senate Committee on the Judiciary Regarding "Whistleblower Retaliation at the FBI: Improving Protections and Oversight"

Questions Posed by Chairman Grassley

Department of Justice and Government Accountability Office Recommendations

1. In its April 2014 report examining the FBI whistleblower regulations, the Justice Department recommended expanding whistleblower protections to disclosures made to the second-in-command of an FBI field office.[1] Despite the urgings of employees, whistleblower advocates, and even the Office of Special Counsel, however, the Department did not recommend expanding protections to disclosures made to direct supervisors or other management within an FBI employee's chain of command.

As the Department notes, "[The Office of Special Counsel (OSC)] believes that to deny protection unless the disclosure is made to the high-ranked supervisors in the office would undermine a central purpose of whistleblower protection laws."[2] The U.S. Government Accountability Office (GAO) report examining the Department's handling of FBI whistleblower cases similarly stresses that employees who report to a "nondesignated entity," whether they intend to officially blow the whistle or not, leaves those employees with "no recourse" against retaliation.[3] GAO explains that it is common for whistleblowers in the FBI to report wrongdoing to their immediate supervisors, and some report concerns without realizing or expecting to make a "whistleblower disclosure."[4] Moreover, internal

[1] Department of Justice Report on Regulations Protecting FBI Whistleblowers (Apr. 2014), at 12-13 (The current regulations protect disclosures made to the first-in-command of an FBI field office) [Hereinafter "DOJ Report"].
[2] U.S. Government Accountability Office, Report to the Chairman, Committee on the Judiciary, U.S. Senate, Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints (Jan. 2015), at 1 [Hereinafter "GAO Report"].
[3] *Id.* at 18.
[4] *Id.* at 19; Notably, the impulse to report wrongdoing to a direct or immediate superior is common in the private sector as well as in the government. *See* Ethics Resource Center, Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey, at 11 (2012) ("In 2011, 56 percent of first reports were made to the employee's direct supervisor."); *available at* http://www.ethics.org/files/u5/reportingFinal_0.pdf.

These responses are current as of 3/27/15

FBI policy *encourages* reporting wrongdoing within the chain of command.[5] The policy "specifically prohibits retaliation against employees who report compliance risks to any supervisor in the employees' chain of command, as well as additional specified officials, but *does not offer any means of pursuing corrective action if an employee experiences retaliation for such a disclosure*."[6]

It is not surprising, then, that during the course of its review the Department examined its handling of 89 FBI whistleblower cases, and determined that 69 of them were deemed "non-cognizable." A "significant portion" of those involved disclosures that were "not made to the proper individual or officer under 28 C.F.R. § 27.1(a)."[7]

Why shouldn't the law or regulations protect disclosures made to direct supervisors and others within an FBI employee's chain of command?

Response:

The question refers to two different sources of protection: the statutory protection afforded to those who make whistleblower disclosures protected by statute (5 U.S.C. § 2303 and its implementing regulations) and the protection provided by FBI policy for those who report compliance risks.

As discussed further in response to Question 6, below, a 2014 FBI policy entitled "Non-Retaliation for Reporting Compliance Risks" (policy directive 0727D) addresses compliance with laws, regulations, and Department of Justice (DOJ) and FBI policies, and protects from retaliation FBI employees who report compliance concerns to: those to whom protected whistleblower disclosure may be made, the FBI Office of Integrity and Compliance (OIC), the OIC Helpline (which accepts anonymous calls), division compliance officers, the Division Compliance Council, **or any supervisor in the reporting employee's chain of command**. (Section 8.4.1.) Retaliation for reporting compliance risks is actionable misconduct under Offense Code 5.16 (Retaliation) of the FBI's "Offense Codes and Penalty Guidelines Governing the FBI's Internal Disciplinary Process" and, in the absence of aggravating or mitigating factors, is punishable under those guidelines by a 30-day suspension without pay.

[5] GAO Report at 19 n. 41 (citing Policy Directive 0032D, Non-Retaliation for Reporting Compliance Risks (Feb. 11, 2008) and Policy Directive 0727D Update (Sept. 23, 2014)).
[6] DOJ Report at 12-13.
[7] *Id.* at 7.

As to the separate question of whether statutory whistleblower protections should be extended to employees who make disclosures to their direct supervisors, we note that this issue was addressed in the Department's report of April 2014. This report was the culmination of a working group of attorneys from the FBI, the Justice Management Division, the Office of Attorney Recruitment and Management, the Office of the Inspector General, the Office of Professional Responsibility, and the Office of the Deputy Attorney General. Ultimately, in the report, this group advocated expanding the list of persons to whom a protected disclosure may be made to the second-highest ranking tier of field office officials. As we formulate these proposed regulations, we will consider this report and all of the testimony before the Senate Judiciary Committee regarding the appropriate category of persons to whom a protected disclosure may be made. As is the normal course, any new regulations will be subject to the requisite notice and comment process, through which we will gather more information and views on this issue.

2. During the March 4 hearing, I asked the witnesses on the second panel whether the FBI regulations should be amended to clarify that FBI whistleblower disclosures to Congress are protected and you and the other second panel witnesses expressed approval. Will the Department include this recommendation in its proposed regulatory amendments? Why or why not?

Response:

Although the whistleblower protection provisions set out at 5 U.S.C. § 2303 and 28 C.F.R. Part 27 do not encompass disclosures to Congress, a separate Federal law provides that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." (5 U.S.C. § 7211.) This statute prohibits interference with an employee's provision of information to Congress, or to a committee or member, as long as the information is not classified or similarly restricted.

3. You state in your testimony that the Department is working with the Office of the Inspector General to improve training so that FBI employees better understand their rights and responsibilities with respect to potential whistleblowing.

a. Will you commit to providing this Committee with complete information regarding any new training programs and materials developed for FBI employees on this subject, including the substance, format, and recipients of such training?

Response:

The FBI would be pleased to continue to provide to the Committee information regarding its training regarding whistleblower protections.

b. During the March 4 hearing, Inspector General Horowitz noted that mid-level managers, in addition to senior management, are important in delivering a message throughout the organization that whistleblowers are valued and protected. What training or guidance does the FBI provide to its mid-level managers concerning their responsibilities in protecting whistleblowers and their role in communicating the value of whistleblowers to their staff?

Response:

The FBI Director believes the message that whistleblowers are valued and protected starts with him, and he takes every opportunity to disseminate that message throughout the FBI's workforce. In addition, whistleblower protections are addressed in briefings for new employees, called "Onboarding New Employees" (ONE) briefings, and during required biennial training, often called No FEAR Act training. Whistleblower protections are also often discussed during annual All Employee conferences and during training directed by the Equal Employment Opportunity Commission, the Merit Systems Protection Board, and others. Information regarding whistleblower protections is additionally available on the websites of both the FBI's Office of Equal Employment Opportunity Affairs and Office of the General Counsel; these websites identify those to whom protected disclosures can be made, provide filing instructions, and address frequently asked questions. Finally, periodic informal communications emphasize the importance of encouraging compliance at all levels. For example, a 2014 communication provides as follows:

> **Institutionally we are well served by a culture that encourages our personnel to raise good-faith concerns.** It is our obligation in fact to raise such concerns, and we provide various avenues for people to raise perceived problems so that they can be assessed and addressed. To foster such a culture, we have incorporated ethics, accountability, and leadership into our core values, and created systems that support the making of such reports, whether it be to the INSD [Inspection Division], OIC, the chain-of-command, the OIG [Office of the Inspector General], or others. Of course, some reports may turn out to be true and others incorrect. Regardless, we prohibit retaliation even if the report

> subsequently proves groundless. . . . **Maintaining a culture of being open to criticism, admitting mistakes, and having faith that the investigative (or EEO) process will follow the facts where ever they lead is part of what it means to be in the FBI. That is who we are.**
>
> (E-mail from Patrick W. Kelley, Assistant Director, OIC, to the FBI's Senior Executive Service officials, Division Compliance Officers, and others, dated November 5, 2014 and restating the contents of a 2013 email (emphasis in original).)

FBI Cooperation in Whistleblower Investigations

4. On February 3, 2015, as required by Section 218 of the 2015 Department of Justice Appropriations Act,[8] Inspector General Michael Horowitz informed appropriations committee leadership in the House and Senate that the FBI "has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act) to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records."[9] According to that letter, the OIG requested those records in connection with its investigations of two FBI whistleblower complaints.

The letter states that the FBI failed to meet deadlines to produce a portion of these records for the "primary reason" that the FBI "desire[d] to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access."[10] Further, the letter states that the FBI "informed the OIG that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG."[11]

However, as the letter correctly states, Section 218 plainly contemplates that the OIG will have access "to *all* records, documents, and other materials," subject to the sole limitation of Section 6(a) of the IG Act.[12] Section 6(a) does not limit the OIG's access to the categories of records the FBI has identified.

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[8] Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014).
[9] Letter from Michael Horowitz, Inspector General, to Rep. Harold Rogers, Rep. Nita Lowey, Sen. Thad Cochran, and Sen. Barbara Mikulski (Feb. 3, 2015).
[10] *Id.* at 2.
[11] *Id.*
[12] *Id.* at 1-2 (emphasis added) (quoting Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014)).

Since February 3, OIG also has issued three additional Section 218 notices regarding the FBI's failure to produce documents in response to the OIG's requests.

a. How is it appropriate for the FBI to decide which documents it will produce to the independent investigator looking into whether the FBI retaliated against a whistleblower?

Response:

The FBI has a good faith disagreement with the Office of the Inspector General (OIG) regarding what documents the FBI may legally provide, in a very limited range of circumstances. The FBI's authority to disseminate its documents is affected by several different legal authorities, including the Wiretap Act, the Bank Secrecy Act, the Fair Credit Reporting Act, and Rule 6(e) of the Federal Rules of Criminal Procedure (regarding grand jury materials). We have been completely transparent with the OIG and the leadership of DOJ regarding this legal disagreement. In order to resolve this matter, consistent with standard DOJ practice, the Office of the Deputy Attorney General has asked DOJ's Office of Legal Counsel (OLC) to render an opinion as to the correct reading of the law. As we await the OLC opinion, in order to comply with the Inspector General Act as well as all other provisions of law that we have concluded are applicable in this context, we believe we must conduct a legal review of the large volume of documents that the OIG has requested from us. Because we are conducting this review in order to provide the OIG with the requested materials in a manner consistent with law, we do not believe we are in violation of section 218 of the fiscal year 2015 DOJ Appropriations Act.

b. I sent a letter to the FBI two weeks ago asking how much in appropriated money was used to conduct these reviews and delay the access to documents. Will you commit to ensuring that the FBI provides a timely and thorough reply?

Response:

The FBI will forward its reply as soon as possible.

Loss of Effectiveness Orders

5. Whistleblowers claim that the FBI uses Loss of Effectiveness orders (LOEs) as a tool for retaliation. LOEs can reportedly result in immediate demotion or transfer, without giving recipients notice or an opportunity to appeal. According to the FBI, an LOE order does

not result in a loss of pay or a demotion in rank. Rather, "the aim is to improve the employee's performance to the fullest extent possible." However, matters relating to employee *performance* or *efficiency* should be handled through Performance Improvement Plans (PIPs), which provide employees notice of any perceived performance deficiency and an opportunity to improve performance in that area. On the other hand, investigations of employee *misconduct* should be forwarded to the Office of Professional Responsibility (OPR) for adjudication – which affords employees with the due process protections of notice and ability to appeal. Given these existing tools, it's unclear whether LOEs serve *any* legitimate purpose at the FBI.

I sent a letter to FBI in September 2014 and letters to GAO and the Inspector General in February 2015, asking for information on the FBI's use of LOEs.

Two days before the hearing, the FBI notified me that it has instituted a new policy that at least provides notice to employees and an opportunity to provide a written response to that claim within 7 days. However, the policy has a loophole. It also says that the FBI Director or Deputy Director "may order the reassignment of any employee" "in whom he no longer reposes trust or confidence" "without adhering to the process and procedures set forth" in the new policy.

a. Under what circumstances could the FBI Director or Deputy Director reassign an employee "without adhering to the process and procedures set forth" in the new policy? Can this reassignment authority be delegated to lower level officials rather than the Director or Deputy Director? Will it be delegated? Why or why not?

Response:

The FBI complies with the statutes (Title 5 of the United States Code) and Office of Personnel Management (OPM) regulations (Title 5 of the Code of Federal Regulations) that govern personnel actions with respect to FBI employees. Among other things, those authorities require that we employ merit system principles, comply with the procedural protections applicable to adverse actions, and afford whistleblower protections. Provided that a non-adverse personnel action is not taken for an improper purpose (such as for a discriminatory purpose or in retaliation for whistleblowing), there is no prohibition on such an action. For example, FBI Special Agents are subject to temporary assignment and transfer anywhere, worldwide, based upon the needs of the Bureau, such as when a particular expertise is needed at a particular location.

A "loss of effectiveness" (LOE) transfer is a particular type of transfer that results when an employee is unable to effectively fulfill official responsibilities in the current position (including for reasons beyond the employee's control) and this cannot be corrected through managerial action such as counseling, mentoring, or the use of a performance improvement plan. As discussed further below, an LOE transfer does not reduce the employee in grade or pay or suspend, furlough, or remove the employee, and it is, consequently, not an adverse action. Provided an LOE transfer is not directed for an improper purpose, it is, like other non-adverse personnel actions, not prohibited by law or regulation.

"Loss of effectiveness" is often identified during an inspection of the office by the FBI's Inspection Division, which is charged with improving organizational performance by providing independent, evaluative oversight of FBI investigative and administrative operations. Under the new policy (policy directive 0773D), an LOE transfer may be recommended by the Inspection Division, an Assistant Director in Charge, a Special Agent in Charge (SAC), an Executive Assistant Director, or an Assistant Director. The affected employee may respond to the recommendation in writing. The Assistant Director of the Human Resources Division will consider both the recommendation for transfer and the employee's response and will propose a course of action to the Associate Deputy Director.

In addition to, and separate from, this process, under the recent policy the FBI Director or Deputy Director may transfer any FBI employee in whom he or she no longer reposes trust or confidence. The policy does not provide for delegation of this authority. Like the LOE transfers discussed above, this transfer is not an adverse action and, unless it is directed for an improper purpose, it is not prohibited by law or regulation.

b. The new suggested LOE policy defines an "adverse action" as "a personnel action that results in a loss of grade or pay (including suspensions without pay and furloughs of less than 30 days) or removal from employment." The policy does not deem an LOE transfer as an adverse action because it "is not initiated to and does not reduce in grade, suspend, furlough, or remove an employee."

Is "adverse action" defined anywhere else in FBI internal guidance or policy? If so, how is that term defined? Does the FBI consider an involuntary removal from an employee's position a "removal"? Please explain why an involuntary transfer—in effect a removal from an employee's position—should not be deemed an "adverse action."

Response:

The FBI uses the term "adverse action" as it is used in Chapter 75 of Title 5 of the United States Code, which governs personnel actions with respect to FBI employees. That chapter uses the term "removal" to mean removal from civil service or termination of employment. The new LOE policy provides the following definition of "adverse action": "a personnel action that results in a loss of grade or pay (including suspensions without pay and furloughs of less than 30 days) or removal from employment." (Policy directive 0773D, Section 15.2.1.) As the policy explains, because an LOE transfer is not initiated to, and does not, reduce the employee in grade or pay or suspend, furlough, or remove the employee, it is not an adverse action.

c. **The new policy states that an LOE transfer may be recommended by INSD, an ADIC, SAC, AD, or EAD. Why shouldn't disclosures to all of these individuals be protected, if those individuals could retaliate against whistleblowers for disclosing wrongdoing?**

Response:

As discussed in the March 2, 2015 letter to Senator Grassley on this topic, and as noted in prior correspondence, information pertaining to an individual's protected activity (such as an EEO claim or a whistleblower complaint of fraud, waste, abuse, or mismanagement) is not reviewed, commented upon, or otherwise considered by any FBI official during any stage of the LOE process. Even if protected disclosures were considered during the LOE process, the entities designated by the Attorney General to receive protected whistleblower disclosures include the FBI's Inspection Division and, as the "highest ranking official in any FBI field office" (28 C.F.R. § 27.1(a)), the FBI's Assistant Directors in Charge and SACs. Consequently, disclosures to the majority of those who can recommend LOE transfers would, in fact, be protected.

d. Are LOEs ever used as an allegation or finding of employee misconduct? If so, shouldn't such cases be forwarded to the Office of Professional Responsibility for adjudication?

Response:

As noted in response to subpart a, above, an LOE transfer is a particular type of transfer that results when the employee is unable to effectively fulfill official responsibilities in the current position (including for reasons beyond the employee's control) and this cannot be corrected through managerial action. An LOE transfer is not an adverse action

and does not result in a reduction in grade or pay. Under the recent policy, the recommendation for an LOE transfer will explain the basis for the transfer, including the circumstances that support it. The employee will receive the recommendation, along with any supporting attachments or other information, and will have an opportunity to respond in writing. If, instead, an adverse action for misconduct were contemplated, the FBI would engage in an entirely separate process as prescribed by Chapter 75 of Title 5, United States Code.

e. Why are investigators from the Inspection Division involved in the LOE process?

Response:

Please see the response to subpart a, above.

f. As of March 1, 2015, the FBI claims that it had issued LOEs against a total of 23 FBI employees. Will you provide all 23 of these individuals with a written justification for their LOEs and an opportunity to provide a written response?

Response:

As discussed in response to subpart a, above, the FBI complies with the statutes and OPM regulations that govern personnel actions with respect to FBI employees. Provided that a non-adverse personnel action is not taken for an improper purpose (such as for discriminatory purposes or in retaliation for whistleblowing), there is no prohibition on such actions. Because an LOE transfer is not initiated to, and does not, reduce the employee in grade or pay or suspend, furlough, or remove the employee, it is not an adverse action. Although we have revised our practice to provide the recommendation of LOE transfer to employees affected in the future, the absence of this documentation does not invalidate past transfers. The need for finality often dictates that once the administrative process prescribed for handling a certain matter is complete, the matter is final, even if a new process or different procedure is subsequently adopted. This is important both to employee expectations and institutional efficiency. Therefore, while we would re-open past cases if they were not handled in accordance with the applicable law or procedural requirements, in the absence of such concerns we decline to disrupt those determinations.

g. Two weeks ago, I asked the Inspector General to examine the FBI's use of these orders in depth. Will you commit to cooperating fully with the Inspector General in this review, and to providing him with timely access to all requested records?

Response:

We will cooperate fully with the Inspector General and appreciate his recognition of the constraints discussed in our response to Question 4, above.

Accountability for FBI Whistleblower Retaliation

6. During the March 4 hearing, I asked you whether the FBI defined whistleblower retaliation as misconduct, and whether the FBI had disciplined anyone for whistleblower retaliation. As indicated in our exchange at the hearing, please provide the written FBI policy that defines whistleblower retaliation as misconduct, the recommended punishment for whistleblower retaliation, and a description of each time the FBI imposed discipline for retaliating against a whistleblower. Will you commit to providing these responses by a date certain?

Response:

The FBI has two policies related to whistleblower protections. Among other things, our policy entitled "FBI Whistleblower Policy" (policy directive 0272D) identifies the types of protected disclosures (reports of mismanagement, gross waste of funds, abuse of authority, substantial and specific danger to public health or safety, and violation of any law, rule, or regulation), the authorities to whom protected disclosures are made, and the responsibility of FBI managers to ensure that whistleblowers are not subject to reprisal.

As discussed in response to Question 1, above, a more recent policy provides additional protections. The purpose of the 2014 policy entitled "Non-Retaliation for Reporting Compliance Risks" (policy directive 0727D) "is to provide an effective process for all Federal Bureau of Investigation (FBI) personnel to express concerns or report potential violations regarding the FBI's legal and regulatory compliance, without retaliation, and to encourage the reporting of any such concerns." (Section 7.) This policy emphasizes that "[t]he FBI is committed to creating and sustaining a culture of compliance that promotes open communication, including open and candid discussion of concerns about compliance with applicable laws, regulations, and Department of Justice (DOJ) and FBI policies" (Section 8.1.1) and makes clear that "FBI personnel are strictly prohibited from retaliating against anyone for reporting a compliance concern" (Section 8.1.2). Protected compliance concerns may be reported to: those to whom protected whistleblower disclosure may be made, the FBI Office of Integrity and Compliance (OIC), the OIC Helpline (which accepts anonymous calls), division compliance officers, the Division

Compliance Council, or any supervisor in the reporting employee's chain of command. (Section 8.4.1.) This policy explicitly provides that it "does not add to, or subtract from, the whistleblower protections provided to FBI personnel under 5 U.S.C. § 2303, the DOJ regulations set forth in 28 CFR Part 27, Intelligence Community Directive (ICD) 120, or Policy Directive (PD) 0272D, *FBI Whistleblower Policy*." (Section 8.5.1.)

In Offense Code 5.16 (Retaliation) of the FBI's "Offense Codes and Penalty Guidelines Governing the FBI's Internal Disciplinary Process," the offense of "retaliation" is defined as follows:

> Taking, or threatening to take, an adverse employment action against an employee who made, or was believed to have made, a protected disclosure, or who engaged, or who was believed to have engaged, in a protected activity. See, *e.g.*, Whistleblower Protection Act; Civil Rights Act of 1964; and other anti-retaliation provisions of federal law.

Under this definition, the offense of "retaliation" includes both retaliation against whistleblowers who make protected disclosures under 28 C.F.R. Part 27 and retaliation against those who report compliance risks under FBI policy directive 0727D. Consequently, FBI personnel are subject to discipline if they retaliate against employees who report concerns about compliance with applicable laws, regulations, or policies regardless of whether the report is made to someone in a position identified in the whistleblower regulations (28 C.F.R. Part 27) or to a direct supervisor or other official in the reporting employee's chain of command as provided for in policy directive 0727D.

The standard penalty for retaliation is a 30-day suspension without pay. Mitigating factors may warrant a 10- to 21-day suspension, while aggravating factors may warrant a 35-day suspension or more, up to dismissal. These penalty guidelines were significantly strengthened in 2012; prior to that, the standard penalty was a 7-day suspension. The FBI investigates and punishes whistleblower retaliation regardless of whether an employee seeks to assert whistleblower status. Consequently, the cases in which the FBI has imposed discipline for retaliating against whistleblowers will not necessarily be identical to the cases in which FBI employees have invoked 28 C.F.R. Part 27 and successfully claimed whistleblower status and demonstrated improper reprisal.

The records that allow us to identify cases in which we have imposed discipline for retaliation against a whistleblower date to 2004. During the period 2004 to the present, the FBI's Office of Professional Responsibility (OPR) has imposed punishment related to whistleblower retaliation in the following cases:

- In a 2004 case, a Unit Chief (UC) was found to have engaged in retaliation against a Special Agent (SA) who complained to the Assistant Special Agent in Charge (ASAC) and Congress about the manner in which a terrorism investigation was conducted. The UC retaliated by removing the SA from serving as an instructor regarding undercover activity. The FBI's OPR suspended the UC for 30 days. Adverse disciplinary actions imposed by OPR may be appealed to the FBI's Disciplinary Review Board (DRB), which occurred in this case. On appeal, the DRB reduced the 30-day suspension to a letter of censure. The FBI Director later set aside the DRB's decision and suspended the UC for 14 days.

- In a 2005 case, an Intelligence Analyst (IA) alleged that she was retaliated against by a Supervisory Special Agent (SSA) and an ASAC for making a protected disclosure to the SAC. OPR found that that there was no protected disclosure to the SAC and that the personnel actions taken against the IA would have been taken in the absence of the IA's complaints. Nevertheless, OPR suspended the ASAC for 7 days for supervisory dereliction for placing the IA under the supervision of an SSA about whom she had openly complained and for failing to take action to remedy the situation once it deteriorated. We include this case because, although the discipline was technically not imposed for retaliation, the case does relate to the FBI's response to allegations of retaliation.

- In a 2006 case, an SAC was found to have engaged in retaliation against an SA who provided testimony critical of the FBI's handling of a terrorism investigation. The SAC retaliated by removing the SA from a terrorism case and reassigning him to a different squad. OPR proposed the SAC for dismissal; the SAC retired before the dismissal could be effected.

- In a second 2006 case, OPR found that a Supervisory Technical Information Specialist (STIS) made a protected disclosure relating to his supervisor's misconduct. Although the disclosure was protected, the FBI's OPR found that the SAC transferred the STIS and reassigned his Bureau vehicle for legitimate reasons unrelated to his complaints. Although OPR did not find whistleblower retaliation, they did find that, in executing the SAC's decision to transfer the STIS, the ASAC engaged in supervisory dereliction by advising the STIS of his reassignment in a meeting to which the ASAC had invited the supervisor about whom the STIS complained. OPR suspended the ASAC for 10 days for supervisory dereliction. The appellate authority (when OPR imposes a suspension of less than 15 days, the appellate authority is the

Assistant Director (AD) of the FBI's Human Resources Division (HRD)) overturned OPR's finding of supervisory dereliction and vacated the 10-day suspension imposed by OPR.

- In a 2008 case, an SSA was found to have engaged in retaliation when he made a comment that caused his squad to believe that if they complained about management during an inspection, management would seek retribution. OPR suspended the SSA for 10 days.

- In a 2009 case, a UC was found to have retaliated against an SSA who reported allegations of misconduct that led to an investigation of the UC. The UC transferred the SSA to another unit and manipulated the timing of her transfer so as to reduce her chances of advancement. OPR suspended the UC for 20 days and demoted him to a non-supervisory position at a lower pay grade.

- In a second 2009 case, an SA was found to have engaged in retaliation against an Electronics Technician (ET) after the ET reported the SA to the Chief Security Officer for improperly using a pass key to gain access to the building, thereby triggering the silent alarm. The SA made negative comments about the ET in an attempt to negatively impact the ET's request for a transfer. OPR suspended the SA for 7 days. The appellate authority (the AD HRD) vacated the SA's suspension.

- In a 2012 case, OPR dismissed a senior manager who, among other things, attempted to discredit employees who reported his improper personal relationship with a subordinate.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

February 3, 2006

The Honorable Glenn A. Fine
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Inspector General Fine:

Pursuant to our authority under the Constitution and the Rules of the United States Senate, we are conducting a review of the allegations raised by former FBI Special Agent Michael German. He alleges that the FBI mishandled an opportunity to conduct undercover operations against a foreign terrorist organization which was seeking financial and money laundering assistance from a domestic terrorist organization. He alleges further that the FBI failed to take advantage of these opportunities and engaged in a cover-up of a series of initial mistakes and mismanagement, including warrantless domestic surveillance in violation of Title III during a January 23, 2002, meeting between representatives of the foreign and domestic terrorist groups.

The Final Report

We have reviewed the final report of the Department of Justice, Office of Inspector General ("OIG") on his allegations. In addition, we reviewed German's response to the draft report initially prepared by OIG. Based upon our independent review of the final report and German's responses, we believe that significant questions remain unanswered. Most importantly, it appears that a number of the issues raised by German are not fully addressed by the final report. However, based on the OIG report and German's response, the following facts do not appear to be in dispute:

(1) At the request of the FBI, a cooperating witness ("CW") secretly recorded a meeting between two subjects on January 23, 2002. There was no warrant, so the recording was only legal to the extent that the CW was present and consented to the recording. However, the CW was not present for a portion of the meeting, leaving the FBI's recording device behind in his absence. The case agent failed to properly document this and numerous other meetings as required by FBI procedures.

(2) In March 2002, the Orlando Senior Supervisory Resident Agent ("SSRA") at the time asked Michael German to begin working on a potential undercover operation involving the CW and the two subjects in the January 2002 meeting.

(3) In August 2002, German learned from a conversation with the CW that the CW had recorded a part of the January meeting without being present. The CW indicated that the FBI was aware he had done so. When he gave the tape to the FBI, he asked to see a transcript so he could learn what was said during the portion of the conversation that occurred while when he was absent.

(4) German advised that this and other meetings be properly documented as quickly as possible. When this advice was not followed, he raised his concerns with the new Orlando SSRA, who had replaced the supervisor who originally requested German's assistance on the investigation. The new Orlando SSRA responded that he just wanted to "pretend it didn't happen,"[1] (or "forgo documenting any previous meetings and simply document the case from that point forward"[2]).

(5) On September 10, 2002, German sent a letter to his supervisors voicing concerns about the mishandling of a terrorism investigation and the improper recording of the key January 2002, meeting. At that time, no FBI documents contradicted his version of events.

(6) After German's letter, the case agent back-dated reports to give the impression that they were completed much earlier than they actually were,[3] and in October 2002, the FBI created two summaries of the January 23, 2002, meeting, one which falsely stated that the meeting was not recorded and the other which mischaracterized the meeting and obscured whether the meeting was recorded.

(7) A December 3, 2002, electronic communication ("EC") drafted by David W. Welker, the Tampa Assistant Special Agent in Charge ("ASAC Welker") falsely denied that the January 23, 2002, meeting was recorded.[4]

(8) German learned of the false December 3 2002, EC during meetings with the FBI's Office of Professional Responsibility ("OPR") in February 2003, which were arranged and attended by the OIG. On or about February 11, 2003, German provided FBI OPR and OIG with a transcript proving that the meeting was recorded, contrary to the claims in the FBI summaries and in ASAC Welker's EC.

(9) Someone alerted ASAC Welker that German provided a copy of the transcript to OPR and OIG. Almost immediately, on or about February 11, 2003, ASAC Welker drafted a "clarifying" EC.[5] The EC admitted that the meeting was recorded, which German had already established by producing the transcript, and admitted that the CW had left a recording device in the room with the subjects while he stepped outside. The FBI also quickly located the tape recording, which it had previously denied existed, in the desk of the Orlando SSRA.

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[1] Michael German, Comments to Draft OIG Report, p. 16.
[2] OIG Report, p. 11.
[3] OIG Report, p. 26.
[4] *Id* at 27.
[5] *Id* at 27-28.

(10) ASAC Welker attached copies of FBI forms to his EC purporting to show that the CW had been informed that he was required to be present for the entire consensual recording. The OIG later determined that these documents had been altered with correction fluid to make it appear as if they were dated before the January 23, 2002, meeting rather than their actual date, March 1, 2002. However, your office was unable to determine who in the FBI altered the documents.

Additionally, we understand from the final report that you have substantiated at least one claim of FBI retaliation against Michael German for reporting these matters.

Questions

In light of these facts and the claims made by German in his response to the draft report, we would like answers to the following questions:

(1) Page 45, the final report states: "However, the investigation of his allegations remained with OPR at this time [December 2002] because German had not yet alleged that the FBI was retaliating against him for making a protected disclosure." This statement is contradicted by German's December 2002 sworn statement to OPR, which claims retaliation on page 10. Please explain this discrepancy. Additionally, please explain in detail why the OIG did not open an investigation of whistleblower retaliation against German until January 2004, 13 months after his initial claim?

(2) Based upon our review of the documents, it appears that the OIG focused narrowly on retaliation issues rather than German's underlying concerns. Why? If not the OIG, what independent entity ought to be responsible for reviewing the underlying claims of an FBI whistleblower (such as Title III violations and the falsification of records to cover up such violations)?

(3) German claims that the OIG did not review the recording of the January 23, 2002 meeting and analyze the transcript he provided in February 2003 until after its draft report was complete and he had submitted his written comments. When did the OIG review the recording and analyze the transcript? If not until recently, then please explain why they were not reviewed and analyzed earlier.

(4) The account on page 23 of the final report leaves the impression that it is unknown whether someone in OPR tipped-off the Tampa division that German could prove that its interview summaries and EC's were false in claiming that the January 2002 meeting was not recorded. Yet, German claims that one of your investigators was present and aware of who in OPR made the call notifying Tampa and prompting the "clarifying" EC. Is German's claim true? If so, why does the report fail to place the clarifying EC in its proper context and document who made the call?

(5) German claims that all of the official records in the FBI files prior to his September 10, 2002, letter consistently support his account of the January 2002 meeting and its

significance. Is it true that the only records that contradict German's version of events were created after he made his allegations? If so, why is this fact not prominently noted in the report?

(6) The reason cited on page 50 of the final report for not examining the FBI press office's false statements about the German matter is simply that an investigation was "not warranted." The August 12, 2004, press release stated that, "an exhaustive investigation and review of available evidence found no information to support allegations that the subject was involved in terrorism or terrorist funding, nor was there an apparent link between a domestic terrorist organization and an international terrorist organization." This statement seems to be directly contradicted by German's February 2003 sworn statement (particularly page 5, which directly quotes pages 49-50 of the January 2002 meeting transcript). If German's sworn statement is accurate and the press statement is false, then please explain why examining this potential misuse of the FBI press office to discredit an FBI whistleblower would not be warranted.

(7) The final report notes that despite significant effort, the OIG was unable to determine who used correction fluid to alter the documents attached to ASAC Welker's February 2003 "clarifying" EC. Those documents were offered by Welker in an attempt to prove that the CW was properly admonished not to leave the recording device in the room without being present. In fact, however, before being altered the admonishment forms were originally dated more than a month after the meeting. Page 29 of the final report indicates that the OIG administered polygraph examinations to the case agent and to the Orlando SSRA, both of whom denied altering the documents. Given that ASAC Welker is the one who used the altered documents to try to exonerate his office of any responsibility for a Title III violation and given that his use of the documents occurred in the context German having just proved, contrary to Welker's denial, that the meeting was recorded, why is there no reference to a Welker polygraph? Was he given a polygraph examination? If not, please explain why not?

(8) According to Welker's February EC, previous denials that the January 2002 meeting had been recorded were found to be untrue after additional contact with the CW. Yet, in response to German's comments, your report acknowledges that the recordings of the January 2002 meeting were transcribed by the Tampa Division before German made his allegations. If the recording was in the Orlando SSRA's desk and had already been transcribed by the Tampa Division before September 2002, why would anyone need further contact with the CW in early 2003 to know that the meeting had been recorded? Did your investigators determine when this additional contact with the CW allegedly occurred and why? Was it documented in an FD-302 interview summary? If not, why not?

(9) On page 38, the report states that "we found no one who substantiated German's allegation that the SSRA made disparaging comments about German." However, according to German he provided the OIG with the name of a witness in April 2004 with relevant information on this issue who was never interviewed. Please explain why this individual was not interviewed.

(10) Given all the misconduct documented in this matter, please explain who the FBI should hold accountable, what discipline has been imposed so far, if any, and what additional steps should be undertaken in this matter?

Classification and Redaction Issues

On June 10 and October 28, 2004, the Judiciary Committee requested a series of documents related to the Michael German matter. On November 10, 2004, the Justice Department produced a set of documents partially responsive to the Committee's request. In its cover letter, the Justice Department noted that the documents "which are packaged together and *some of which* are classified are available for review in Senate Security by Committee staff with the requisite 'Secret' security clearances."[6] Indeed, some of the documents are individually marked as having been classified at one time and then declassified at a later date.

We believe it is inappropriate to attempt to limit access to unclassified documents by sending them to the Office of Senate Security packaged together with classified documents. Moreover, we are concerned about the over-classification and extensive redactions of the documents the Committee has received so far. The documents produced to the Committee contain extensive, unnecessary, and unexplained redactions which render them difficult to comprehend and of little help in resolving the issues in dispute. We ask that you examine the facts and circumstances surrounding the decision to respond to our previous document requests in this manner and report on whether the classification and redaction decisions were necessary and appropriate.

Document Request

Given the nature of the disputes between German, the FBI, and the OIG, the only way that the Committee can obtain a full understanding of the facts is to obtain and review all of the documents first hand. Therefore, please provide, by February 14, 2006, copies of all documents upon which the OIG relied in preparing its report, including but not limited to:

(1) all interview summaries, deposition transcripts, polygraph results, affidavits, and other records of witness statements;

(2) copies of all the documents produced in response to the Committee's June 10 and October 28, 2004, requests without redactions of FBI file numbers, so-called "law enforcement privilege" information, "unrelated information," or "personal privacy" information (i.e., deletion codes F, G, H, O-1, and P-1);

(3) the transcript of the January 23, 2002, tape-recorded meeting at issue between members of the foreign and domestic terrorist groups, which German provided to the OIG in February 2003;[7]

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[6] Emphasis added.

[7] The Committee first requested this document from the FBI on October 28, 2004, but did not receive it.

(4) any other transcription of that tape-recording referred to above;

(5) a September 6, 2003, email from German to Michael S. Clemens;[8]

(6) a February 8, 2002, electronic communication ("EC") from FBI Tampa division to FBI headquarters, domestic terrorism unit (documenting the January 23, 2002, meeting at issue);

(7) any Orlando terrorism undercover operation proposal submitted to the Domestic Terrorism Unit in April 2002 containing information about a confidential informant ("CI") alleging that Subject #1 was involved in supporting terrorists inside the United States;

(8) a Tampa Division memo to the file quoting a Tampa ASAC ordering the removal of all terrorism references from the proposal in or around May 2002;

(9) any FD-302 interview summaries dated in or around October 2002 falsely reporting that the CW did not bring a recorder into the January 23, 2002, meeting, or otherwise describing the meeting in a manner inconsistent with the transcript; and

(10) an October 4, 2004, letter from Michael German that detailed all of the false statements in an FBI press release and other FBI press statements.

[8] The Committee first requested this document from the FBI on June 10, 2004, but did not receive it.

Any responsive classified material should be delivered to the Office of Senate Security. Any responsive unclassified material should be faxed or hand-delivered to the Committee offices. If you have any questions about this matter please contact Carolyn Short at (202) 224-5225, Jason Foster at (202) 224-4515, or Lydia Kay Griggsby at (202) 224-7703. Given that this matter was first reported nearly three years ago, we would appreciate your prompt attention to this request.

Sincerely,

Arlen Specter
Chairman

Patrick Leahy
Ranking Member

Charles E. Grassley
Member

U.S. Department of Justice

Office of the Inspector General

March 8, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Grassley
Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senators Leahy and Grassley:

This is in response to your letter dated February 3, 2006, regarding the Office of the Inspector General (OIG) investigation of allegations raised by former Federal Bureau of Investigation (FBI) Special Agent Michael German. In that letter, you raised a series of questions about the OIG's report of investigation regarding Mr. German's allegations. After receiving your letter, we conducted a detailed briefing with members of your staff on February 17, 2006, regarding our investigation and orally provided answers to the questions in your letter. After the briefing, the staff members requested a letter with written responses to the questions, which we provide below.

In addition, we want to update you on the steps we have taken to respond to the document request in your letter. First, with regard to OIG documents – consisting largely of Memoranda of Interviews, affidavits, and an interview transcript – we have no objection to providing you access to these documents. However, consistent with our long-standing practice before providing access to such documents, we have asked the FBI for its position on release of the information because the documents contain FBI information as well as information relating to an FBI investigation that is not closed. The FBI has informed us that its review of our documents will be completed shortly,

after which we hope to make the cleared documents available to the Committee's staff. These items will be responsive to request number one on page five of your letter. Further, document request number ten asks for an October 2004 letter sent by Mr. German to the OIG. We enclose with this letter a copy of that correspondence.

The remainder of the documents requested in your letter are FBI documents. Again, we have no objection to your reviewing these FBI documents; however, because they are FBI documents we have referred your requests for this information to the FBI and have encouraged the FBI to provide responsive documents to the Committee. We understand that Committee staff has been dealing directly with the FBI on this matter.

Second, before addressing the ten questions in your letter, I wanted to highlight for you the overall conclusions of our report of investigation. As described in our report, we substantiated many of Mr. German's allegations, including the FBI's mishandling and mismanagement of an investigation in Orlando, Florida, and the retaliation against Mr. German by an FBI official.

However, we did not substantiate all of Mr. German's allegations, particularly his claim that the FBI missed a viable terrorist financing case. We carefully analyzed the evidence relating to his terrorism allegations, including the transcript of the only meeting between the two subjects, the recording of that meeting, and recordings of other meetings between the informant and one of the subjects. Based on this review, we concluded that the evidence did not show that the subjects discussed any willingness to engage in terrorist activities, fund foreign terrorist organizations, or participate in money laundering.

Moreover, we believe that had the original case agent listened to these recordings in a timely manner and documented what was discussed, as Mr. German in fact had urged the case agent to do, the FBI would have concluded in early 2002 that the two subjects did not express a desire to engage in terrorist or illegal activities but, rather, shared with each other their highly offensive anti-Semitic views. After a review of the evidence, we, along with terrorism experts in the FBI, reached the conclusion that there was insufficient evidence that a viable terrorism case was missed. While Mr. German may disagree, we believe that this conclusion is strongly supported by the evidence.

We now address the ten questions raised in the Committee's letter, which are set forth below in bold followed by the OIG's response.

1. Page 45, the final report states: "However, the investigation of his allegations remained with OPR at this time [December 2002] because German had not yet alleged that the FBI was retaliating against him for

making a protected disclosure." This statement is contradicted by German's December 2002 sworn Statement to OPR, which claims retaliation on page 10. Please explain this discrepancy. Additionally, please explain in detail why the OIG did not open an investigation of whistleblower retaliation against German until January 2004, 13 months after his initial claim?

The OIG acknowledges that the sentence from our report highlighted in the Committee's question was not worded as precisely as it should have been to reflect the point that until October 2003 Mr. German had not asked the OIG to investigate his allegations, including a retaliation allegation. In fact, prior to October 2003 the OIG had taken steps to further Mr. German's desire to have his complaint about the handling of the Orlando case reviewed by the FBI, including ensuring that the FBI's Office of Professional Responsibility (OPR) interview him and having the FBI's Counterterrorism Division discuss with him his concerns about the Orlando case. However, the first time Mr. German asked the OIG to investigate his retaliation complaint was in his October 2003 letter to us. After review of that letter, the OIG decided to open that investigation in January 2004.

Moreover, it is important to place Mr. German's December 2002 sworn statement in proper context. The 12-page statement, which Mr. German gave to the FBI OPR as part of an OPR matter, outlined in detail Mr. German's allegations of mishandling and mismanagement in the Orlando investigation. On page 11, Mr. German briefly referred to a passage in a Tampa Division memorandum stating that the case could move forward with a "qualified undercover agent," and Mr. German said that he "took this comment to be a retaliatory remark against me." However, at no time before October 2003 did Mr. German ask the OIG to investigate this comment as retaliation for a protected disclosure.

2. Based upon our review of the documents, it appears that the OIG focused narrowly on retaliation issues rather than German's underlying concerns. Why? If not the OIG, what independent entity ought to be responsible for reviewing the underlying claims of an FBI whistleblower (such as Title III violations and the falsification of records to cover up such violations)?

It is not correct to state that the OIG focused narrowly on retaliation issues rather than Mr. German's other concerns about the handling of the underlying investigation. In fact, approximately 40 pages of the OIG's 52-page investigative report are devoted to addressing Mr. German's underlying concerns about mishandling and mismanagement of the Orlando investigation and the OIG's investigation of alleged misconduct by FBI employees. However, we also view allegations of retaliation seriously and in this case spent

considerable time and resources investigating Mr. German's allegations of retaliation.

On the issue of the alteration of records using white-out, the OIG discovered the altered documents in the course of our investigation, and we expended significant effort trying to identify who altered the forms, including conducting forensic analysis, polygraph examinations, and interviews. Despite these efforts, we were unable to identify the individual who altered the documents. With respect to the Title III violation by the informant, we reviewed this matter and confirmed with experts in the Department that, after Mr. German notified the drug case agent about the issue, the FBI took appropriate steps to address the violation.

3. German claims that the OIG did not review the recording of the January 23, 2002 meeting and analyze the transcript he provided in February 2003 until after its draft report was complete and he had submitted his written comments. When did the OIG review the recording and analyze the transcript? If not until recently, then please explain why they were not reviewed and analyzed earlier.

It is incorrect to state that we did not analyze the transcript of the January 2002 meeting until after receiving Mr. German's comments to our draft report. In fact, OIG investigators carefully reviewed the transcript during the course of our investigation, well before our draft report was complete.

Prior to receiving Mr. German's comments to our draft report in November 2005, no one had ever questioned the accuracy of the transcript of the meeting between the two subjects, and we had not reviewed the recording against the transcript. When Mr. German suggested in his comments to our draft report that the FBI's Tampa Division may have created an altered transcript of the January 2002 meeting, we listened to the recording of the meeting to determine its accuracy. Our review of the recording of the meeting confirmed the accuracy of the transcript. We also listened to the recordings of other meetings involving the informant and one of the subjects, and these conversations further supported the conclusion that the subjects did not discuss engaging in terrorist activities. Indeed, in the meetings with one subject, the informant repeatedly tried to interest the subject in money laundering, but the subject persistently refused.

4. The account on page 23 of the final report leaves the impression that it is unknown whether someone in OPR tipped-off the Tampa division that German could prove that its interview summaries and EC's were false in claiming that the January 2002 meeting was not recorded. Yet, German claims that one of your investigators was present and aware of who in OPR made the call notifying Tampa and prompting the "clarifying"

EC. Is German's claim true? If so, why does the report fail to place the clarifying EC in its proper context and document who made the call?

The OIG investigator present for the OPR interview indicated that he and the OPR investigator spent several hours over three days with Mr. German. The OIG investigator said he was not aware of anyone making a call to the Tampa Division that he would characterize as a "tip off" call. Moreover, as part of our investigation we interviewed John Roberts, the OPR Unit Chief who Mr. German alleged tipped off Tampa. He told us that while he did make calls to the Tampa Division frequently during this time period and may have inquired about the transcript to obtain information on what the Tampa Division had done in the matter, he does not recall making any call to "tip them off," nor would he make such a call.

5. German claims that all of the official records in the FBI files prior to his September 10, 2002, letter consistently support his account of the January 2002 meeting and its significance. Is it true that the only records that contradict German's version of events were created after he made his allegations? If so, why is this fact not prominently noted in the report?

Mr. German's claims are not accurate. There were records in existence prior to his September 2002 letter that conflict with Mr. German's account of the January 2002 meeting and its significance. First, the recording and the transcript of the January 2002 meeting preceded Mr. German's September 2002 letter. Our analysis of the recording and transcript of the January 2002 meeting does not support Mr. German's conclusion that the subjects showed a willingness to engage in terrorist activities, send money to foreign terrorist groups, or launder money. Moreover, the recordings of other meetings between the informant and one of the subjects also existed prior to Mr. German's involvement in the case and are in conflict with Mr. German's account, as well as the accounts that came from the informant and the original case agent prior to October 2002.

We noted in the OIG's report that Mr. German, much like the original case agent, appears to be relying in part on the inaccurate account of the meetings with the subjects that was provided by the informant, rather than relying on the actual transcript of the meeting. The case agent created an inaccurate written account of the meeting, and this inaccurate account was then included in several other FBI documents, despite the existence of an accurate transcript of the meeting. Both the OIG in its report, and Mr. German in his September 2002 letter, were critical of the case agent's delay in listening to and drafting accurate summaries of the January meeting and the later meetings.

6. The reason cited on page 50 of the final report for not examining the FBI press office's false statements about the German matter is simply that an investigation was "not warranted." The August 12, 2004, press release states that, "an exhaustive investigation and review of available evidence found no information to support allegations that the subject was involved in terrorism or terrorist funding, nor was there an apparent link between a domestic terrorist organization and an international terrorist organization." This statement seems to be directly contradicted by German's February 2003 sworn statement (particularly page 5, which directly quotes pages 49-50 of the January 2002 meeting transcript). If German's sworn statement is accurate and the press statement is false, then please explain why examining this potential misuse of the FBI press office to discredit an FBI whistleblower would not be warranted.

Mr. German's claim about the press release being false concerns the key question that we addressed throughout our report. The FBI's press statement relied on the Tampa Division and Inspection Division reviews, both of which found a lack of a terrorism nexus between the two subjects. In fact, we investigated this issue and reached the same conclusionS. We described the basis of our conclusions throughout the report.

Moreover, we note that Mr. German's quote from pages 49-50 of the January 2002 transcript, when analyzed in context of the complete discussion that was captured in the transcript and the recording, does not support his contention that the press release is false. For example, in the very next passage on page 50 of the transcript, the subjects discussed how to spread their offensive views in the United States – not by doing "anything . . . radical or off the wall," but instead by "opening people's hearts and minds."

Finally, other than the direct quote from pages 49-50 of the January 2002 meeting, Mr. German does not refer to any specific pages in the transcript to support his contention that the subjects discussed participating in any terrorist activities or funding for terrorism. As noted above, we reviewed the entire transcript and listened to the recording, and we believe the transcript and recording support our – and the FBI's – conclusions that the evidence did not support a viable terrorism case.

7. The final report notes that despite significant effort, the OIG was unable to determine who used correction fluid to alter the documents attached to ASAC Welker's February 2003 "clarifying" EC. Those documents were offered by Welker in an attempt to prove that the CW was properly admonished not to leave the recording device in the room without being present. In fact, however, before being altered the admonishment forms were originally dated more than a month after the meeting. Page 29 of the final report indicates that the OIG administered polygraph examinations to the case agent and to the Orlando SSRA, both

of whom denied altering the documents. Given that ASAC Welker is the one who used the altered documents to try to exonerate his office of any responsibility for a Title III violation and given that his use of the documents occurred in the context German having just proved, contrary to Welker's denial, that the meeting was recorded, why is there no reference to a Welker polygraph? Was he given a polygraph examination? If not, please explain why not?

We interviewed Welker and took an affidavit from him, but we did not polygraph him. Based on interviews, the OIG investigators believed that the original admonishment forms were altered before they were faxed from the FBI's Orlando office to the Tampa office, where Welker received them. This information excluded him as a potential subject in the alteration of the forms. Instead, the OIG polygraphed both the original case agent and the Orlando supervisor who both had an opportunity to alter the documents in Orlando. They both passed the polygraph examination.

Finally, we note that despite the apparent failure to give the informant these admonishment forms in advance of the January 2002 meeting, the informant had been given similar admonishment forms in another Tampa case several months prior to the January meeting. We did not find evidence to prove who altered the forms in that case.

8. According to Welker's February EC, previous denials that the January 2002 meeting had been recorded were found to be untrue after additional contact with the CW. Yet, in response to German's comments, your report acknowledges that the recordings of the January 2002 meeting were transcribed by the Tampa Division before German made his allegations. If the recording was in the Orlando SSRA's desk and had already been transcribed by the Tampa Division before September 2002, why would anyone need further contact with the CW in early 2003 to know that the meeting had been recorded? Did your investigators determine when this additional contact with the CW allegedly occurred and why? Was it documented in an FD-302 interview summary? If not, why not?

This question refers to a contact with the informant in early 2003. However, as indicated in Welker's February EC, that contact with the informant occurred on October 15, 2002, rather than in early 2003. The meeting was documented in an FD-302 by the drug case agent on the same date as the meeting. This October meeting with the informant was held after the Orlando RA had completed its review of all recordings in the terrorism case. The purpose of the meeting was to resolve portions of the recordings which were unintelligible or involved equipment failures, according to our interview of the agent who met with the informant.

Thus, this contact with the informant already had taken place by the time Welker issued his December 2002 EC in which he misstated that the January 2002 meeting was not recorded. As we noted in our report, Welker relied on confusing and vague summaries in the case file when inaccurately reporting that the January 2002 meeting was not recorded.[1] According to Welker, he was not aware at the time he issued his December 2002 EC of either the recording or transcript of the January meeting. Welker did not recall who asked him to prepare the February 2003 EC or that there were any challenges to the December 2002 EC. He remembered being tasked with preparing the February 2003 EC and that its purpose was to ensure that nothing in the December 2002 EC was "mischaracterized."

9. On page 38, the report states that "we found no one who substantiated German's allegation that the SSRA made disparaging comments about German." However, according to German he provided the OIG with the name of a witness in April 2004 with relevant information on this issue who was never interviewed. Please explain why this individual was not interviewed.

The allegation made by Mr. German addressed on page 38 of the OIG's report was that the Orlando Supervisory Special Resident Agent made disparaging remarks about Mr. German indirectly in the October 2002 EC, to others in the Orlando office, and to Mr. German's supervisor in Atlanta. After interviewing all of the witnesses who Mr. German identified for this allegation, we did not substantiate the allegation.

Mr. German also gave OIG investigators the name of a witness who he said could provide information about an unsuccessful attempt to block his "paperwork" to participate in a local undercover training program in Boston. Mr. German told us that ultimately he was cleared to participate in the local training program, and he traveled from Atlanta to Boston to attend the local program. We focused our investigative resources on the retaliation allegations where Mr. German claimed he suffered harm, including the alleged disparaging remarks by the SSRA. Finally, it is important to note that, in the course of our investigation, we conducted approximately 50 interviews to probe Mr. German's various allegations.

10. Given all the misconduct documented in this matter, please explain who the FBI should hold accountable, what discipline has been

[1] For example, one of the summaries of the January 23 meeting stated that the informant had left the recording device in the vehicle and that as a consequence the meeting was not recorded. When we listened to the recording by the informant on January 23, we noted that the informant left the recording device in the vehicle for a period of approximately 17 minutes in which only traffic noises could be heard.

imposed so far, if any, and what additional steps should be undertaken in this matter?

In our report, we identified poor performance and potential misconduct and recommended that the FBI review our findings and take appropriate action, including discipline. Specifically, we stated that the original Orlando case agent had been deficient in timely documenting investigative activities, including the critical meeting between the two subjects, even though Mr. German had urged that this documentation be completed immediately. We also stated that the Tampa Division supervisors failed to address effectively the case agent's investigative deficiencies, despite Mr. German's complaints. Further, we faulted these supervisors for not imposing a performance work plan for the case agent until February 2004, more than a year after stating that one would be imposed. In addition, we recommended that FBI OPR review the case agent's conduct in assigning inaccurate dates for when the documents were dictated and transcribed in order to give the impression that they were created much earlier than they actually were. We have provided our report to the FBI and recommended that it consider the performance or misconduct issues of the individuals involved. We understand that the FBI is in the process of reviewing our report.

With regard to the finding of retaliation against Mr. German by FBI supervisor Jorge Martinez, that matter is now pending before the Department's Office of Attorney Recruitment and Management (OARM). Pursuant to the FBI whistleblower regulations, we provided our finding of retaliation to OARM and our recommendation for correction action.

In addition to the specific recommendation regarding Martinez, we recommended that the FBI reiterate to its supervisors that reprisals for protected disclosures are prohibited.

If you have further questions about this matter, please contact me or Scott Dahl, Senior Counsel, at (202) 514-3435.

Sincerely,

Glenn A. Fine
Inspector General

Enclosure

August 12, 2004

Michael German
4201 Wilson Blvd, #110-491
Arlington, VA 22207

Glenn A. Fine
Inspector General
U.S. Department of Justice
Investigations Division
950 Pennsylvania Avenue, NW
Room 4322
Washington, DC 20530

Dear Mr. Glenn A. Fine:

Two years ago I made a complaint regarding mismanagement of a terrorism case to which I was assigned. I followed the FBI protected disclosure policy. Your office is currently investigating retaliatory action taken against me following this complaint.

Last Sunday, August 8, 2004, FBI Spokeswoman, Assistant Director Cassandra Chandler, appeared on NBC Dateline and made several false statements attempting to refute the allegations I made in my complaint. AD Chandler made statements on the air which were false, and I was asked by Dateline to respond to other statements she made, that were not aired, which were also false. I was told the FBI made a contemporaneous recording of the interview, so obtaining this statement should not be a problem for your office. In addition, a written statement by the FBI broadcast today on MSNBC Live likewise contained false information. The Office of Inspector General has all of the evidence which I presented over the last two years. A simple comparison of the evidence to the FBI's public statements will demonstrate that these statements are not true, but I will be happy to meet with you at your convenience to go over the statements and the evidence. I believe the FBI's false statements are being made intentionally to discredit me, in furtherance of the organized efforts of the FBI to retaliate against me. The evidence in your possession is incontrovertable, and does not rely on the credibility of any specific individual. The FBI managers involved in my complaint originally denied this evidence even existed, and now the FBI is perpetuating a false conclusion which flies in the face of this evidence.

I request the Office of Inspector General open an investigation into these recent statements and take appropriate action against the FBI. I also request the OIG issue a public correction of these statements, and prohibit the FBI from making any additional false statements regarding this matter. I can be reached through my attorney, Lynne Bernabei, (202)745-1942.

Sincerely,

Michael German

October 4, 2004

Michael German
4201 Wilson Blvd., #110-491
Arlington, VA 22203

Charles T. Huggins
Special Agent in Charge
U.S. Department of Justice
Office of the Inspector General
Washington Field Office
1300 North 17th Street, Suite 3200
Arlington, VA 22209

Dear Mr. Huggins:

This letter responds to your September 29, 2004 letter requesting more specific information regarding false statements made by FBI Assistant Director Cassandra Chandler during an August 8, 2004 broadcast of Dateline NBC, and false statements made in an FBI press release dated August 12, 2004. The allegations were made in my August 12, 2004 letter to Inspector General Glenn Fine and were reiterated in an August 13, 2004 letter to FBI Director Robert S. Mueller from my attorney, Lynne Bernabei.

AD Chandler made several false statements during her appearance on Dateline NBC. The most serious regarded the nature of the investigation involved in my complaint:

1) NBC Interviewer: "She says the case itself was seriously flawed. As far as any connection between domestic militia and foreign Islamic terror groups…"
AD Chandler: "It did not exist, there was not a coming together of those two separate groups."

This is a false statement. I provided signed sworn statements to the FBI OPR and the DOJ IG on December 15, 2002 and February 13, 2003 which detail these events, and I provided the IG with a copy of a 1/23/02 transcript which is irrefutable proof of a meeting between an associate of an Islamic terror group and the leader of a domestic terror group. The contents of that transcript reveal, from statements made separately by both subjects of the investigation, that this recorded meeting was in fact the second meeting between representatives of the two groups.

2) An NBC producer asked me to respond to a statement from AD Chandler that this meeting was the result of entrapment by a cooperating witness. This is demonstrably a false statement. The cooperating witness did not initiate the 12/23/02 meeting. The transcript records both subjects separately stating that the meeting was initiated by a telephone call the Islamic terror group associate made to the domestic terror group after finding an anti-Semitic leaflet issued by the domestic group. This call, according to both

subjects, was followed up with an initial meeting between the Islamic terror group associate and an associate of the domestic terror group who is not in attendance at the 1/23/02 meeting. The success of this preliminary meeting led to the 1/23/02 meeting between the Islamic group associate and the leader of the domestic group. The cooperating witness was asked to accompany the leader to the 1/23/02 meeting, and the cooperating witness plays only a minor role in the 1/23/02 meeting, as demonstrated by the contents of the transcript. Since the cooperating witness did not initiate the call to request a meeting, since he was not in attendance in the first meeting, and since he was not driving the discussion in the second meeting, he could not have entrapped the subjects of the second meeting. Further, a Group I proposal submitted to FBIHQ in April of 2002 was required to contain a letter from the United States Attorney reflecting that proposal had been reviewed and no entrapment issues existed. A second Group II proposal approved in September, 2002 was also required to contain such a letter.

3) NBC Interviewer: "She insists Mike German does not know the whole story."
AD Chandler: "He was not the case agent on that case. He did not see the final review of the case and the results."

This is a false statement. Although the final report of the Inspection Division review of my complaints was withheld from me for several months as part of the effort to retaliate against me for having brought the complaint, when I reported this matter to Congress the Office of Congressional Affairs arranged for me to review the report before I met with Congressional staff. This was known at high levels of the FBI because one of the matters I discussed with Congressional staff was the lack of integrity in the Inspection Division review of this matter. This false statement is important because it was made specifically for the purpose of discrediting me in continuing retaliation for bringing a complaint forward.

4) AD Chandler said, "Since he's made allegations of retaliation we've taken them seriously." This is a false statement. I made an allegation of retaliation to Assistant Director John Pistole on October 9, 2002, via e-mail but received no response. My follow-up phone call was not returned. I alleged retaliation in my sworn statements of December 15, 2002 and February 13, 2003 but the FBI OPR never investigated these allegations. The Inspection Division took over the investigation in March of 2003 and I provided documentary evidence of retaliation. The Inspection report does not reflect any investigative effort addressing my allegations of retaliation or my allegations of false statements made by FBI managers. The FBI never investigated any of my allegations of retaliation, and allowed the retaliation to continue until my resignation in June of 2004. Although the Inspector General's office was aware of these allegations as well, the IG did not open an investigation until January 30, 2004, and did not conduct any investigation until taking another signed sworn statement from me in April 2004.

5) AD Chandler: "When information did come forward in the case that he's referring to it was reviewed and it was determined there was inadequate information to go forward beyond that level."

relevant documentation. This documentation included an electronic communication that falsely reported the results of the Undercover Review Committee meeting to suggest the Committee questioned my qualifications when they had not.

2) "Accordingly, two different teams, one from the field office and one from our Inspection Division, performed an exhaustive investigation and review of available evidence and found no information to support allegations that the subject was involved in terrorism or terrorist funding, nor was there an apparent link between a domestic terrorist organization and an international terrorist organization."

This is a false statement. The Inspection Division report acknowledges historical links between the subject and an international terrorist group. The December EC I wrote to Section Chief Frahm details significant reporting regarding this subject's links to terrorism and terrorism funding. The 12/23/02 transcript proves there was a meeting between a representative of a domestic terrorist organization and an international terrorist organization. The contents of that transcript detail an earlier phone call and meeting, so there are at least three contacts between these groups.

3) "The informant's faulty and uncorroborated version of events was insufficient predication to support the continuation of a counterterrorism investigation."

This is a false statement. The informant's version of events is corroborated by the 12/23/02 transcript. It is the field division management's version of events that are contradicted by the transcript.

I hope this is detailed enough for you to begin an investigation of this matter. Please contact me if you need further information.

Sincerely,

Michael German

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

July 17, 2014

VIA ELECTRONIC TRANSMISSION

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Director Comey:

At a hearing on May 21, 2014, I brought to your attention the cases of three female whistleblowers at the FBI.[1] Each one previously worked as a supervisor in FBI offices where their colleagues were predominantly male. These women alleged that they suffered gender discrimination and that they were retaliated against when they reported these abuses through the Equal Employment Opportunity process or other means.

In response, you pledged that the Bureau would fully cooperate with any review undertaken by the Inspector General concerning these allegations.[2] In addition, you assured the Committee that you would ensure that there is no further retaliation.[3] To your credit, I have heard reports from within the Bureau that personnel changes you recently made at the leadership level have sent a positive message to employees.

However, the above-referenced whistleblowers have raised more pressing concerns of retaliation from their immediate supervisors. For example, one whistleblower reports that her current, male supervisor is a friend of the man who was the subject of her initial complaint of gender discrimination. On behalf of this friend, the whistleblower's current supervisor is reportedly perpetrating subtler forms of retaliation against her.

In addition, since the May 21, 2014 hearing, five additional FBI whistleblowers have contacted my office. Four of them are women who claim that they were retaliated against after reporting gender discrimination. The fifth is a male coworker who allegedly suffered reprisal when he spoke out against the alleged discrimination.

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[1] U.S. Senate Committee on the Judiciary, *Oversight of the Federal Bureau of Investigation*, (May 21, 2014); http://www.judiciary.senate.gov/meetings/oversight-of-the-federal-bureau-of-investigation-2014-05-21, at 50:00-52:00; last accessed July 14, 2014.
[2] *Id.*
[3] *Id.*

Overall, each of the *eight* whistleblowers referenced above asserts that the FBI uses Loss of Effectiveness (LOE) orders as a method of retaliation. Apparently, a Loss of Effectiveness order can be used as a punitive tool by retaliatory managers because it allows them to bypass the Office of Professional Responsibility (OPR) and thus avoid basic due process. Unlike an OPR review, an LOE does not provide the employee in question a right of appeal. Moreover, according to the whistleblowers, employees who receive an LOE do not necessarily even receive notice of the underlying allegations. Therefore, that employee never has the opportunity to defend against those allegations.

Despite this total lack of due process, the consequences of an LOE are reportedly extensive. The whistleblowers claim that managers often use an LOE as a basis for a demotion. The whistleblowers also allege that an LOE can preclude the possibility of promotion for three years. Further, the whistleblowers note that if an allegation of fraud or false statements is made as the purported basis of an LOE against an employee, that employee is required to disclose that allegation in court, regardless of its merits, if that employee is ever called to testify as a government witness in a criminal trial.

Finally, one of the whistleblowers notes that she has spoken to three additional individuals at the FBI who claim that the Bureau used LOEs to retaliate against them. These three individuals allegedly declined to come forward to my staff because they fear further reprisal from the FBI.

In order to understand the use of LOEs and their potential role in whistleblower retaliation, please respond to the following:

1. What is the FBI's policy concerning the use of Loss of Effectiveness orders?

2. For FBI employees against whom an LOE is issued, does the FBI provide basic due process, including (1) the ability to appeal, (2) notice, and (3) an opportunity to defend against the underlying allegations? If not, why not?

3. How many LOE's have been issued since January 1, 2009?

    a. How many of those LOEs were issued against an employee following that employee's providing notice of a potential EEO claim?

    b. How many of those LOEs were issued against an employee following that employee's alleging waste, fraud, abuse, or mismanagement?

    c. Were those LOEs issued against female FBI agents in higher proportions than their representation among all agents? Please provide supporting documentation and data.

4. Are you willing to meet with the whistleblowers referenced at the May 2014 hearing who allege continuing retaliation?

Please provide your reply in writing no later than August 15, 2014. If you have any questions, please contact Jay Lim of my Committee staff at (202) 224-5225. Thank you for your continuing cooperation in this important matter.

Sincerely,

Charles E. Grassley
Ranking Member

cc: Michael E. Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Patrick J. Leahy
Chairman
Senate Committee on the Judiciary
Washington, D.C. 20510

U.S. Department of Justice

Office of the Inspector General

February 3, 2015

The Honorable Harold Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
H-305, The Capitol
Washington D.C. 20515

The Honorable Nita Lowey
Ranking Member
Committee on Appropriations
U.S. House of Representatives
1016 Longworth House Office Building
Washington D.C. 20515

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
S128, The Capitol
Washington D.C. 20510

The Honorable Barbara Mikulski
Vice Chairwoman
Committee on Appropriations
United States Senate
142 Dirksen Senate Office Building
Washington D.C. 20510

Dear Chairmen, Vice Chairwoman, and Ranking Member:

This letter is to report to the Committees on Appropriations, as required by Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014), that the Federal Bureau of Investigation (FBI) has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act) to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records. The OIG requested these records in connection with two investigations being conducted by the OIG under the Department's Whistleblower Protection Regulations for FBI Employees, 28 C.F.R. pt. 27.

As you are aware, Section 218 provides:

> No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended. The Inspector General of the Department of Justice shall report to the Committees on Appropriations within five calendar days of any failures to comply with this requirement.

Id.

The unfulfilled document requests that cause the OIG to make this report were sent to the FBI on September 26, 2014, and October 29, 2014, respectively. Since that time, the FBI has made partial productions in both matters, and there have been multiple discussions between the OIG and the FBI about these requests, resulting in the OIG setting a final deadline for production of all material of February 2, 2015.

On February 2, 2015, the FBI informed the OIG that it would not be able to produce the remaining records by the deadline and that it would need until later this week in one of the whistleblower investigations to do so, and sometime later next week in the second whistleblower investigation to do so. The primary reason for the FBI's inability to meet the deadline set by the OIG for production is the FBI's desire to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. The FBI further informed the OIG that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG. However, Section 6(a) of the IG Act does not contain an express limitation of the OIG's access to these categories of information. Moreover, even if the Department's leadership were to give such authorization, which it has indicated it would do, a process allowing the OIG access to records of the Department only when granted permission by the Department's leadership is inconsistent with the OIG's independence, as reflected in Section 6(a) of the IG Act and Section 218 of the Appropriations Act.

Section 218 of the Appropriations Act does not permit the use of funds appropriated to the Department of Justice to deny the OIG access to records in the custody of the Department unless in accordance with an express limitation of Section 6(a) of the IG Act. The IG Act, Section 6(a), does not expressly or otherwise limit the OIG's access to the categories of information the FBI maintains it must review before providing records to the OIG. For this reason, we are reporting this matter to the Appropriations Committees in conformity with Section 218.

We will continue to work to resolve this matter, and will keep the Committees apprised of our progress. If you have any questions, please feel free to contact me or Chief of Staff Jay Lerner at (202) 514-3435.

Sincerely,

Michael E. Horowitz
Inspector General

cc: The Honorable Jason Chaffetz
Chairman, Committee on Oversight and
Government Reform
U.S. House of Representatives

The Honorable Elijah Cummings
Ranking Member, Committee on Oversight and
Government Reform
U.S. House of Representatives

The Honorable Ron Johnson
Chairman, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Thomas Carper
Ranking Member, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
U.S. House of Representatives

The Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
U.S. House of Representatives

The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate

The Honorable John Culberson
Chairman, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
U.S. House of Representatives

The Honorable Chaka Fattah
Ranking Member, Subcommittee on Commerce, Justice, Science
and Related Agencies
Committee on Appropriations
U.S. House of Representatives

The Honorable Richard Shelby
Chairman, Subcommittee on Commerce, Justice, Science,
and Related Agencies
Committee on Appropriations
United States Senate

U.S. Department of Justice

Office of the Inspector General

February 19, 2015

The Honorable Hal Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
H-305, The Capitol
Washington D.C. 20515

The Honorable Nita Lowey
Ranking Member
Committee on Appropriations
U.S. House of Representatives
1016 Longworth House Office Building
Washington D.C. 20515

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
S128, The Capitol
Washington D.C. 20510

The Honorable Barbara Mikulski
Vice Chairwoman
Committee on Appropriations
United States Senate
142 Dirksen Senate Office Building
Washington D.C. 20510

Dear Chairmen, Vice Chairwoman, and Ranking Member:

This letter is to report to the Committees on Appropriations, as required by Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014), that the Federal Bureau of Investigation (FBI) has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act), to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records. The OIG requested these records in connection with an ongoing review of the Drug Enforcement Administration's use of administrative subpoenas to obtain and utilize certain bulk data collections.

As you are aware, Section 218 provides:

> No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended. The Inspector General of the Department of Justice shall report to the Committees on Appropriations within five calendar days of any failures to comply with this requirement.

Id.

The unfulfilled information request that causes the OIG to make this report was sent to the FBI on November 20, 2014. Since that time, the FBI has made a partial production in this matter, and there have been multiple discussions between the OIG and the FBI about this request, resulting in the OIG setting a final deadline for production of all material of February 13, 2015.

On February 12, 2015, the FBI informed the OIG that it would not be able to produce the remaining records by the deadline. The FBI gave an estimate of 1-2 weeks to complete the production but did not commit to do so by a date certain. The reason for the FBI's inability to meet the prior deadline set by the OIG for production is the FBI's desire to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. It has been the FBI's position in other cases that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG. However, Section 6(a) of the IG Act does not contain an express limitation of the OIG's access to these categories of information. Moreover, even if the Department's leadership were to give such authorization, a process allowing the OIG access to records of the Department only when granted permission by the Department's leadership is inconsistent with Section 6(a) of the IG Act, OIG independence, and Section 218 of the Appropriations Act.

Section 218 of the Appropriations Act does not permit the use of funds appropriated to the Department of Justice to deny the OIG access to records in the custody of the Department unless in accordance with an express limitation of Section 6(a) of the IG Act. The IG Act, Section 6(a), does not expressly or otherwise limit the OIG's access to the categories of information the FBI maintains it must review before providing records to the OIG. For this reason, we are reporting this matter to the Appropriations Committees in conformity with Section 218.

We will continue to work to resolve this matter, and will keep the Committees apprised of our progress. If you have any questions, please feel free to contact me or Chief of Staff Jay Lerner at (202) 514-3435.

Sincerely,

Michael E. Horowitz
Inspector General

cc: The Honorable John Culberson
Chairman, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
U.S. House of Representatives

The Honorable Chaka Fattah
Ranking Member, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
U.S. House of Representatives

The Honorable Richard Shelby
Chairman, Subcommittee on Commerce, Justice, Science and
Related Agencies
Committee on Appropriations
United States Senate

The Honorable Jason Chaffetz
Chairman, Committee on Oversight and
Government Reform
U.S. House of Representatives

The Honorable Elijah Cummings
Ranking Member, Committee on Overight and
Government Reform
U.S. House of Representatives

The Honorable Ron Johnson
Chairman, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Thomas Carper
Ranking Member, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
U.S. House of Representatives

The Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
U.S. House of Representatives

The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate

U.S. Department of Justice

Office of the Inspector General

February 25, 2015

The Honorable Hal Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
Rayburn House Office Building
Washington D.C. 20515

The Honorable Nita Lowey
Ranking Member
Committee on Appropriations
U.S. House of Representatives
Rayburn House Office Building
Washington D.C. 20515

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
Hart Senate Office Building
Washington D.C. 20510

The Honorable Barbara Mikulski
Vice Chairwoman
Committee on Appropriations
United States Senate
Hart Senate Office Building
Washington D.C. 20510

Dear Chairmen, Vice Chairwoman, and Ranking Member:

This letter is to report to the Committees on Appropriations, as required by Section 218 of the Department of Justice Appropriations Act, 2015, Pub. L. No. 113-235, § 218, 128 Stat. 2130, 2200 (2014), that the Federal Bureau of Investigation (FBI) has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act), to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records. The OIG requested these records in connection with its pending review of the FBI's use of information derived from the National Security Agency's collection of telephony metadata obtained from certain telecommunications service providers under Section 215 of the Patriot Act. The timeliness of production is particularly important given that Section 215 of the Patriot Act is set to expire in June of this year.

As you are aware, Section 218 of the Appropriations Act provides:

> No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody of the Department or to prevent or impede the Inspector General's access to such records, documents and other

> materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended. The Inspector General of the Department of Justice shall report to the Committees on Appropriations within five calendar days of any failures to comply with this requirement.

Id.

The unfulfilled document request that causes the OIG to make this report was sent to the FBI on October 10, 2014. Since that time, the FBI has made partial productions in this matter, and there have been multiple discussions between the OIG and the FBI about this request, resulting in the OIG setting a deadline for production of all material of January 23, 2015.

On January 27, 2015, the FBI informed the OIG that it would need an extension of time for completing production, but was unable to provide an estimate of how much additional time was needed. More recently, the FBI informed the OIG that it will take several additional weeks to complete production of a portion of the outstanding material and potentially longer to complete the balance. One of the reasons for the FBI's inability to meet the deadline set by the OIG for production is the FBI's desire to continue its review of e-mails requested by the OIG to determine whether they contain any information that the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information. It has been the FBI's position in other cases that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG. However, Section 6(a) of the IG Act does not contain an express limitation of the OIG's access to these categories of information. Moreover, even if the Department's leadership were to give such authorization, a process allowing the OIG access to records of the Department only when granted permission by the Department's leadership is inconsistent with Section 6(a) of the IG Act, OIG independence, and Section 218 of the Appropriations Act.

Section 218 of the Appropriations Act does not permit the use of funds appropriated to the Department of Justice to deny the OIG access to records in the custody of the Department unless in accordance with an express limitation of Section 6(a) of the IG Act. The IG Act, Section 6(a), does not expressly or otherwise limit the OIG's access to the categories of information the FBI maintains it must review before providing records to the OIG. For this reason, we are reporting this matter to the Appropriations Committees in conformity with Section 218 of the Appropriations Act.

We will continue to work to resolve this matter, and will keep the Committees apprised of our progress. If you have any questions, please feel free to contact me or Chief of Staff Jay Lerner at (202) 514-3435.

Sincerely,

Michael E. Horowitz
Inspector General

cc: The Honorable John Culberson
Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
United States House of Representatives

The Honorable Chaka Fattah
Ranking Member, Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
United States House of Representatives

The Honorable Richard Shelby
Chairman, Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations
United States Senate

The Honorable Jason Chaffetz
Chairman, Committee on Oversight and Government Reform
United States House of Representatives

The Honorable Elijah Cummings
Ranking Member, Committee on Oversight and Government Reform
United States House of Representatives

The Honorable Ron Johnson
Chairman, Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Thomas Carper
Ranking Member, Committee on Homeland Security and
Governmental Affairs
United States Senate

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
United States House of Representatives

The Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
United States House of Representatives

The Honorable Charles Grassley
Chairman, Committee on the Judiciary
United States Senate

The Honorable Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

February 26, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable James B. Comey
Director
Federal Bureau of Investigation
935 Pennsylvania Ave., N.W.
Washington, D.C. 20535

Dear Director Comey:

Section 218 of the 2015 Department of Justice Appropriations Act provides as follows:

> No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice *timely* access to *all* records, documents, and other materials in the custody or possession of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended. The Inspector General of the Department of Justice shall report to the Committees on Appropriations within five calendar days any failures to comply with this requirement.[1]

This month, the Justice Department's Office of the Inspector General (OIG) has submitted *three* such reports, each noting a failure of the Federal Bureau of Investigation (FBI) to provide the OIG with timely access to records.[2] According to the OIG, the records were sought in connection with its review of (1) the FBI's use of information collected by the National Security Agency; (2) the Drug Enforcement Administration's use of administrative subpoenas to obtain and utilize certain bulk data collections; and (3) two FBI whistleblower complaints.[3]

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[1] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, (2014), at Div. B, Title II, Sec. 218 (emphasis added).

[2] Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Feb. 3, 2015); Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Feb. 19, 2015); Letter from Michael Horowitz, Inspector General, U.S. Department of Justice, to Sen. Comm. on Appropriations and House Com. on Appropriations (Feb. 25, 2015).

[3] *Id.*

The OIG reports that the FBI failed to meet deadlines to produce a portion of these records for the "primary reason" that the FBI "desire[d] to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access."[4] Further, the OIG states that the FBI "informed the OIG that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG."[5]

However, under the statute, the Attorney General's blessing on the Inspector General's work is not required. That is the essence of independence. In certain limited circumstances, the law does allow the Attorney General to "prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing any subpoena."[6] Yet, the Attorney General is required to provide written notice to the Inspector General of the reasons for doing so, and the Inspector General must forward a copy of that written notice to Congress.[7]

The current practice is the opposite of the procedure dictated by the statute. Under the Inspector General Act (IG Act), the Attorney General is required to write to the Inspector General not when *permitting* access to records, but—precisely the opposite—when *denying* the authority to conduct a review. In other words, the burden is placed on the Attorney General to explain in writing why an Inspector General review should *not* proceed, not *vice versa*. The Department's current practice, however, shifts that burden on to the Inspector General by requiring him to justify his inquiry and obtain the blessing of the Attorney General to proceed, even though his right of access is already clearly established by statute.

Imposing a requirement not found in the statute for written permission from the Attorney General *before* granting access to records unnecessarily delays the work of the OIG. It also circumvents the oversight authority with regard to such disputes, which Congress explicitly reserved for itself through the reporting requirement.[8] This is because inaction in response to a document request allows the Department's leadership to indefinitely deny or delay a review sought by the OIG under its statutory right of access, without having to report to Congress.

Moreover, Section 218 plainly contemplates that OIG shall have access "to *all* records, documents, and other materials," subject to the sole limitation of Section 6(a) of the IG Act.[9] Section 6(a) does not limit the OIG's access to the categories of records the FBI has identified. Accordingly, the FBI appears to be engaging in a continuing pattern of violating the restriction on appropriations in Section 218.

Please respond to the following by March 20, 2015:

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[4] *Id.*
[5] *Id.*
[6] 5 U.S.C. App. § 8E(a)(1), (2).
[7] 5 U.S.C. App. § 8E(a)(3).
[8] 5 U.S.C. App. § 8E(a)(3).
[9] *See* note 1, *supra* (emphasis added).

1. Please provide to this Committee a detailed description, in the nature of a Vaughn index, of each record withheld and referenced in the three Section 218 reports that the OIG submitted to the Committees on Appropriation in February 2015, including (a) the date of the document, (b) the number of pages, (c) all sender, recipient, and subject matter designations on the document, and (d) the unit or division of the FBI and the official in possession of the records at the time of the OIG request.

2. In total, what is the amount of the appropriated funds expended to fund the FBI's "review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access" in each of these three cases?

3. Who at the FBI has been conducting the "review[s] of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access" in each of these three cases?

4. Are the FBI employees conducting these reviews paid with Congressional appropriations? If not, what is the source of funding for their activities? If so, then please explain how such reviews can occur without violating the Antideficiency Act[10] in each of these three cases?

Should you have any questions, please contact Jay Lim of my Committee staff at (202) 224-5225. Thank you for your attention to this important matter.

Sincerely,

Chuck Grassley

Charles E. Grassley
Chairman
Senate Committee on the Judiciary

cc: The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice

The Honorable Patrick Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Karl R. Thompson
Acting Assistant Attorney General
Office of Legal Counsel, U.S. Department of Justice

[10] 31 U.S.C. § 1341.

The Honorable Harold Rogers
Chairman
Committee on Appropriations, U.S. House of Representatives

The Honorable Nita Lowey
Ranking Member
Committee on Appropriations, U.S. House of Representatives

The Honorable Thad Cochran
Chairman
Committee on Appropriations, U.S. Senate

The Honorable Barbara Mikulski
Vice Chairwoman
Committee on Appropriations, U.S. Senate

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform, U.S. House of Representatives

The Honorable Elijah Cummings
Ranking Member
Committee on Oversight and Government Reform, U.S. House of Representatives

The Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs, U.S. Senate

The Honorable Thomas Carper
Ranking Member
Committee on Homeland Security and Governmental Affairs, U.S. Senate

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary, U.S. House of Representatives

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary, U.S. House of Representatives

The Honorable John Culberson
Chairman
Subcommittee on Commerce, Justice, Science and Related Agencies
Committee on Appropriations, U.S. House of Representatives

The Honorable Chaka Fattah
Ranking Member
Subcommittee on Commerce, Justice, Science and Related Agencies
Committee on Appropriations, U.S. House of Representatives

The Honorable Richard Shelby
Chairman
Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations, U.S. Senate

The Honorable Barbara Mikulski
Ranking Member
Subcommittee on Commerce, Justice, Science, and Related Agencies
Committee on Appropriations, U.S. Senate

The Honorable Rob Portman
Chairman
Permanent Subcommittee on Investigations
Committee on Homeland Security and Governmental Affairs, U.S. Senate

The Honorable Claire McCaskill
Ranking Member
Permanent Subcommittee on Investigations
Committee on Homeland Security and Governmental Affairs, U.S. Senate

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

March 2, 2015

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

This responds to your letter to Director Comey dated September 26, 2014, requesting additional information concerning the use of loss of effectiveness (LOE) transfers within the FBI and restating certain questions from an earlier letter on the same topic. We responded to your initial letter on September 25, 2014, and provide this second letter to answer the new questions raised in your latest correspondence and to update you on the new manner in which LOE transfers will be effectuated within the FBI.

As noted in prior correspondence, the FBI uses LOE transfers to maximize the efficiency and effectiveness of the workforce. It is vital for FBI management to be able to identify and quickly reassign supervisors and others who, for whatever reason (including reasons beyond the control of the employee), cannot effectively fulfill their official duties and responsibilities

The FBI recently adopted an important, new policy directive concerning LOE transfers. In order to initiate the transfer process, a written justification must be provided to the Human Resources Division (HRD) from senior executive management or the Inspection Division. The affected employee will also be provided with the written justification and will be given seven business days to provide a written response. HRD will consider the recommendation and the employee's response in determining whether the standard for the LOE transfer has been met. An LOE transfer is warranted when under the totality of the circumstances, the employee cannot satisfactorily perform his or her duties and the employee's ability to perform his or her duties cannot be brought to a satisfactory level. If HRD makes such a determination, the Associate Deputy Director will be advised and must concur in the transfer.

In your letter, you referenced a report prepared by the Office of Integrity and Compliance (OIC) related to LOE transfers. That report was prepared for the internal deliberations of FBI senior management in considering potential changes to the LOE transfer policy, and the report does not express any opinion on the merits of any individual case. As an internal deliberative document, we would decline to provide the report. However, as discussed above, the FBI has instituted a new LOE policy and we would welcome the opportunity to brief you or your staff on the policy changes.

In your amended request, you restated questions from your earlier correspondence related to LOE ECs from the Inspection Division (INSD), and specifically asked how many LOE ECs from INSD did not result in removal, suspension for more than 14 days, reductions in grade or pay, or a furlough of 30 days or less. As of March 1, 2015, INSD has issued LOE ECs concerning twenty-three individuals. Three individuals chose to retire after issuance of an INSD EC. Four individuals were returned or assigned to lower grade positions for various reasons.[1] None of the INSD ECs resulted in an individual's removal, suspension for more than 14 days, or furlough of 30 days or less.

You also referred to circumstances surrounding an FBI Special Agent in Charge (SAC) who was referred for discipline to the FBI's Office of Professional Responsibility (OPR). Because OPR dismissed the SAC from the rolls of the FBI, an LOE transfer was not considered.

As noted in prior correspondence, information pertaining to an individual's exercise of protected activity (such as an EEO claim or a whistleblower complaint of fraud, waste, abuse or mismanagement) is not reviewed, commented upon, included, or otherwise considered by any FBI official during any stage of the LOE process. Further, we do not maintain statistics concerning protected status in connection with LOE transfers.

Finally, given that the FBI employee identified in your letter is engaged in litigation challenging his LOE transfer, the issues pertaining to that transfer will be resolved in the context of that litigation. As a result, and as noted in prior correspondence, the Director will be unable to meet with him at this time.

As always, we appreciate your continued support of the FBI.

Sincerely,

Stephen D. Kelly
Assistant Director
Office of Congressional Affairs

1- The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

[1] One individual was in a non-permanent, term position and returned to his original grade at the end of the term. Another individual requested a transfer to his office of preference, which resulted in a reduction in grade. A third individual agreed to step down in grade in order to remain in her office of assignment. A fourth individual was reallocated from Headquarters to a position in a local field office.

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

March 3, 2015

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

This is in further response to your letter to Director Comey dated September 26, 2014 concerning the use of loss of effectiveness (LOE) transfers within the FBI.

In our response dated March 2, 2015, we advised that the FBI recently adopted a new policy directive concerning LOE transfers. A copy of the policy directive is enclosed. This internal document is provided in furtherance of the Committee's oversight activities and should not be further disseminated without prior consultation with the FBI.

We appreciate your interest in this issue and your continued support of the FBI.

Sincerely,

Stephen D. Kelly
Assistant Director
Office of Congressional Affairs

Enclosure

1 – The Honorable Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

UNCLASSIFIED

FEDERAL BUREAU OF INVESTIGATION
POLICY DIRECTIVE

0773D

1. Policy Directive Title.	Loss of Effectiveness Transfers
2. Publication Date.	2015-03-01
3. Effective Date.	2015-03-01
4. Review Date.	2018-03-01
5. Primary Strategic Objective. 13-Link skills and competencies to needs.	

6. Authorities:

6.1. Title 5 United States Code (U.S.C.) Section (§) 301

6.2. 28 Code of Federal Regulations (CFR) § 0.138

7. Purpose:

The purpose of this policy is to provide an effective but fair process under which employees may be reassigned for loss of effectiveness.

8. Policy Statement:

8.1. It is vital to the effective and efficient operation of the FBI for management to be able to reassign supervisors and others who, for whatever reason (including reasons beyond the employee's control), are determined by management to be unable to effectively fulfill their official duties and responsibilities while in their currently assigned positions.

8.2. Transfers of personnel that are directed based upon the findings set out in subsection 8.4.1. below are "loss of effectiveness" (LOE) transfers. An LOE transfer is an FBI management-directed reassignment; it may be ordered without the consent of the affected employee and is not an "adverse action" as that term is used in Title 5 of the U.S.C. or in related law and regulation.

8.3. An employee may not be recommended for an LOE transfer if the individual's ability to perform his or her duties can be brought to a satisfactory level through managerial action—including, but not limited to, through counseling, mentoring, or the use of a performance improvement plan while in his or her current position.

8.4. An LOE transfer may be recommended by the Inspection Division (INSD), an assistant director in charge (ADIC), a special agent in charge (SAC), an assistant director (AD), or an executive assistant director (EAD).

8.4.1. The recommendation must be sent to the AD, Human Resources Division (HRD) via electronic communication (EC) and be documented as follows:

8.4.1.1. All documentation resulting from an INSD LOE transfer recommendation must be serialized to the restricted file number being utilized for the particular inspection and to the personnel file of the affected employee.

8.4.1.2. All documentation resulting from an LOE transfer recommendation initiated by an ADIC, an SAC, an AD, or an EAD must be serialized to the personnel file of the affected employee.

8.4.2. The recommending official must set out in the EC the basis for the LOE transfer, including the circumstances, factors, and details that support the LOE recommendation. The EC must address why the employee meets the following standards for an LOE transfer:

8.4.2.1. The employee cannot satisfactorily perform his or her duties.

8.4.2.2. The employee's ability to perform his or her duties cannot be brought to a satisfactory level while remaining in that position.

8.4.2.3. The employee must, consequently, be removed from that position for the effectiveness and efficiency of the FBI.

8.4.3. The recommendation EC must include any other relevant information or attachments to support the recommendation. A copy of the recommendation EC, along with any supporting attachments or other information, must be provided to the affected employee concurrently with its submission to the AD, HRD.

8.5. The affected employee may respond in writing in an EC to the AD, HRD within seven business days of receiving the recommendation. The employee must provide a copy of his or her response to the proponent official at the same time his or her EC is submitted to the AD, HRD. The seven-day period begins on the first day after the employee's receipt of the recommendation for LOE transfer.

8.6. Using the standards listed in subsection 8.4.1., and after considering both the proponent's basis for the LOE recommendation and the employee's response, if any, the AD, HRD must approve or deny the LOE transfer recommendation. The AD, HRD must discuss the matter with the associate deputy director (ADD) and obtain the ADD's concurrence with the proposed course of action. If concurrence is obtained, the AD, HRD and ADD must notify the proponent official and affected employee of the approved LOE transfer and subsequent course of action via EC, using the above file number. No approved LOE transfer recommendation may be finalized without the concurrence of the ADD. Approved recommendations are final.

8.7. Upon denial of the LOE transfer recommendation, the AD, HRD will notify the proponent official and the affected employee of the decision via an EC, using the appropriate file number from subsection 8.4.1.

8.8. If the LOE recommendation is not approved, no reference to the recommendation in a name-check or similar process is permitted.

8.9. Denial of an LOE transfer recommendation does not preclude other appropriate action.

9. Scope:

9.1. This policy applies to FBI employees only. It does not apply to contractors, task force personnel, or other non-employees.

9.2. This policy applies only to management-directed reassignments which, because of the circumstances under which they are initiated, are designated as LOE transfers; that is, transfers not so designated are not within the scope of this directive even if they are otherwise management-directed.

10. Proponent:

Human Resources Division

11. Roles and Responsibilities:

11.1. The INSD, SACs, ADs, and EADs will recommend an employee for LOE transfer when, in their opinion, the standards set forth in subsection 8.4.1. are met.

11.2. AD, HRD must:

11.2.1. Receive and process all recommendations for LOE transfer in accordance with subsections 8.6., 8.7., and 8.8.

11.2.2. Take the following actions if the recommendation is approved: (a) determine where the employee should be placed after considering the employee's previous work history, education, skills, prior climate surveys, performance appraisals, awards, and other background information, and after making any necessary and appropriate consultations; (b) document the decision in an EC to the employee, with a copy to the proponent; (c) take any necessary action to reassign the employee; and

(d) coordinate with the employee's new management any appropriate follow-up action to assist the employee in succeeding in his or her new assignment.

11.2.3. Document the decision in an EC to the proponent, with a copy to the employee, if the recommendation is not approved.

12. Exemptions:

Because the Director is responsible to the Attorney General (AG) and, through the AG, to the President, for executing the duties of his office through the actions of his subordinates, the Director must be able to remove from a position any FBI employee in whom he no longer reposes trust or confidence. Consequently, the Director or Deputy Director (DD) may order the reassignment of any employee without adhering to the process and procedures set forth in this policy.

13. Supersession:

None

14. References, Links, and Forms:

None

15. Key Words, Definitions, and Acronyms:

15.1. Key Words

15.1.1. None

15.2. Definition

15.2.1. Adverse action: a personnel action that results in a loss of grade or pay (including suspensions without pay and furloughs of less than 30 days) or removal from employment. Because an LOE transfer is not initiated to and does not reduce in grade, suspend, furlough, or remove an employee, it is not an adverse action.

15.3. Acronyms

15.3.1. AD: assistant director

15.3.2. ADD: associate deputy director

15.3.3. ADIC: assistant director in charge

15.3.4. AG: Attorney General

15.3.5. CFR: Code of Federal Regulations

15.3.6. DD: Deputy Director

15.3.7. EAD: executive assistant director

15.3.8. EC: electronic communication

15.3.9. HRD: Human Resources Division

15.3.10. INSD: Inspection Division

15.3.11. LOE: loss of effectiveness

15.3.12. SAC: special agent in charge

15.3.13. U.S.C.: United States Code

16. Appendices and Attachments:

None

Sponsoring Executive Approval

Name:	James L. Turgal
Title:	Assistant Director, Human Resources Division
Assistant Director Approval	
Name:	James A. Baker
Title:	General Counsel, Office of the General Counsel
Assistant Director Approval	
Name:	Patrick W. Kelley
Title:	Assistant Director, Office of Integrity and Compliance
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Name:	Valerie Parlave
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Associate Deputy Director Approval	
Name:	Kevin L. Perkins
Title:	Associate Deputy Director
Final Approval	
Name:	Mark F. Giuliano
Title:	Deputy Director

UNCLASSIFIED

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

October 17, 2014

The Honorable Charles E. Grassley
United States Senate
Washington, DC 20510

The Honorable Ron Wyden
United States Senate
Washington, DC 20510

Dear Senators Grassley and Wyden:

This responds to your letter of August 12, 2014, to the President, which requested a copy of the Attorney General's report titled "Department of Justice Report on Regulations Protecting FBI Whistleblowers." This report resulted from Presidential Policy Directive 19 (PPD-19), entitled "Protecting Whistleblowers with Access to Classified Information." Your letter was referred to the Department of Justice (the Department) for response.

The Department recognizes the important role played by whistleblowers in our law enforcement efforts. We take very seriously our responsibilities with regard to FBI employees who make protected disclosures under the regulations. We appreciate your interest in these matters and, in response to your request, have enclosed a copy of the Attorney General's report. This report addresses the Department's process for handling and adjudicating FBI whistleblower complaints and for protecting whistleblowers from reprisal. Specifically, the report assesses the efficacy of the provisions contained in part 27 of title 28, Code of Federal Regulations, in deterring the personnel practices prohibited in section 2303 of title 5, United States Code, and in ensuring appropriate enforcement of that section.

To assess and recommend potential changes to the current FBI whistleblower process, the Department brought together key stakeholders to form a working group of attorneys from the Office of the Deputy Attorney General, the FBI, the Justice Management Division, the Office of Attorney Recruitment and Management (OARM), the Office of the Inspector General (OIG), and the Office of Professional Responsibility (OPR). The working group analyzed and developed thoughtful suggestions for both streamlining and improving the process, to ensure that the FBI whistleblower procedures afford appropriate protections and that the process is a reasonably timely one. As part of its evaluation, the working group sought feedback from whistleblower advocates in the community, and the FBI consulted with its own employees – the ultimate beneficiaries of the Department's review. In addition, and pursuant to PPD-19, a draft of the report was circulated to the Office of Special Counsel for comment.

Based on this review, the report provides proposals and recommendations on a number of legal, policy, and regulatory matters, that the Department believes are warranted. As noted below, the Department has already started implementing some of these recommendations. Other recommendations will require further development, including, in some instances, the usual public notice and comment procedures involved in the rulemaking process. Specifically, the report proposes the following changes:

- **Providing access to alternative dispute resolution (ADR).** As a result of this review, the Department has created a voluntary mediation program for FBI whistleblower cases. This program utilizes the Department of Justice Mediator Corps Program, which was created in 2009 to expedite and make more efficient the resolution of workplace disputes. Mediation is available at all stages in the process at the request of the complainant. Through the notice and comment process, the Department will seek to formalize inclusion of the ADR program.

- **Awarding compensatory damages.** In accordance with PPD-19, the Department will propose amending its regulations to provide that OARM may award compensatory damages, in addition to other available relief.

- **Expanding the list of persons to whom a protected disclosure may be made.** Currently, a disclosure is protected if (1) its content qualifies for protection, and (2) it was made to specific persons within FBI management. The Department supports expanding the list of people to whom protected disclosures may be made to include – in addition to the highest-ranking FBI field office official – the second-highest ranking tier of field office officials. Such a change would mean that, in 53 field offices, a disclosure to the Special Agent in Charge (the highest-ranking official) or to any Assistant Special Agent in Charge (the second-highest ranking tier of officials, typically 2-3 per office) would be protected, assuming the disclosure's content qualified for protection. In the remaining and largest three field offices – Los Angeles, New York City, and Washington, D.C. – a disclosure to the Assistant Director in Charge (the highest-ranking official) or to any Special Agent in Charge (the second-highest ranking tier of officials, typically 5-6 in these three offices) would be protected. The Department will propose amending the regulations accordingly.

- **Improving training for FBI employees.** The Department believes that it is essential that all FBI employees, as well as non-FBI employees involved in the Department's FBI whistleblower program, receive proper training on the Department's regulations and the rights and responsibilities of all parties. The OIG Whistleblower Ombudsman, in connection with the FBI and other affected

offices, is currently reviewing the Department's training efforts regarding whistleblowing activities. As a result of this process, the Department will implement a new training program to ensure that (1) relevant employees receive appropriate training on a regular basis, and (2) that all employees are fully apprised of their rights and responsibilities.

- **Reporting findings of wrongdoing to the appropriate authority**. The Department, through OARM, has recently implemented a policy of referring any final decision that includes a finding of unlawful reprisal to the FBI Office of Professional Responsibility, and copying the FBI Director. The Department will propose amending the regulations to formalize this process.

- **Providing authority to sanction violators**. On several occasions, including in circumstances where the parties have requested the investigative file from OPR or OIG, the parties have agreed to enter a joint stipulated protective order to prevent the release of privacy-protected or sensitive law enforcement information. Currently, OARM does not have the authority to enforce such an order. To protect against the release of this sensitive information, the Department supports providing OARM with the authority to sanction those who violate protective orders similar to that provided to Merit System Protection Board (MSPB) administrative judges.

- **Expediting the OARM process through the use of acknowledgement and show cause orders**. At MSPB, within three business days of receipt of an appeal, an administrative judge issues an order which acknowledges receipt of the appeal, and informs the parties of the MSPB's case processing procedures (e.g., pertaining to designating a representative, discovery, filing pleadings, the agency's response, settlement, etc.). In cases where there is an initial question about the MSPB's jurisdiction, the MSPB issues, along with the acknowledgment order, an order directing that the appellant show cause as to why the appeal should not be dismissed for lack of jurisdiction. The show cause order puts the parties on notice of the jurisdictional requirements and their respective burdens of proof. Although MSPB procedures do not apply to FBI whistleblowers, issuing similar orders in FBI whistleblower cases could increase the efficiency of case adjudication at the jurisdictional phase. Through the public notice and comment process the Department intends to propose modifying its procedures to more closely mirror the MSPB process.

- **Equalizing access to witnesses.** During the Department's review, whistleblower advocates who met with the Department raised concerns about access to FBI

witnesses. They noted that, in some cases, the FBI has been able to call former FBI management officials or employees as witnesses against the complainant, either through affidavits or testimony at a hearing. However, they stated that the complainant has been unable to compel the deposition of those witnesses because OARM lacks authority to compel attendance at a hearing of, or the production of documentary evidence from, persons not currently employed by the Department. The Department will consider whether to amend its regulations to prohibit a party from admitting affidavits into evidence from persons who are unavailable for cross-examination at a hearing or deposition, unless an equitable access arrangement has otherwise been made.

- **Expanding resources for OARM**. During the course of the Department's review, the Department determined that OARM's resources should be expanded to reduce the time necessary to adjudicate FBI whistleblower cases. In November 2013, OARM hired a part-time attorney to supplement the work of its full-time staff attorney. Since then, OARM has improved its case processing time.

- **Publishing decisions**. During the Department's review, whistleblower advocates recommended that decisions entered by OARM and the Deputy Attorney General be made available to the public, with appropriate redactions to protect the identities of employees and claimants. They suggested that publication of opinions would help potential whistleblowers better understand their rights and responsibilities and would assist whistleblowers in litigating their cases should they suffer reprisal. Generally, these decisions have not been published due to the presence of law enforcement-sensitive and Privacy Act-protected information. Often, OARM opinions are highly fact-dependent, with detailed personal information about the complainant inextricably interwoven into the legal analysis. To improve transparency in the process, the Department is exploring whether it is possible to publish suitably redacted opinions in a manner that would provide useful information to FBI employees and the public.

- **Publishing annual reports**. During the Department's review, whistleblower advocates recommended that the Department publish the annual reports that the Attorney General submits to the President pursuant to a 1997 Presidential memorandum delegating to the Attorney General responsibilities concerning FBI employees under the Civil Service Reform Act of 1978, as amended by the Whistleblower Protection Act of 1989. The Department has previously disclosed the underlying data contained in the annual FBI whistleblower reports in response

We hope that this information is helpful. Please do not hesitate to contact this Office if we may provide additional assistance regarding this or any other matter.

Sincerely,

Peter J. Kadzik
Assistant Attorney General

Enclosure

cc: Hon. Patrick Leahy, Chairman, Senate Committee on the Judiciary
Hon. Orrin Hatch, Ranking Member, Senate Committee on Finance

Department of Justice Report on Regulations Protecting FBI Whistleblowers

April 2014

DOJ Report on Regulations Protecting FBI Whistleblowers

I. Introduction

The Department of Justice has prepared this report pursuant to Presidential Policy Directive/PPD-19, "Protecting Whistleblowers with Access to Classified Information." The report:

> assesses the efficacy of the provisions contained in part 27 of title 28, Code of Federal Regulations in deterring the personnel practices prohibited in section 2303 of title 5, United States Code, and ensuring appropriate enforcement of that section, and describes any proposed revisions to the provisions contained in Part 27 of title 28 that would increase their effectiveness in fulfilling the purposes of section 2303 of title 5, United States Code.

PPD-19 at 5. Part II of this report provides historical context regarding the Department's efforts to protect Federal Bureau of Investigation (FBI) whistleblowers from reprisal. Part III explains the Department's current policies and procedures for adjudicating claims of reprisal against FBI whistleblowers. Part IV summarizes and analyzes statistics regarding the use of these policies and procedures in recent years. Part V describes how the Department has conducted this review, including consultations. Part VI discusses changes that the Department intends to make to its policies and procedures. Part VII discusses changes that have been proposed to the Department but that the Department believes are not warranted at this time.

II. Historical Background

The protection of civilian federal whistleblowers from reprisal began in 1978 with passage of the Civil Service Reform Act of 1978 (CSRA), and has been expanded legislatively via the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA). Currently, federal employees fall into three categories. Most civilian federal employees are fully covered by the statutory regime and can challenge alleged reprisals via the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB). By contrast, some federal agencies that deal with intelligence are expressly excluded from the whistleblower protection scheme established by these statutes. The FBI is in an intermediate position; its employees are protected by regulations promulgated pursuant to the CSRA and WPA. *See* 28 C.F.R. Part 27. The regulations forbid reprisals against whistleblowers and provide an administrative remedy within the Department of Justice.

The CSRA set forth "prohibited personnel practices"—a range of personnel actions taken against federal employees for improper reasons. One such prohibited personnel practice is retaliating against an employee for revealing agency misconduct. Specifically, the CSRA made it illegal for an agency to

> take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for
> (A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences
> (i) a violation of any law, rule, or regulation, or

> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Pub. L. 95-454 § 101(a) (codified at 5 U.S.C. § 2302(b)(8)). The CSRA created the MSPB and OSC to enforce the prohibitions on specified personnel practices.

The CSRA expressly excluded from this scheme the FBI, the Central Intelligence Agency, various intelligence elements of the Department of Defense, and, "as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities." Pub L. 95-454 § 101(a) (codified at 5 U.S.C. § 2302(a)(2)(C)(ii)).

For the FBI alone, the CSRA enacted a separate statutory provision that specifically prohibits reprisals against whistleblowers in its employment. As enacted, 5 U.S.C. § 2303 provided:

> (a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General (or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences –
>
> > (1) a violation of any law, rule, or regulation, or
> > (2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.
>
> For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).
>
> (b) The Attorney General shall prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.
>
> (c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of section 1206 of this title.

Pub L. 95-454 § 101(a) (codified at 5 U.S.C. § 2303). In enacting section 2303, Congress provided protection to FBI employees only for disclosures made through limited internal channels—*i.e.*, to the Attorney General or a designee. By contrast, the broader scheme

applicable to most civil service employees that Congress created in section 2302 did not contain such restrictions on reporting.

In January 1980, the Department published a final rule implementing section 2303. The rule authorized the Department's Office of Professional Responsibility (OPR) to "request the Attorney General to stay any personnel action" against an FBI employee if the OPR Counsel determined that "there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a reprisal for a disclosure of information by the employee to the Attorney General (or a Department official designated by the Attorney General for such purpose) which the employee reasonably believed evidenced" wrongdoing covered by section 2303. 45 FR 27754, 27755.

Congress revisited these issues in the Whistleblower Protection Act of 1989, which significantly expanded the avenues available to most civilian federal employees. Among other things, the WPA allowed aggrieved employees to file an individual right of action alleging retaliation for protected disclosures—a vehicle that had not been available under the CSRA. The WPA amended section 2303 by replacing the requirement that the President "provide for the enforcement of this section in a manner consistent with applicable provisions of section 1206" with a requirement that enforcement be consistent with applicable provisions of newly-added sections 1214 and 1221. Sections 1214 and 1221 set forth the procedures under which OSC would investigate prohibited personnel practices and recommend or seek corrective action and the circumstances in which an individual right of action would be available.

The WPA also amended the regime generally applicable to civil service employees by revising section 2302 to protect only disclosures of "gross mismanagement," rather than disclosures of simple "mismanagement" as provided by the CSRA. The Senate Report explained the change to section 2302 as follows:

> While the Committee is concerned about improving the protection of whistleblowers, it is also concerned about the exhaustive administrative and judicial remedies provided under S. 508 that could be used by employees who have made disclosures of trivial matters. CSRA specifically established a de minimus [*sic*] standard for disclosures affecting the waste of funds by defining such disclosures as protected only if they involved "a gross waste of funds." Under S. 508, the Committee establishes a similar de minimus standard for disclosures of mismanagement by protecting them only if they involve "gross mismanagement."

S.Rep. No. 413, 100th Con. 2d Sess. at 13 (1988). However, for reasons not clear from the legislative record, the WPA did not make a corresponding change to section 2303. Thus, the law continued to cover FBI whistleblowers who disclosed "mismanagement," even if it did not rise to the level of "gross mismanagement."

In April 1997, President Clinton issued a memorandum to Attorney General Reno in which he delegated to the Attorney General the "functions concerning employees of the Federal Bureau of Investigation vested in the President by . . . section 2303(c)," and directed the

Attorney General to establish "appropriate processes within the Department of Justice to carry out these functions." 62 FR 23123. The memorandum further instructed the Attorney General to provide to the President an annual report including the number of reprisal allegations received and their dispositions.[1]

In November 1999, the Department issued a final rule establishing procedures under which FBI employees or applicants for employment may make disclosures of wrongdoing. 64 FR 58782. The rule created a remedial scheme within the Department through which FBI employees could seek redress for having suffered reprisal for making a protected disclosure. Subject to minor amendments in 2001 and 2008, the rule remains in force.

III. Current Rule

A. Definition of Protected Disclosure

With regard to its content, a disclosure is protected only if (as under the 1980 final rule)

> the person making it reasonably believes that it evidences:
> (1) A violation of any law, rule or regulation; or
> (2) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

28 C.F.R. § 27.1(a).

Unlike the 1980 rule, which authorized disclosures to the Attorney General or designee, the current rule specifies the set of persons to whom a disclosure of wrongdoing must be made in order to qualify as a protected disclosure. A disclosure may qualify as protected only if it is made to

> the Department of Justice's (Department's) Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the FBI Inspection Division (FBI-INSD) Internal Investigations Section (collectively, Receiving Offices), the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office.

Id.

B. Investigation

An FBI employee or applicant who believes he or she has suffered a reprisal for making a

[1] According to press reports at the time, this memorandum was issued during the pendency of a lawsuit filed against the FBI by an employee of the FBI Laboratory who alleged that he had suffered retaliation for disclosing misconduct and sought to avail himself of the expanded remedies offered by the WPA. The memorandum was issued one day before the Department's Inspector General issued a report substantiating many of the employee's allegations about misconduct at the FBI Laboratory.

protected disclosure may report the reprisal in writing to OPR or OIG (some are also referred by the FBI Inspection Division to the OIG). OPR and OIG will then confer to determine which office will conduct an investigation into the alleged reprisal. Occasionally, OIG or OPR may determine that one or the other component is more suited based on a variety of factors, including, for example, if one component has prior experience with the complainant, if the OIG has investigated the complainant for misconduct or is doing so at the time of the complaint, if the complainant alleges retaliation in connection with making a complaint to the OIG, or if the complainant's allegations are particularly relevant to the mission of the OIG. Otherwise, the offices typically will take turns. The office that eventually conducts the investigation is known as the "Conducting Office"; its role is roughly analogous to the role played by OSC for employees covered by section 2302. The Conducting Office investigates the allegation "to the extent necessary to determine whether there are reasonable grounds to believe that a reprisal has been or will be taken" for a protected disclosure. 28 C.F.R. § 27.3(d). The office has 240 days to make this determination unless granted an extension by the complainant. *Id.* § 27.3(f).

If the Conducting Office finds that there is no reasonable basis to believe that a reprisal occurred, it provides a draft report to the complainant with factual findings and conclusions justifying termination of the investigation, and allows the complainant to submit a written response. *Id.* § 27.3(g). Upon termination, the Office must so inform the complainant in writing, and must provide the reasons for termination, a summary of relevant facts ascertained by the Office, and a response to any written response submitted by the complainant. *Id.* § 27.3(h).

As part of its investigation, the Conducting Office obtains relevant documents from the FBI and from any other relevant source, including the complainant. These documents may include, for example, e-mails and personnel files. The Conducting Office interviews witnesses with relevant knowledge, typically including the complainant, the person(s) who allegedly retaliated against the complainant, and others (often other FBI employees working in the same unit) in a position to have knowledge of the relevant facts and circumstances.

If the Conducting Office determines that there are reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure, it reports its conclusion, along with any findings and recommendations for corrective action, to the Department's Office of Attorney Recruitment and Management (OARM). *Id.* § 27.4(a). Alternatively, a complainant may file a request for corrective action with OARM within 60 days of receipt of notification of termination of an investigation by the Conducting Office, or at any time beyond 120 days after filing a complaint with the Conducting Office if that Office has not notified the complainant that it will seek corrective action. *Id.* § 27.4(c)(1).

The regulations limit the extent to which proceedings before the Conducting Office are admissible before OARM. Without the complainant's consent, a determination by the Conducting Office that there are reasonable grounds to believe a reprisal has been or will be taken may not be cited or referred to. *Id.* § 27.4(a). (Where the Conducting Office finds in favor of the complainant on some, but not all claims, the complainant might not consent to the report being cited or referred to in proceedings before OARM, in order to prevent OARM from seeing any negative findings.) Nor may the Conducting Office's written statement explaining the termination of an investigation be admitted unless the complainant consents. *Id.* § 27.3(i).

C. Adjudication

OARM's adjudicatory role is roughly analogous to the role played by the MSPB in cases arising under section 2302. OARM's first step is to make a jurisdictional determination. To establish jurisdiction, a complainant must (1) demonstrate exhaustion of Conducting Office remedies and (2) allege in a non-frivolous manner that the complainant made a protected disclosure under 28 C.F.R. § 27.1(a) that was a contributing factor in the FBI's decision to take or not take (or threaten to take or not take) a personnel action covered by 28 C.F.R. § 27.2(b) against the complainant.

If OARM's jurisdiction is established, the parties then engage in discovery. In the past, OARM would sometimes stay proceedings in a case for an extended period of time at the parties' request to pursue related claims in another venue or to pursue settlement. In 2011, OARM implemented new case processing procedures under which it will dismiss a claim without prejudice where the parties need additional time to engage in discovery, to pursue settlement, or to litigate claims in an alternate forum.

OARM typically affords the parties 75 days to complete discovery, but extensions are often granted upon the parties' joint request. In some cases, at the parties' request, OARM has provided the parties with redacted portions of the investigative file received from the Conducting Office, subject to a stipulated protective order. OARM is often called upon by the parties to resolve discovery disputes, including various objections and motions to compel. Discovery is often extensive and may include thousands of pages of documentary evidence for OARM's review. Either party may request a hearing before OARM, which OARM may grant or deny at its discretion. At a hearing on the merits, the parties may call and cross-examine witnesses, and the proceedings are transcribed by a court reporter.

After discovery and any hearing, OARM sets a schedule for briefing on the merits, which typically takes two to four months to complete. To prevail on the merits, a complainant must first prove by a preponderance of the evidence that a protected disclosure was a contributing factor in a personnel action taken or to be taken. This can be proved indirectly:

> OARM may conclude that the disclosure was a contributing factor in the personnel action based upon circumstantial evidence, such as evidence that the employee taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

Id. § 27.4(e)(1). If the complainant meets this burden, OARM will grant corrective relief unless the FBI proves by clear and convincing evidence that it would have taken the same personnel action against the complainant even if he or she had not made the protected disclosure. *Id.* § 27.4(e)(2).

After any merits hearing and filing of the parties' respective merits (or post-hearing)

briefs. OARM renders a final determination on the merits. OARM has broad authority to order corrective relief, which may include

> placing the Complainant, as nearly as possible, in the position he would have been in had the reprisal not taken place; reimbursement for attorneys fees, reasonable costs, medical costs incurred, and travel expenses; back pay and related benefits; and any other reasonable and foreseeable consequential damages.

Id. § 27.4(f). Typically, the parties will submit briefs regarding the appropriateness of specific corrective remedies. A final corrective action order may require OARM to complete complex calculations regarding fees, back pay, and expenses, which in themselves may require additional rounds of briefing.

D. Appeal

Within 30 days of a final determination or corrective action order by OARM, either party may request review by the Deputy Attorney General (DAG), *see* 28 C.F.R. § 27.5, which usually involves another round of briefing. The DAG may set aside or modify OARM's actions, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without procedures required by law, rule, or regulation having been followed; or unsupported by substantial evidence. The DAG has full discretion to review and modify corrective action ordered by OARM. However, if the DAG upholds a finding that there has been a reprisal, then the DAG must order appropriate corrective action.

IV. Statistical Summary

Below is a summary of the disposition of FBI whistleblower reprisal cases filed with OIG, OPR, OARM, and the DAG from the beginning of 2005 through March 15, 2014.

A. OIG

OIG reviewed a total of 89 cases, of which four remained pending as of March 15, 2014. Of the 85 cases that were closed, OIG found that 69 were "non-cognizable." In a significant portion of cases, the claim was found non-cognizable because it was not made to the proper individual or office under 28 C.F.R. § 27.1(a). In other cases, the disclosure did not qualify as protected because it did not allege the type of violation or other misconduct cognizable under the regulations. In another set of cases, the complainant did not allege or suffer a qualifying adverse personnel action as a result of the disclosure. One case was voluntarily dismissed before a decision was made on whether to investigate it.

Of the 69 non-cognizable cases, only three complainants filed a request for corrective action (RCA) with OARM. In two of those cases, OARM found that it lacked jurisdiction to consider the complainants' RCAs. The third case is currently pending before OARM.

OIG determined that the claims of whistleblower reprisal warranted investigation in 15 of the 85 closed matters. Two of these cases were dismissed voluntarily by the complainant after OIG had begun its investigation. In seven cases, OIG determined that there were reasonable grounds to believe that reprisal had been taken against the complainant. In another six cases,

OIG did not find reasonable grounds to believe that a reprisal had been or would be taken. Of the four pending cases, OIG has initiated an investigation pursuant to 28 C.F.R. Part 27 in one case and is reviewing the others to determine whether such an investigation is appropriate.

Of the five cases in which OIG found reasonable grounds to believe that reprisal for a protected disclosure had occurred or would occur, three were reported to OARM under 28 C.F.R. § 27.4(a). In two of those cases, OARM found reprisal by the FBI and ordered corrective action. The third case is currently pending before OARM. In the two remaining cases not reported to OARM, one case ended because the FBI agreed to provide corrective relief, and the complainant in the other case did not pursue the matter following OIG's finding.

Of the five cases in which OIG found no reasonable grounds to believe that reprisal had been or would be taken, only one complainant proceeded to file an RCA with OARM. That matter is currently pending before OARM.

B. OPR

OPR has received 30 reprisal complaints, of which it has resolved 24. Three complainants pursued RCAs with OARM after waiting the requisite 120 days after filing a complaint with OPR, and three complaints remained pending as of March 15, 2014.

Of the 24 complaints resolved, in only two cases did OPR find that there were reasonable grounds to believe that whistleblower reprisal had been or will be taken. In both cases, OPR forwarded its report to OARM. In one of the cases, OARM ultimately concluded that the complainant had failed to prove his allegations. The other case is pending with OARM.

In 16 of the resolved cases, OPR found that it lacked jurisdiction over the claims due to one or more jurisdictional flaws: (1) the complainant complained to a supervisor or other entity, such as the FBI Office of General Counsel, that is not one of the nine individuals or entities listed under 28 C.F.R. § 27.1(a) to receive protected disclosures; (2) the complainant failed to allege a violation of law, mismanagement, gross waste of funds, abuse of authority or a danger to public health or safety; or (3) the alleged protected disclosure occurred after, and thus could not have caused, the alleged reprisal. After OPR terminated its investigation and closed their complaints, three of these 16 complainants filed RCAs with OARM. One is currently pending, OARM dismissed another, and the third was dismissed voluntarily by the complainant.

In another five cases, OPR terminated the investigation after concluding that it lacked reasonable grounds to believe that reprisal occurred. In only one of these five cases did a complainant pursue an RCA with OARM. That matter is currently pending with OARM.

In addition to cases in which OPR either found it lacked jurisdiction or concluded it lacked reasonable grounds to believe reprisal occurred, OPR closed one matter because the complainant did not respond to OPR's requests for additional information.

In the three cases in which the complainants pursued RCAs with OARM after not hearing within 120 days whether OPR would seek corrective action in their case, two cases were dismissed voluntarily by the complainants. In the third matter, OARM found that the complainant failed to prove the merits of his RCA.

C. OARM

A total of 50 cases have been active before OARM. Of those, 37 have been resolved, and 13 remain pending.

Of the 37 closed matters, OARM dismissed 16 for a lack of jurisdiction. Of these 16 cases, seven complainants failed to exhaust their Conducting Office remedies by failing to file a reprisal complaint with either OIG or OPR prior to filing an RCA with OARM. Three of the dismissed claims were filed by individuals who were neither FBI employees nor applicants for employment. OARM dismissed the remaining six claims for failing to make non-frivolous allegations sufficient for OARM's jurisdiction or for failure to state a claim upon which relief could be granted.

In another 16 cases reviewed by OARM, the complaint established jurisdiction (including one case in which the DAG found on appeal that a complainant had established jurisdiction, reversing OARM's initial determination that it lacked jurisdiction). Eight of the 16 cases were adjudicated on the merits. In four of these cases, OARM found reprisal by the FBI and ordered corrective relief. In the other four cases, OARM did not find reprisal. Of the remaining eight cases, in four cases the parties reached a settlement after OARM's finding of jurisdiction, and in the other four cases the complainant voluntarily dismissed the case subsequent to OARM's finding of jurisdiction.[2]

In another three cases, the complainants requested voluntary dismissal of their RCAs prior to a jurisdictional determination by OARM. Finally, two additional cases were opened based on complainants' notice of intent to file RCAs, but were closed when no RCAs were ultimately filed.

D. DAG

Seven cases decided by OARM have involved one or more requests for review by the DAG under 28 C.F.R. § 27.5. Three cases involved appeals of OARM's ruling on jurisdiction. In one case, the DAG affirmed OARM's determination that the complainant had failed to establish OARM's jurisdiction over his RCA. In a second case, the DAG reversed OARM's finding that the complainant failed to establish jurisdiction and remanded the matter to OARM. OARM subsequently made a determination that the complainant had proved some, but not all, of his allegations at the merits stage of the proceedings, and ordered corrective relief. The complainant filed an appeal of OARM's decision, which was affirmed by the DAG. In the third case, OARM determined that the complainant had failed to make a nonfrivolous allegation of a protected disclosure sufficient for OARM's jurisdiction. The complainant appealed OARM's decision in that regard, and the matter is currently pending before the DAG.

[2] Of the four cases in which the complainant voluntarily dismissed the case subsequent to OARM's finding of jurisdiction, one complainant sought dismissal due to counsel's maternity leave, one sought dismissal to focus on a related Title VII claim in federal court, and one sought dismissal to pursue extended discovery (pursuant to OARM's new case processing directive, *see supra* at 6, under which OARM will dismiss without prejudice to refiling when additional time is sought to engage in discovery). The record in the fourth case does not reflect the reason for the voluntary dismissal.

Three other cases decided by OARM reached the DAG on appeal after OARM's adjudication of the merits of the complainants' RCAs. In one case, the DAG affirmed OARM's determination that the complainant failed to prove the merits of her case. In the second case, both parties appealed portions of OARM's final determination (which granted the complainant's RCA) and corrective action order; the DAG ultimately affirmed OARM's decision and ordered corrective relief consistent with that ordered by OARM. In the third case, OARM granted the complainant's RCA and ordered corrective action. Following the FBI's appeal, the DAG remanded the matter to OARM for further consideration of the legal standard it applied to one of complainant's claims. The DAG eventually affirmed OARM's remand decision, rejecting both sides' appeals, and ordered corrective action.

The seventh case was remanded to OARM for consideration of whether the complainant proved by a preponderance of the evidence that he made a protected disclosure. In that case, OARM had assumed without deciding that the complainant had made a protected disclosure, but ultimately denied the complainant's RCA on the basis that he failed to prove that his alleged protected disclosure was a contributing factor to the personnel action at issue. The matter is currently pending before OARM.

V. The Department's Review and Consultations

This review was led by the Office of the Deputy Attorney General, with participation from the other key participants in administering the Department's FBI whistleblower regulation—the FBI, OARM, OIG, and OPR—as well as the Justice Management Division. In addition, the Department consulted with the Office of Special Counsel and FBI employees, as required by PPD-19, as well as with representatives of non-governmental organizations that support whistleblowers' rights and with private counsel for whistleblowers (collectively, "whistleblower advocates").[3]

For the consultation with FBI employees, the FBI's representatives on the Department's working group consulted with various FBI entities: the Ombudsman; the Office of Equal Employment Opportunity Affairs; the Office of Integrity and Compliance; the Office of Professional Responsibility; the Human Resources Division; and the Inspection Division. The representatives also solicited the views of each of the FBI's three official advisory committees that represent FBI employees—the all-employees advisory committee, the agents committee, and the middle-management committee. In addition, the FBI working group representatives discussed the matter at length with the two co-chairs of the all-employees advisory committee.

The latter co-chairs conveyed two main points, based upon their own prior consultation with various constituents. First, they stated that OARM takes too long to process cases. The co-chairs repeatedly mentioned delays in the OARM process, which they depicted as a serious shortcoming. Second, the co-chairs stated that a better job could be done of making FBI employees conscious of the whistleblower process and its parameters. The co-chairs mentioned

[3] The Department convened a meeting with the following whistleblower advocates: Angela Canterbury of the Project on Government Oversight; David Colapinto and Stephen Kohn of Kohn, Kohn & Colapinto; Tom Devine of the Government Accountability Project; Michael German of the American Civil Liberties Union; and Steven Katz, former chief counsel to the chairman of the MSPB.

specifically that FBI employees may not be aware that, within field offices, a disclosure is protected only if made to the highest-ranking official in the office. The co-chairs recommended that additional trainings or other avenues be explored in order to increase employee knowledge of the rules. The co-chairs also gave the impression that they thought the adjudicators in these cases should be more independent; they implied that use of OARM and the DAG inherently suffered from an appearance-of-bias problem.

VI. Recommended Changes

Below is a discussion of changes to policies and procedures, typically but not necessarily involving changes to the regulations, that the Department believes are warranted.

A. Providing Access to Alternative Dispute Resolution (ADR)

As a result of this review, the Department has created a voluntary mediation program for FBI whistleblower cases. ADR can focus the parties' attention at early stages of litigation, enabling each side to learn more about the other side's goals in a manner that may facilitate early resolution. The Department's Equal Employment Opportunity (EEO) community created the Department of Justice Mediator Corps (DOJMC) Program in 2009 as a means of informal resolution to address and, when possible, resolve workplace disputes. Although the program focuses on EEO issues, the mediators are available to help resolve any type of dispute. Coincidentally, the FBI Office of Equal Opportunity Affairs is responsible for the operational management of the DOJMC program, whose scope is Department-wide. The DOJMC currently has approximately 120 collateral-duty mediators. Roughly two-thirds are FBI employees; the remaining mediators are drawn from across other Department components. Current mediator resources are expected to be sufficient to make available a mediator from outside the FBI should the complainant so desire.

The Department developed and delivered training to a cadre of skilled mediators, and launched the mediation program for FBI whistleblower cases in April 2014. Mediation is available at all stages of the process—*i.e.*, at the Conducting Office level, before OARM, and on any appeal to the Deputy Attorney General. Once mediation is elected, the matter will be stayed. The mediation process should last approximately 90 calendar days, with most mediations taking place within 45 calendar days from the date of election. The mediator will meet with the parties and facilitate discussions in an effort to find common grounds on which to resolve the complaint. If mediation does not result in a settlement, proceedings will resume and the mediator will have no input into the investigation or adjudication of the matter. Nonetheless, the parties are likely to return to the proceedings with a better understanding of what is important to them and to the other party, which may help them reach a settlement later in the process.

OSC actively utilizes mediation in retaliation cases, and offered its strong support for the Department doing so in FBI whistleblower cases.

When revising its regulations, the Department will seek to formalize inclusion of the ADR program, by providing that ADR should be available with the agreement of both the complainant and the FBI from the time of the filing of the initial claim with the Conducting Office and at any subsequent point throughout the process, and that the time periods set forth in

the regulations for review and disposition of the claim, as well as for related filings, would be formally stayed pending completion of the mediation process. (Under the current regulations, the Conducting Office's 240-day deadline for completing its investigation and rendering a determination can be extended only if the complainant consents.)

B. Awarding Compensatory Damages

The Department supports amending its regulations to provide that OARM may award compensatory damages, in addition to other available relief. Currently, corrective action ordered by OARM may include:

> placing the Complainant, as nearly as possible, in the position he would have been in had the reprisal not taken place; reimbursement for attorneys fees, reasonable costs, medical expenses incurred, and travel expenses; back pay and related benefits; and any other reasonable and foreseeable consequential damages.

28 C.F.R. § 27.4(f). These categories roughly matched the remedies available to whistleblowers covered by section 2302 at the time when the rule was promulgated. However, the WPEA amended sections 1214 and 1221 to make compensatory damages available for such whistleblowers. *See* Pub. L. 112-199 § 107(b) (amending 5 U.S.C. §§ 1214(g)(2) and 1221(g)(1)(A)(ii)). Likewise, PPD-19 provides that corrective action may include compensatory damages, to the extent authorized by law. PPD-19 at 2.

The Department believes that it is appropriate to amend its regulations to provide for compensatory damages, and has determined that it is authorized to do so by section 2303, which (as amended by the WPA) authorized rulemaking "consistent with applicable provisions" of sections 1214 and 1221. In light of the provision of compensatory damages to whistleblowers covered by section 2302, and PPD-19's direction that covered agencies must make available compensatory damages where authorized by law, the Department intends to amend its regulations accordingly. To be sure, assessment of compensatory damages in a specific case would require examination of additional facts and would necessitate another round of briefing. The Department will therefore carefully monitor the impact of this expansion of remedies on OARM's case processing pace.

C. Expanding the Definition of Persons to Whom a Protected Disclosure May Be Made

At this time, the Department recommends a limited expansion of the set of persons to whom a "protected disclosure" may be made. Currently, a disclosure is protected if (1) its content qualifies for protection and (2) it was made to one of numerous entities and individuals:

- the Department's Office of Professional Responsibility,
- the Department's Office of the Inspector General,

- the FBI Office of Professional Responsibility,
- the FBI Inspection Division Internal Investigations Section,
- the Attorney General,
- the Deputy Attorney General,
- the Director of the FBI,
- the Deputy Director of the FBI, or
- the highest-ranking official in any FBI field office.

28 C.F.R. § 27.1(a).

The Department recommends expanding the persons to whom protected disclosures may be made to include—in addition to the highest-ranking FBI field office official—the second-highest ranking tier of field office officials. Such a change would mean that, in 53 field offices, a disclosure to the Special Agent in Charge (the highest-ranking official) or to any Assistant Special Agent in Charge (the second-highest ranking officials, typically 2-3 per office) would be protected, assuming its content qualified for protection. Further, in the remaining and largest three field offices—Los Angeles, New York City, and Washington, D.C.—a disclosure to the Assistant Director in Charge (the highest-ranking official) or to any Special Agent in Charge (the second-highest ranking official, typically 5-6 in these three offices) would be protected.

This expansion would enhance the ability of employees to make protected disclosures within their own office. At the same time, the limited nature of the expansion would retain the benefit of channeling on-site disclosures to persons with authority to redress wrongdoing once identified. The Department intends to evaluate the impact of this expansion and may choose subsequently to expand further the set of persons to whom a protected disclosure may be made, if it determines that such expansion is warranted.

During the process of reviewing the current FBI whistleblower standards and procedures, the whistleblower advocates recommended revising and broadening the regulations to protect disclosures to any supervisor, noting that PPD-19 instructs IC elements to protect disclosures to any supervisor in the employee's direct chain of command and that the WPEA similarly protects civil-service employees.

OSC, while supportive of the Department's proposed expansion, agrees with the whistleblower advocates that FBI personnel should be protected for making disclosures to other supervisors in the chain of command. OSC recommends that a disclosure should be protected if made to a supervisor at least one level above the employee who may be responsible for the wrongdoing or inefficiency that was disclosed. In OSC's view, whistleblower protection laws are most productive at encouraging the disclosure of wrongdoing, and therefore at making the government more efficient, if protections extend to the employee's specific work site, where

most government inefficiencies occur and can be eliminated. OSC believes that to deny protection unless the disclosure is made to the high-ranked supervisors in the office would undermine a central purpose of whistleblower protection laws.

For now, however, the Department recommends a narrower approach to this issue. The Department believes that the set of persons to whom a protected disclosure can be made is extensive and diverse, and has seen no indication that the list has impeded disclosures of wrongdoing. Indeed, the list of persons and offices to whom a protected disclosure may be made appears on the FBI's Intranet site and is readily findable by any employee who searches that site for "whistleblowing."

D. Improving Training

The Department believes that it is essential that all FBI employees, as well as non-FBI employees involved in the Department's FBI whistleblower program, receive proper training on the Department's regulations and the rights and responsibilities of all parties. The OIG Whistleblower Ombudsman, in connection with the FBI and other affected offices, is currently reviewing the Department's training efforts regarding whistleblowing activities, and expects to submit recommendations for increasing employee awareness regarding the FBI whistleblower program. The Department will aim to ensure that (1) relevant employees receive appropriate training on a regular basis and (2) employees have ready access at all times to information regarding their rights and responsibilities. Specifically, in light of the discussion in the previous section, the Department will aim to ensure that FBI employees are aware of the various entities and individuals to whom they may make a protected disclosure.

E. Reporting Findings of Wrongdoing

The whistleblower advocates recommended that any final decision that includes a finding of unlawful reprisal be forwarded to OIG, or other appropriate law enforcement authority, for consideration of whether disciplinary action is warranted against the officials responsible for the reprisal. OARM has recently implemented a policy of sending referrals to the FBI Office of Professional Responsibility, with a copy to the FBI Director. The Department believes the regulation should be amended to formalize this practice.

F. Providing Authority to Sanction Violators

The Department supports revising its regulations to allow OARM to sanction litigants who violate protective orders. On several occasions, including in circumstances where the parties have requested the investigative file from the Conducting Office, the parties have agreed to enter a joint stipulated protective order to prevent the release of sensitive law enforcement or privacy-protected information. And although it has yet to have occasion to do so, OARM would issue a protective order if necessary to protect from harassment a witness or other individual who testifies before it.

Because OARM lacks sanction authority, there is currently no recourse available against a party who does not comply with a protective (or other) order, except for possible referral to a

bar association. The Department therefore intends to revise its regulations and/or OARM's procedures, as appropriate, to include a provision providing sanction authority similar to that provided to MSPB administrative judges under 5 C.F.R. § 1201.43. Under that provision, MSPB judges may impose sanctions upon the parties "as necessary to serve the ends of justice." As amended in October 2012, *see* 77 FR 62350, 62366, the rule provides that an MSPB judge must provide appropriate prior warning, allow a response to the actual or proposed sanction when feasible, and document in the record the reasons for any resulting sanction. Under the regulation, when a party fails to comply with an order, a judge may:

> (1) Draw an inference in favor of the requesting party with regard to the information sought;
>
> (2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;
>
> (3) Permit the requesting party to introduce secondary evidence concerning the information sought; and
>
> (4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.

5 C.F.R. § 1201.43(a).

G. Implementing Acknowledgement and Show Cause Orders

The Department believes that the OARM process could be expedited through use of acknowledgement and show cause orders. The MSPB procedures can serve as a model for this process.

Under OARM's current procedures, 28 C.F.R. § 27.4(c)(1), when a complainant files an RCA with OARM. OARM usually forwards it to the FBI and provides the FBI 25 calendar days to file its response. In some instances, however, the allegations in a complainant's RCA are so deficient that neither OARM nor the FBI can reasonably construe the specific claims raised. In such cases, OARM issues an order requiring the complainant to supplement the RCA to specifically address the elements of a whistleblower claim necessary for OARM's jurisdiction. OARM then forwards the RCA, as supplemented, to the FBI for a response. The complainant is afforded an opportunity to file a reply to the FBI's response, and the FBI is afforded time to file its surreply, if any, thereto. OARM then makes a jurisdictional determination over the complainant's RCA. If OARM finds that it has jurisdiction to consider all or some of complainant's claims, the parties are so notified and are directed to engage in discovery as relevant to the claims over which OARM has jurisdiction.

By contrast, at the MSPB, within three business days of receipt of an appeal, an

administrative judge issues an acknowledgment order, which acknowledges receipt of the appeal and informs the parties of the Board's case processing procedures (*e.g.*, pertaining to designating a representative, discovery, filing pleadings, the agency's response, settlement, etc.). In cases where there is an initial question about the Board's jurisdiction, the Board issues, along with the acknowledgment order, an order directing that the appellant show cause as to why the appeal should not be dismissed for lack of jurisdiction. The show cause order puts the parties on full notice of the jurisdictional requirements and their respective burdens of proof. In individual right of action cases, the Board orders the appellant to file a statement accompanied by evidence, within 10 calendar days of the date of the order, listing the following:

(1) the protected disclosure(s);
(2) the date on which the appellant made the disclosure(s);
(3) the individual(s) to whom the appellant made the disclosure(s);
(4) why the appellant's belief in the truth of the disclosure(s) was reasonable;
(5) the action(s) the agency took or failed to take, or threatened to take or fail to take, against the appellant because of the disclosure(s);
(6) why the appellant believes that a disclosure was a contributing factor to the action(s); and
(7) the date of the appellant's complaint to the Office of Special Counsel (OSC) and the date on which OSC notified the appellant that it was terminating its investigation into the complaint, or if the appellant has not received such notice, evidence that 120 days have passed since the appellant filed a complaint with OSC.

The agency then has 20 calendar days from the date of the order to file its response on the jurisdictional issue. Unless the judge informs the parties otherwise, the record on the issue of jurisdiction will close on the date the agency's response is due. No evidence or argument on jurisdiction filed after that date is accepted unless the submitting party shows that it was not readily available before the record closed.

Implementing similar acknowledgment/show cause orders in FBI whistleblower cases could increase the efficiency of case adjudication at the jurisdictional phase. The acknowledgment order, which would be issued in every case, would notify the parties of OARM's case processing procedures (including its deadlines for filing, the form of and restrictions on pleadings, etc.), the jurisdictional requirements, and the parties' respective burdens of proof at the very beginning of the litigation. Where it appears on the face of the RCA that OARM may lack jurisdiction over the matter (*e.g.*, in cases where the complainant failed to exhaust Conducting Office remedies), OARM would give the complainant a very short time period to show cause why the case should not be dismissed, allowing for quick resolution of cases that plainly fail to meet the jurisdictional standard. The FBI would have a specified number of calendar days from the date of the acknowledgement/show cause order to file its response to the complainant's RCA. The FBI's response would be required to include: a statement identifying the FBI's action taken against the complainant and stating the reasons for taking the action; all documents contained in the FBI record of the action; designation and signature by the FBI representative; and any other documents or responses requested by OARM. After receipt of the FBI's response, the record on the jurisdictional issue would close (absent

exigent circumstances showing the need for the presentation of additional evidence and/or arguments), thereby eliminating the current practice of providing the parties with the opportunity and time to file reply/surreply briefs. Implementing these procedures would require that the current language pertaining to OARM's initial case processing procedures in 28 C.F.R. § 27.4(c)(1) be revised accordingly.

H. Equalizing Access to Witnesses

The whistleblower advocates who met with the Department raised concerns about access to FBI witnesses. They noted that, in some cases, the FBI has been able to call former FBI management officials or employees as witnesses against the complainant, either through affidavits or testimony at a hearing. However, the complainant has been unable to compel the deposition of those witnesses because OARM lacks authority to compel attendance at a hearing of, or the production of documentary evidence from, persons not currently employed by the Department. *See* 28 C.F.R. § 27.4(e)(3). The Department is considering amending its regulations to prohibit a party from admitting affidavits into evidence from persons who are unavailable for cross-examination at a hearing or deposition, unless an access arrangement has otherwise been made.

I. Expanding Resources

Over the years, concerns have been expressed about the length of time it takes to adjudicate FBI whistleblower cases. With a consistent average of approximately ten new cases a year, the number of active FBI whistleblower cases on OARM's docket at any one time is relatively small. However, the pendency of several large, complex cases among the more routine cases, along with associated administrative responsibilities, significantly slows overall case processing times. Prior to 2005, adjudications were rendered by the Director of OARM with the support of OARM attorneys who were also charged with numerous other duties performed by OARM. This arrangement was found to be impractical and inefficient. In 2005, a full-time attorney position was established to assist the Director in his adjudicatory functions and oversee all whistleblower and related matters.

The functions performed by the staff attorney include, but are not limited to: complaint intake and docketing; record review and organization; legal research; drafting and issuing jurisdictional findings; holding or participating in hearings/teleconferences on discovery issues; ruling on routine motions for extensions of time; setting briefing/hearing schedules; holding or participating in trial-type hearings on the merits of complainants' cases; and drafting final determinations and orders for appropriate corrective relief. The staff attorney also provides significant assistance to attorneys in the Office of the Deputy Attorney General who prepare memoranda to aid the DAG in reviewing cases on appeal. Aside from these adjudicatory functions, the staff attorney is also responsible for the management and oversight of all administrative functions associated with the program, such as records management (including transferring closed case files to the Washington National Records Center/NARA under the appropriate records retention system); maintaining OARM's FBI whistleblower website, docket, case precedent system, and case processing directive; handling Congressional inquiries regarding cases and potential legislation; preparing the annual FBI whistleblower report to the President for

the AG's signature; and routinely advising senior level Department officials on OARM's FBI whistleblower procedures and relevant law.

Large, complex cases can slow the adjudicative process due to the multitude of procedural questions that may arise, requests to extend discovery, and extensive factual records that must be reviewed and analyzed after discovery has closed. Such cases complicate the assignment of Department resources in relation to the total case load. A number of cases have taken several years to resolve; the longest case took ten years from the filing of the complaint with OIG to the final decision by the DAG.

During the course of this review, the Department determined that OARM's resources should be expanded. In November 2013, OARM hired a part-time attorney to supplement the work of its full-time staff attorney. In a short period of time, this has enabled faster case processing by OARM.[4]

J. Publishing Decisions

The whistleblower advocates recommended that decisions entered by OARM and the DAG be made available to the public, with appropriate redactions to protect the identities of employees and claimants. They suggested that publication of opinions would help potential whistleblowers provide information in a manner that would be protected and would assist them in litigating their cases should they suffer reprisal. Traditionally, these opinions have not been published due to the presence of law enforcement sensitive and Privacy Act-protected materials. Often, these opinions are highly fact-dependent, with detailed personal information about the claimant inextricably interwoven into the legal analysis. In August 2013, upon a complainant's motion for public disclosure of OARM's Final Determination, OARM for the first time released to the parties for public dissemination a copy of its opinion, which was redacted for Privacy Act protected and law enforcement sensitive information. The Department is exploring whether it is possible, on a broader basis, to publish suitably redacted opinions in a manner that would provide useful information.

K. Publishing Annual Reports

The whistleblower advocates recommended that the Department publish the annual

[4] In addition, OARM has recently revised its policies to address concerns about slow case adjudication, particularly in the area of extended discovery requested by the parties. In a case processing directive issued in October 2011, OARM set specific limits on the type and amount of discovery the parties may conduct, adopting the MSPB's prior procedures and time limits pertaining to the parties' initial disclosures and requests for discovery. Previously, OARM had taken a liberal approach, routinely allowing the parties to engage in extended discovery and present thousands of pages of evidence in support of their respective claims. OARM also would liberally grant motions for extension of discovery deadlines (which had been 90 days from the date on which OARM issued a jurisdictional finding; now, parties are typically afforded 75 days). Now, when the parties request an extended continuation of the time for discovery, OARM has the discretion to dismiss the case without prejudice to filing again after the parties have completed discovery. This procedural option helps to keep cases from languishing on OARM's case docket, while providing the parties the time they need to obtain the discovery they seek. This option is also available in instances where the parties request time to pursue settlement, or where a complainant seeks a stay of OARM proceedings to pursue a Title VII claim in federal court.

reports that the Attorney General submits to the President pursuant to President Clinton's 1997 memorandum. The Department has no objection to doing so, should the President authorize such publication. The Department has previously disclosed the underlying data contained in the reports (which is essentially what the reports consist of) in response to requests from Congressional staff.

VII. Changes Considered But Rejected

The whistleblower advocates also recommended a number of additional changes that, upon consideration, the Department is not in favor of adopting at this time. These proposals, and the Department's rationale for not adopting them, are discussed below.

A. Allowing Judicial Review

The whistleblower advocates recommended that the regulations be amended to provide a right to judicial review. The Department declines to endorse this suggestion. In passing section 2303, Congress made a deliberate choice to create a closed system for FBI whistleblowers, in contrast to most civil service employees, who received the broader protections of section 2302(b), including access to judicial review. While most employees are protected for disclosures made to the general public, section 2303 provided that disclosures by FBI employees would be protected only if made to the Attorney General or a designee. Had Congress intended for FBI whistleblowers to be subject to judicial review like other agencies, it would have incorporated the FBI into the MSPB process. *See* 64 FR 58783 (quoting 124 Cong. Rec. 28770 (1978) ("We gave [the FBI] special authority . . . to let the President set up their own whistle-blower system so that appeals would not be to the outside but to the Attorney General.") (statement of Representative Udall)). Indeed, every court to have considered the question has concluded that section 2303 does not provide subject matter jurisdiction to hear a challenge to a determination made under the Department's FBI whistleblower regulations. *See McGrath v. Mukasey*, 2008 WL 1781243, *4+ (S.D.N.Y. Apr 18, 2008) (No. 07 CIV. 11058(SAS)); *Runkle v. Gonzales*, 391 F.Supp.2d 210, 230-34 (D.D.C. 2005); *Roberts v. U.S. Dep't of Justice*, 366 F.Supp.2d 13, 17-23 (D.D.C. 2005). The Department lacks the authority to afford judicial review given the terms of the statute.

Moreover, the Department believes that Congress's choice was appropriate given the FBI's involvement in national security work— which has increased dramatically since section 2303 was enacted in 1978—and in law enforcement. The rationale for excluding other agencies from coverage under section 2302 applies to the FBI as well.

B. Using Administrative Law Judges

The whistleblower advocates recommended that adjudications be performed by administrative law judges (ALJs), who are selected pursuant to 5 U.S.C. § 3105, in order to ensure that the adjudications are independent and impartial. The Department agrees, of course, that adjudications must be impartial, but does not believe that ALJs are necessary in order to accomplish this. The Department is considering whether it is appropriate to amend its regulations to make explicit what has always been implicit regarding the independence and impartiality of OARM determinations.

C. Imposing Deadlines for Decisions

The whistleblower advocates recommended that OARM's adjudication be subject to a regulatory time limit of 240 days to conduct discovery and convene a hearing, that a decision be issued within 90 days of the close of the record, and that DAG review be limited to 60 days from the completion of briefing. The advocates would allow these time limits to be extended only by consent of the complainant. The Department does not support these revisions at this time.

Many cases involve voluminous evidentiary records and present complex factual and legal disputes. As a result, it would be difficult, if not impossible, to meet a strict deadline for adjudication. OARM has recently made procedural changes aimed at decreasing case processing times; if the parties comply with the new stricter discovery deadlines and briefing schedules, OARM believes that it would be possible to adjudicate most cases within one year of receipt (excluding the time needed at the Conducting Office or DAG levels). However, OARM believes that some flexibility is critical, especially when balancing the current resources, case load, and complexity of cases (some of which present thousands of pages of discovery for OARM's review and consideration). Until resource issues can be resolved, it is premature to determine whether and how such a flexible deadline should be constructed. If such a flexible deadline is to be devised, the Department would consider applying it at the DAG level as well.

D. Granting Hearings Upon Request

The whistleblower advocates recommended that OARM grant hearings in all cases upon request. The Department does not believe such a change would be productive.

Currently, the decision whether to hold a hearing before OARM is discretionary. In making a determination of whether a protected disclosure was a contributing factor in a personnel action taken or to be taken, the Director of OARM "may hold a hearing at which the Complainant may present evidence in support of his or her claim, in accordance with such procedures as the Director may adopt." 28 C.F.R. § 27.4(e)(1). In practice, OARM has been receptive to requests for a hearing, particularly where the credibility of a witness is at issue. Where a fully developed written record presents a clear basis for a decision, holding a hearing could cause further delay in case resolution.

OSC agrees that hearings may not be necessary in all cases, but suggests adopting a short list of factors for OARM to consider when exercising its discretion on granting or denying a hearing. OSC suggests, for example, that a hearing could be held in cases that depend on witness credibility determinations, cases that require an assessment of employee performance, or where significant whistleblowing disclosures have been made that could reasonably result in retaliation by management.

Of these factors, the Department believes that whether or not witness credibility needed to be assessed is most directly relevant to determining whether a hearing should be held. The Department will consider whether to adopt a list of factors and, if so, whether other factors should be included.

E. Requiring the Production of Any Federal Employee

The whistleblower advocates recommended that OARM procedures be revised to require the production of any current employee of the federal government. (As noted in Part VI.H, OARM may compel attendance at a hearing of, or the production of documentary evidence from, only of persons currently employed by the Department.) The Department believes that it lacks the authority to make such a change by regulation, and therefore rejects this suggestion.

[redacted]

From: FBI Attorney-Advisor, Office of Integrity and Compliance [redacted]
Sent: Monday, August 04, 2014 1:53 PM
To: FBI Whistleblower
Subject: Whistleblower protection

[redacted],

Below I've copied and pasted the section from the Code of Federal Regulations section about FBI employees making protected disclosures. Your disclosure will receive "protected" status if:

- You disclose information
- That you reasonably believe
- Shows evidence of:
  - Violation of law, rule, or regulation; or
  - Mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health and safety.
- And you disclose the information to any of the following:
  - DOJ's Office of Professional Responsibility
  - DOJ's Office of Inspector General
  - FBI's Office of Professional Responsibility
  - FBI INSD (Internal Investigations Section)
  - The Attorney General
  - The Deputy Attorney General
  - Director of the FBI
  - The Deputy Director of the FBI
  - The highest ranking official in any FBI field office

So, I believe that according to the regulation, you would receive whistleblower protection for making a report to DOJ OIG. The main question would turn on the reasonableness of your belief; that is, would a reasonable person, in your situation, believe that the conduct at issue demonstrated mismanagement or abuse of authority (or any of the appropriate categories listed above)? In my opinion, yes. I'm sure you know, though, that this does not guarantee that you will not be retaliated against, even though retaliation/reprisal for making protected disclosures is illegal. (One caution about the above advice: I am not authorized to act as your attorney, and none of the above advice should be construed as anything more than my own personal opinion.)

I would be glad to discuss this with you further at your convenience.

Regards,
[redacted]

Effective: January 9, 2008
28 C.F.R. § 27.1

§ 27.1 Making a protected disclosure.

Currentness

(a) When an employee of, or applicant for employment with, the Federal Bureau of Investigation (FBI) (FBI employee) makes a disclosure of information to the Department of Justice's (Department's) Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the FBI Inspection Division (FBI–INSD) Internal Investigations

Section (collectively, Receiving Offices), the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office, the disclosure will be a "protected disclosure" if the person making it reasonably believes that it evidences:

(1) A violation of any law, rule or regulation; or
(2) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any office or official (other than the OIG or OPR) receiving a protected disclosure shall promptly report such disclosure to the OIG or OPR for investigation. The OIG and OPR shall proceed in accordance with procedures establishing their respective jurisdiction. The OIG or OPR may refer such allegations to FBI–INSD Internal Investigations Section for investigation unless the Deputy Attorney General determines that such referral shall not be made.

Credits

[Order No. 2492–2001, 66 FR 37904, July 20, 2001; Order No. 2926–2008, 73 FR 1495, Jan. 9, 2008]
SOURCE: Order No. 2264-99, 64 FR 58786, Nov. 1, 1999, unless otherwise noted.
AUTHORITY: 5 U.S.C. 301, 3151; 28 U.S.C. 509, 510, 515–519; 5 U.S.C. 2303; President's Memorandum to the Attorney General, Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978; 3 CFR p. 284 (1997).

28 C.F.R. § 27.1

[redacted]
Attorney Advisor
Office of Integrity and Compliance
(202) [redacted]

FBI email warns whistleblower of retaliation if surveillance program concerns reported

washingtontimes.com (http://www.washingtontimes.com/news/2015/mar/3/fbi-email-warns-whistleblower-of-retaliation-if-su/) · March 4, 2015

The FBI bluntly told a potential whistleblower that he could face retaliation by coming forward with concerns about political meddling inside a secret terrorism and counterintelligence surveillance program.

The warning came in an email from a bureau attorney that raises questions in Congress about the bureau's ability to properly handle accusations of wrongdoing and protect those who come forward.

The Senate Judiciary Committee is planning to take testimony Wednesday about the FBI's whistleblower protections, and an ongoing review of the bureau's surveillance program has raised concerns for the panel's chairman, Sen. Chuck Grassley, Iowa Republican.

"The main question would turn on the reasonableness of your belief; that is, would a reasonable person, in your situation, believe that the conduct at issue demonstrated mismanagement or abuse of authority?" the FBI attorney, within the Office of Integrity and Compliance, wrote in an email responding to the whistleblower's inquiry. "In my opinion, yes."

Then came the kicker: "I'm sure you know, though, this does not guarantee that you will not be retaliated against, even though retaliation/reprisal for making protected disclosures is illegal," the attorney concluded in the August email to the whistleblower.

The email, which was obtained and validated by The Washington Times, demonstrates what lawmakers and whistleblower activists have long suspected: The FBI repeatedly mishandles whistleblower cases, retaliating against employees who report waste, fraud and abuse, and fails to adequately investigate charges of misbehavior.

This whistleblower works in one of the FBI's "G-teams," which investigate counterterrorism cases, a topic on which the FBI is notoriously resistant to whistleblower complaints.

"The FBI has placed its bureaucratic culture ahead of protecting Americans from terrorism," said Stephen Kohn, a lawyer and executive director of the National Whistleblowers Center. "They have allowed retaliatory animus and their cultural hostility toward whistleblowers to compromise the counterterrorism program. What these employees are reporting is shocking but not new."

Last month, the Government Accountability Office found the FBI did little to offer its whistleblowers immunity and recommended the law enforcement agency issue guidance for those who wished to file complaints.

The GAO report found nearly 90 percent of FBI whistleblower claims were dismissed, and in only three cases from 2009 to 2013 did the Department of Justice side with the complainant.

It also took the bureaucracy as long as 10 years to resolve the complaints, even if verified, the report found.

"The FBI's whistleblower process is broken," Mr. Grassley said in a statement to The Times.

His committee will dig into such accusations Wednesday, demanding better protections and oversight for those brave enough to come forward.

"I am going to take a very serious look at the reforms proposed by GAO and the Justice Department at Wednesday's Judiciary Committee hearing," Mr. Grassley said.

The FBI is continually trying to improve its whistleblower protection process, but not all lawyers within the FBI are qualified to answer whistleblower protection questions or grant whistleblower status, according to those within the agency.

Entire Story (http://www.washingtontimes.com/news/2015/mar/3/fbi-email-warns-whistleblower-of-retaliation-if-su/?page=all)

Only nine officials have been formally designated within the bureau to receive whistleblower complaints, the GAO report found. Any FBI employee who reports wrongdoing to a boss not anointed by the FBI to handle such complaints "is not protected, and the person does not have a right to recourse if the individual should experience retaliation as a result," according to the GAO assessment.

"The FBI recognizes the important role played by whistleblowers in our law enforcement efforts, and we take very seriously our responsibilities with regard to FBI employees who make protected disclosures under the regulations," FBI spokesman Christopher Allen said in response to the whistleblower's accusations and emails.

"The FBI will not tolerate reprisals or intimidation by any FBI employee against those who make protected disclosures, nor tolerate attempts to prevent employees from making such disclosures," the spokesman said.

Last year, the FBI proposed revamping its whistleblower rules to make it easier for those to come forward. It expanded the list of FBI officials to whom a whistleblower can report concerns, and it allows whistleblowers to call witnesses if their cases are heard and make them eligible for compensation if their case proves true.

Still, those revisions proved little solace for the member on the surveillance squad wanting to report misbehavior.

The whistleblower's personnel file shows that for most of the last two decades he received high ratings and frequent praise for his surveillance work, including numerous awards and commendations as well as personal letters of gratitude directly from FBI directors when he worked in the Washington area. He received a rating of "excellent" in 2013 in his new division.

But after he questioned management in 2014 as to why his division was passed over for a new surveillance team it had earned in the rankings, the whistleblower was given a first-ever negative evaluation. "I've been retaliated against just for asking a fair question," he told The Times.

His performance review, dated September 2014 — a month after he went to the FBI's legal team seeking whistleblower advice — was downgraded to "minimally successful," with the primary justification being he was spending too much time trying to call out mismanagement rather than concentrating on the job at hand.

"[Name of whistleblower] advised he had consulted with a law firm and was going to pursue legal action," his superior wrote in his September review, obtained by The Times. "I advised him he was free to do so, but all research and related activity must be on his own time, and his time was to be spent leading the team."

Just a year earlier, however, the whistleblower received an "excellent" performance review, even notching off a few "outstanding" marks — the highest rank — in some categories.

"[Name of whistleblower] demonstrated excellent skill in establishing priorities, schedules, and plans when given a new assignment or task, [he] quickly evaluated the priority and addressed appropriately," the 2013 review said.

After the performance downgrade, and being told by an FBI lawyer his efforts to report agency waste, fraud and abuse may led to retaliation, the whistleblower sought whistleblower protection status and took his concerns to both the Justice Department's inspector general and the Senate Judiciary Committee.

"FBI culture discourages any kind of official complaint," said Michael German, a fellow with the Brennan Center for Justice's Liberty and National Security Program and a former FBI agent. "You can whine and stomp your feet, and nobody is going to get too angry with you. But if you make an official complaint — if it has to go on paper, it exists, it's real, and somebody has to deal with it."

Mr. German left the FBI in 2004 after reporting deficiencies in the FBI's counterterrorism operations to Congress — complaints of which he said ended his career at the bureau.

"You'd think the FBI would be interested in knowing how to do its job better, but they seemed more concerned about suppressing complaints, especially regarding terrorism cases," he said.

Entire Story (http://www.washingtontimes.com/news/2015/mar/3/fbi-email-warns-whistleblower-of-retaliation-if-su/?page=all)

The fact there's so few people qualified to grant whistleblower protection has a chilling effect on those in the bureau who may want to report misdeeds but can't go through their traditional chain of command, Mr. German said.

Forty-two percent of FBI agents surveyed by the inspector general in 2009 said they did not report all the employee misconduct they found on the job, and 18 percent said they never reported misconduct at all, which is troubling for a law enforcement agency, said Mr. German.

The reasons cited for not reporting included fears of retaliation, management not being supportive or worries no discipline action would be sought.

The counterterrorism units in which the threatened whistleblower works are known as G-teams, and are made up of covert tracking specialists who do not have the rank of special agents. With the possibility of 1,000 terrorist sleeper cells embedded within the U.S., the G-teams work with FBI agents to track down potential threats to the U.S. homeland.

"I just know what our team was and what it could be — I want to think the oath I took means something," the whistleblower told The Times. "I consider some [of] our team's actions an abuse of power and potentially a substantial and specific danger to public health and safety."

washingtontimes.com (http://www.washingtontimes.com/news/2015/mar/3/fbi-email-warns-whistleblower-of-retaliation-if-su/) · March 4, 2015

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

May 21, 2014

VIA ELECTRONIC TRANSMISSION

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Dear Inspector General Horowitz:

Recently, three female FBI whistleblowers contacted my office. Each one previously worked as a supervisor in FBI offices where their colleagues were predominantly male. These women allege that they suffered gender discrimination and that they were retaliated against when they tried to report these abuses through the Equal Employment Opportunity process or other means. These whistleblowers allege that there are additional female employees at the FBI who have suffered similar abuse, but are reluctant to report due to fear of reprisal.

At today's FBI oversight hearing, FBI Director James Comey was apprised of these allegations and pledged that the Bureau would fully cooperate with any review you might undertake and ensure that there is no further retaliation.[1] Please investigate these individual cases and determine whether there might be a pattern or perception of hostility toward women or whistleblowers that the FBI needs to address.

Please have your staff contact my office to make arrangements to contact these women and assess their allegations. Also, I would appreciate a status update on each of the requested investigations by June 23, 2014, including whether your office has decided to initiate an investigation and your rationale for that decision. Thank you for your attention to this matter. If you have any questions, please contact [redacted] my Committee staff at (202) 224-5225.

Sincerely,

Charles E. Grassley
Ranking Member

[1] U.S. Senate Committee on the Judiciary, *Oversight of the Federal Bureau of Investigation*, (May 21, 2014); http://www.judiciary.senate.gov/meetings/oversight-of-the-federal-bureau-of-investigation-2014-05-21, at 50:00-52:00; accessed May 21, 2014.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

September 26, 2014

VIA ELECTRONIC TRANSMISSION

The Honorable James B. Comey, Jr.
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Director Comey:

At a hearing on May 21, 2014, I brought your attention to three female whistleblowers at the FBI who claimed that they suffered retaliation for reporting gender discrimination.[1] In response, you pledged that there would be no further retaliation and that the FBI would fully cooperate with the Office of the Inspector General (OIG) in any review of these allegations.[2]

Following this hearing, five additional FBI whistleblowers contacted my office reporting gender discrimination and retaliation at the Bureau. All eight whistleblowers alleged that the FBI Inspection Division (INSD) uses Loss of Effectiveness orders (LOEs) to punish whistleblowers because LOEs allow retaliatory managers to circumvent the Office of Professional Responsibility (OPR) and its due process protections. So, on July 17, 2014, I wrote you and requested written responses to four questions concerning the FBI's use of LOEs by August 15, 2014. To date, I have not received a response.

Since that letter, three more FBI whistleblowers have reported to my staff that the FBI uses LOEs to punish whistleblowers and anyone whom managers dislike. One whistleblower, Richard Kiper, worked as Unit Chief of the Investigative Training Unit (ITU) in the Training Division (TD). Kiper claims that, at the behest of his supervisor, INSD issued an LOE Electronic Communication (EC) on fabricated grounds against Kiper in retaliation for Kiper's identification of inefficiencies in curriculum management and business process. Based on this EC, the Human Resources Division (HRD) demoted Kiper from a GS-15 to a GS-13 position.

If these allegations are true, the FBI's treatment of whistleblowers stands in stark contrast with how it treats agents who have been found by OIG to have committed actual, disciplinable offenses. For example, on February 26, 2014, OIG provided the FBI with a Report of Investigation (ROI) on an FBI Special Agent-in-Charge (SAC) who:

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[1] U.S. Senate Committee on the Judiciary, *Oversight of the Federal Bureau of Investigation*, (May 21, 2014); http://www.judiciary.senate.gov/meetings/oversight-of-the-federal-bureau-of-investigation-2014-05-21, at 50:00-52:00; last accessed July 14, 2014.
[2] *Id.*

> engaged in a protracted sexual relationship with a foreign national that he deliberately concealed from the FBI; disclosed sensitive FBI information to the foreign national; and misused FBI-issued iPads and an FBI-issued Blackberry device by allowing the foreign national to use them on numerous occasions, and by using the Blackberry device to exchange sexually explicit communications with the foreign national.[3]

According to the Inspector General, the SAC in question admitted to "inappropriately disclosing sensitive information to the foreign national, as well as his deliberate failure to report his relationship with foreign national to the FBI."[4] In addition, the Inspector General found that the SAC lied about permitting the foreign national to use the FBI-issued iPads and Blackberry; the SAC apparently did not admit the truth until a compelled polygraph examination.[5] In sum:

> in addition to lacking candor and using poor judgment, the investigation found that the SAC's actions violated several FBI policies relating to personal conduct, ethics, security self-reporting requirements, and the provision of false or misleading information on employment and security documents.[6]

Despite this finding by OIG and a disciplinary action proposed by OPR, the FBI had not issued a final determination on this disciplinary action as of June 24, 2014 – four months after receiving the ROI from the Inspector General.[7] In fact, the only "discipline" that had been imposed on the SAC was the FBI's approval of *the SAC's own request* for a demotion to a GS-13 position – the same discipline that the abovementioned Kiper received.[8]

Curiously, the FBI apparently did *not* issue a Loss of Effectiveness order against the SAC despite all indications of a loss of effectiveness: lack of candor; poor judgment; and violation of FBI policies regarding personal conduct, ethics, and security. Rather, via the OPR adjudicative process, the FBI apparently provided the SAC with notice and an opportunity to be heard. Meanwhile, in Kiper's case, the FBI denied these procedural safeguards by issuing an LOE.

According to the attached LOE EC,[9] INSD found Kiper ineffective on three grounds, each of which is contradicted by the FBI's own documents.[10] First, INSD found Kiper

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[3] *See* "U.S. Department of Justice Office of the Inspector General Summaries of Investigations Provided Pursuant to Request by Senators Grassley and Coburn," July 14, 2014, at 1-2 [Exhibit 1].
[4] *Id.* at 2.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *See* "Training Division Inspection; Managerial Deficiencies for Unit Chief J. Richard Kiper," May 10, 2013 [Exhibit 2].
[10] *See* "319X-HQ-A1487713 Serial 26," August 25, 2011 [Exhibit 3] [Reorganization EC]; "Critical element #7 – Achieving Results – ITU Goals and Objectives," February 26, 2013 [Exhibit 4]; and "Correction regarding information in the Inspection EC," December 23, 2013 [Exhibit 5].

ineffective because Kiper allegedly "did not support TD's mission and reorganization [plan] set forth in an EC dated 8/25/2011, and documented in 319X-HQ-A1487713 Serial 26 . . . ."[11] According to INSD, this Reorganization EC purportedly designated the Curriculum Management Section (CMS) as "the sole developer of curriculum."[12] In the LOE EC, INSD claimed that the mission statement that Kiper drafted for ITU contravened that of CMS, because Kiper used phrases like "develop an integrated curriculum," "develop and plan lesson plans," and "validate and improve ITU curriculum" in defining ITU's goals.[13]

However, the Reorganization EC[14] does not designate CMS as "the sole developer of the curriculum." Instead, the Reorganization EC describes CMS as follows:

> The Curriculum Management Section (0220), with four units, will introduce a new service to the FBI, curriculum management. Educationally sound curricula are developed, evaluated, catalogued, archived, reviewed on a defined life cycle management schedule, and updated when appropriate. It will be headed by a newly selected Section Chief. The units in this Section *support* all phases of instructional systems design.[15]

Far from being the sole—or even a primary—lead in instructional systems design, CMS' mission is actually defined in a support capacity by the plain language of the Reorganization EC itself. Not surprisingly, the Reorganization EC goes on to direct at least six other, non-CMS units within TD to "develop" or "design" curriculum and training.[16]

Second, INSD found Kiper ineffective because Kiper allegedly failed to attach an addendum to the FY 2012 performance plans of each of his fourteen employees in ITU.[17] The addendum was supposed to describe ITU's goals and objectives and was supposed to be attached to the "Achieving Results Critical Element (CE)" of each employee's performance plan.[18]

However, on February 26, 2013, two months *before* INSD's inspection of Kiper, Kiper sent the attached email[19] to fourteen employees. Attached to this email was a Word-document entitled, "Critical_Element_7_Addendum."[20] In that email, Kiper explains to the fourteen employees that "[t]his two page document contains the recently approved goals and objectives

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[11] Ex. 2 at 2.
[12] *Id.* at 3.
[13] *Id.*
[14] *See* Exhibit 3.
[15] *Id.* at 4. (emphasis added).
[16] (1) Career Skills Development Unit; (2) International Training and Assistance Unit; (3) Physical Training Unit; (4) HUMINT Operations Training Unit; (5) Behavioral Science Unit; and (6) Targeting and Data Exploitation Training Unit [Ex. 3 at 7-13].
[17] Ex. 2 at 6.
[18] *Id.*
[19] Ex. 4.
[20] *Id.*

for ITU. Everyone needs to print, sign, and date the first page . . . so that it can added to your Performance Plan."[21] Kiper also instructs a specific employee to "coordinate the collection of the signed CE #7 Addenda for the Performance Plans."[22]

Third, INSD found Kiper ineffective because of his alleged attempt to mislead INSD into believing that Kiper had removed from his unit Special Agent (SA) Alan Vanderploeg whose performance as instructor was purportedly deficient.[23] Specifically, according to INSD:

> UC Kiper stated he removed Instructor Alan Vanderploeg from teaching based on performance issues noted through peer reviews, evaluation results, and personal observations. UC Kiper verbally counseled Instructor Vanderploeg and provided suggestions for improvement. UC Kiper claimed Instructor Vanderploeg was rated "Minimally Successful" in instructing with an overall rating of "Successful" because "he was a good collaborator." INSD review of SSA Vanderploeg's PAR revealed he did not receive a "Minimally Successful" rating in any element and had an overall rating of "Excellent." UC Kiper failed to document the instruction deficiency in the PAR. At the time of inspection, Instructor Vanderploeg was still assigned to ITU.[24]

However, on December 23, 2013, five months after Kiper's LOE EC was issued, INSD sent the attached email[25] to SA Vanderploeg in which INSD *admitted* that they "inaccurately identified [SA Vanderploeg] as the . . . instructor who was relieved of his instruction duties."[26] Significantly, the INSD Inspector who wrote this exculpatory email, and the two INSD Inspectors who are carbon copied to the email, are the three INSD Inspectors who are listed on the first page of Kiper's May 10, 2013 LOE EC as having approved the contents of that EC.[27]

In light of this evidence clearly contradicting the assertions in the LOE in this case, there is serious cause for concern that the FBI's use of LOEs may be similarly arbitrary and capricious in other cases as well as a tool of whistleblower retaliation.

Apparently, the FBI's Office of Integrity and Compliance (OIC) shares these concerns. According to whistleblowers, OIC will soon be issuing a report to Deputy Director Mark Giuliano that calls for transparency in the LOE process and recommends enterprise-level changes at INSD and HRD. In addition, the OIC report allegedly corroborates the assertions of eight whistleblowers who approached my staff after suffering retaliation through LOEs.

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[21] *Id.*
[22] *Id.*
[23] Ex. 2 at 6-7.
[24] *Id.*
[25] Ex. 5.
[26] *Id.*
[27] *Compare* Ex. 2 at 1 *with* Ex. 5.

In order to understand the role of LOEs and what safeguards, if any, exist to ensure their accuracy, please respond in writing to the following:

1. Will you review this OIC report and implement corrective actions as necessary? If not, why not? If so, please describe the corrective actions you will implement. In either case, please provide a copy of the OIC report to the Committee.

2. Will you meet with Kiper? As detailed above, the "management deficiencies" cited in his LOE EC appear to be contradicted by the FBI's own documents.

3. Has the FBI issued a final disciplinary action against the former-SAC referenced above? If yes, please describe the disciplinary action. If not, why not? Was an LOE ever considered? If not, why not?

4. What is the FBI's policy concerning the use of LOEs and LOE ECs? Does the FBI consider an LOE or an LOE EC to be an adverse action? If not, why not? Please provide documentation of the FBI's written policy on these matters.

5. Before an LOE EC is issued, does the FBI provide the subject employee basic due process, including notice and an opportunity to defend against the underlying allegations? If not, why not? After an LOE EC is issued, does the FBI provide that employee notice and an opportunity to appeal? If not, why not?

6. How many LOE ECs have been issued by INSD since January 1, 2009?
   a. How many of those ECs did *not* result in removal, suspension for more than 14 days, reductions in grade or pay, or a furlough of 30 days or less?
   b. How many of those ECs were issued against an employee following that employee's providing notice of a potential EEO claim?
   c. How many of those ECs were issued against an employee following that employee's alleging waste, fraud, abuse, or mismanagement?
   d. Were those ECs issued against females in higher proportions than their representation among all agents? Please provide documentation and data.

7. Will you meet with the whistleblowers referenced at the May 2014 hearing who allege continuing retaliation?

Please provide your reply in writing no later than October 17, 2014. If you have any questions, please contact Jay Lim of my Committee staff at (202) 224-5225. Thank you.

Sincerely,

Charles E. Grassley
Ranking Member

cc: Michael E. Horowitz
Inspector General
U.S. Department of Justice
Washington, D.C. 20530

Patrick J. Leahy
Chairman
Senate Committee on the Judiciary
Washington, D.C. 20510

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY NOTES:
"RESPONSE TO FBI LETTER OF MARCH 2, 2015"

Response to FBI Letter of March 2, 2015

In his letter AD Kelly deviates slightly from the language of the new policy directive section 8.1:

> It is vital for FBI management to be able to identify and quickly reassign supervisors and others who, for whatever reason (including reasons beyond the control of the employee), cannot effectively fulfill their official duties and responsibilities [sic – no period]

Suggested Question: Why does the FBI see the need to *quickly* reassign supervisors? (The word "quickly" does not appear in the new LOE policy). Why is the current Performance Appraisal System (PAS) inadequate? Isn't the LOE process just a way to circumvent the PAS to avoid the due process and appeals that usually accompany a transparent process?

At one point AD Kelly makes an offer to the Committee:

> ...the FBI has instituted a new LOE policy and we would welcome the opportunity to brief you or your staff on the policy changes.

Suggested Question: When can you brief us on the policy changes? Please be prepared to discuss the prior LOE policy, and provide a copy of that prior policy, so that we understand what exactly has been modified.

As I stated previously, AD Kelly continues to mislead the committee regarding how LOEs do not result in loss of grade or pay for individuals:

> In your amended request, you restated questions from your earlier correspondence related to LOE ECs from the Inspection Division (INSD), and specifically asked how many LOE ECs from INSD did not result in removal, suspension for more than 14 days, reductions in grade or pay, or a furlough of 30 days or less. As of March 1, 2015, INSD has issued LOE ECs concerning twenty-three individuals. Three individuals chose to retire after issuance of an INSD EC. Four individuals were returned or assigned to lower grade positions for various reasons. None of the INSD ECs resulted in an individual's removal, suspension for more than 14 days, or furlough of 30 days or less.

As I discussed in my notes on the policy itself, the above paragraph has problems. However, in his footnote AD Kelly propagates the incredibly misleading statement: "One individual was in a non-permanent, term position and returned to his original grade at the end of the term." Of course, that individual was *me*, and this statement makes it sound like I *voluntarily* returned to my original grade at the end of my *full* term!

Suggested Question: Referencing a paragraph that aims to depict LOE ECs as NOT having detrimental effects on employees, AD Kelly states, "One individual was in a non-permanent, term position and returned to his original grade at the end of the term." Was that individual "returned to his original grade" voluntarily or involuntarily? Did his term run its course or did the FBI end it prematurely? If the FBI forced him out of his position involuntarily, why wouldn't you state so?

Suggested Question: According to your own Special Agent Mid-Level Management System Policy Guide, Section 4.11.3, at the ending of the term the employee will return to his/her permanent position " ... unless he/she successfully competes for another position." [see SAMMS-PG.pdf, page 36]. Did the individual whose term you ended prematurely have the opportunity to compete for jobs as this policy states, or was that person removed from the Executive Development and Selection Program (EDSP) and thereby prevented from competing for other jobs?

Suggested Question: Would you agree that if you removed a person from EDSP, prevented them from competing from other jobs, and then "returned them to their former grade," isn't that the same as a demotion?

Suggested Question: Where is it documented that the individual's term was ended?

Suggested Question: I have a document here that characterizes this individual's removal TWICE as a "loss of effectiveness transfer and summary demotion." [see FOIA_1253443-0 Kiper.pdf] Again, how can you reconcile this in your new policy directive section 15.2.1 that "an LOE transfer is not initiated to and does not reduce in grade?" [The serialized document may be found in FBI case file number 297-HQ-A1271984-A, serial 248].

Suggested Question: I have the transfer orders of this individual who AD Kelly states "was in a non-permanent, term position and returned to his original grade at the end of the term." In his transfer orders it states "Demotion" as the justification for his change of grade. [see 27-3_NotificationOfAgentTransfer_1302337TH.pdf]. Do you still want to tell this committee that his non-permanent term was ended? Or was he DEMOTED as these documents clearly prove?

At the very end, AD Kelly states:

> Finally, given that the FBI employee identified in your letter is engaged in litigation challenging his LOE transfer, the issues pertaining to that transfer will be resolved in the context of that litigation. As a result, and as noted in prior correspondence, the Director will be unable to meet with him at this time.

Suggested Question: Currently, the only question before OARM is whether the disclosures made by SA J. Richard Kiper were protected under 28 CFR 27. Is the Director unable to determine whether false statements were made to justify an LOE removal and demotion? Why does this determination depend on Whistleblower status? Is it acceptable to document false statements in support of LOE removals of the affected employee is NOT a whistleblower?

MOST IMPORTANT Suggested Question: Regardless of Whistleblower status and potential retaliation, how does the FBI correct blatant misrepresentations of fact as documented in LOE ECs?

UNITED STATES SENATE COMMITTEE ON THE JUDICIARY NOTES: "FBI POLICY DIRECTIVE 0773D, LOSS OF EFFECTIVENESS TRANSFERS, OBSERVATIONS"

FBI Policy Directive 0773D
Loss of Effectiveness Transfers
Observations

A. The policy redefines terms to avoid accountability.

> 15.2.1. Adverse action: a personnel action that results in a loss of grade or pay (including suspensions without pay and furloughs of less than 30 days) or removal from employment. Because an LOE transfer is not initiated to and does not reduce in grade, suspend, furlough, or remove an employee, it is not an adverse action.

The policy redefines the word "removal" by adding the phrase "from employment." This language does not appear in the FBI's Manual of Administrative and Operational Procedures (MAOP), Section 14-4.1:

> For the purposes of this manual, an 'adverse action' involves removal, suspension for more than 14 days, reductions in grade or pay, or a furlough of 30 days or less.

This MAOP entry tracks the language in 5 USC Part III, Subpart F, Chapter 75, Subchapter II. The new LOE policy does not.

Suggested Question: If the FBI asserts in Section 8.2 that "an LOE transfer… is not an 'adverse action' as that term is used in Title 5 of the U.S.C. or in related law and regulation," then why add the phrase "from employment" to the definition of "removal?"

Apparently the FBI leadership seeks to equate "removal" with "dismissal," so they can get away with saying no one was "removed" as a result of an LOE. If being removed from a position is not an "adverse action," then there was no "adverse action" as a result of a Whistleblower disclosure… and so on… They are desperately trying to avoid accountability.

Suggested Question: Does the FBI consider an involuntarily removal from one's position as "removal?" If not, then what is it?

Suggested Question: If YOU (Director Comey) were to be involuntarily removed from YOUR position, would you consider it to be an "adverse action?" What if that removal was based on derogatory information against you?

B. The policy contradicts the FBI's response of March 2, 2015.

In this letter, AD Kelly continues to mislead the committee regarding how LOEs do not result in loss of grade or pay for individuals:

> In your amended request, you restated questions from your earlier correspondence related to LOE ECs from the Inspection Division (INSD), and specifically asked how many LOE ECs from INSD did not result in removal, suspension for more than 14 days, reductions in grade or pay, or a furlough of30 days or less. As of March 1, 2015, INSD has issued LOE ECs concerning twenty-three individuals. Three individuals chose to retire after issuance of an INSD EC. Four individuals were returned or assigned to lower grade positions for various reasons. None of the INSD ECs resulted in an individual's removal, suspension for more than 14 days, or furlough of 30 days or less.

Suggested Question: Of the four (out of 23) individuals cited in this paragraph, would you say that they all VOLUNTARILY "returned or [were] reassigned to lower grade positions?"

Suggested Question: I noticed that you removed "reductions in grade or pay" in your final statement: "None of the INSD ECs resulted in an individual's removal, suspension for more than 14 days, or furlough of 30 days or less." Are you conceding that some of the INSD LOE ECs actually DID result in "reductions in grade or pay?" If so, then how do you reconcile that with your new policy directive section 15.2.1 that states "an LOE transfer is not initiated to and does not reduce in grade?"

C. The policy does not address LOE process shortcomings in the past.

> 8.4.2. The recommending official must set out in the EC the basis for the LOE transfer, including the circumstances, factor, and details that support the LOE recommendation. The EC must address why the employee meets the following standards for an LOE transfer:
>
> 8.4.2.1. The employee cannot satisfactorily perform his or her duties.
> 8.4.2.2. The employee's ability to perform his or her duties cannot be brought to a satisfactory level while remaining in that position.

None of these so-called "standards" were articulated when writing our LOE ECs. Setting aside the fact that the ECs containing false information, we were given absolutely NO NOTICE of the supposed wrongs we committed, much less the opportunity to improve our performance in any way.

Suggested Question: Will the justification of past LOEs be re-examined to determine whether they conform to these new standards? If not, why not? Will the LOE ECs be re-examined for factual accuracy?

Subsection 8.4.2.2. (cited above) implies that counseling, letter of censure, Performance Improvement Plan (PIP), etc. must have been attempted and failed to justify why the employee "cannot be brought to a satisfactory level" of performance.

Suggested Question: Will methods of improving an employee's performance be exhausted in order to meet the standard in Subsection 8.4.2.2.? If not, then how else will this standard be met? If so, then why weren't these methods employed with past LOE recipients?

D. The policy does not adequately protect employees from Whistleblower reprisal or other capricious actions taken against FBI employees in the future.

> 9.2. This policy applies only to management-directed reassignments which, because of the circumstances under which they are initiated, are designated as LOE transfers; that is, transfers not so designated are not within the scope of this directive even if they are otherwise management-directed.

In other words, FBI management only needs to avoid *designating* a management-directed action as an "LOE transfer," and none of this policy applies. This section gives the FBI the same blank check to remove people from their positions without any recourse, due process, appeal, or opportunity for the removee to respond to the facts that allegedly justify the removal.

Here are other reasons why the new policy fails to protect FBI employees:

1. There is no requirement for authors of LOE findings to **conduct due diligence** and **fact-check** the allegations they use to substantiate the LOE findings.

2. There is no requirement for the LOE finding to be **overturned** and the employee **restored** if the facts justifying the LOE are found to be demonstrably **false**.

3. There is no language regarding the **finding of misconduct** for those who intentionally document false information to support an LOE or refuse to correct the false information that resulted in the LOE finding.

4. There is no language regarding giving the affected employee any **notice of the LOE** prior to documentation of the LOE finding. Both the AD of INSD and the AD of HRD have said in the

past that the employee should not be "surprised" by the finding. In our cases we were absolutely surprised.

5. **INSD should not be a "sole authority" in recommending an LOE.** Inspectors typically have 2 weeks or less to gather evidence and conduct interviews. This rush to conclusions does not allow enough time for fact-checking and mitigation before a very strong LOE removal decision is made (as evidenced by my case). At most, INSD may document their observations and suggest that the affected employee receive counseling, be placed on a PIP, etc. Because of their extremely limited view into the employee's work life, they should never be given the "last word" for an LOE transfer. Again, my case is illustrative – I was given Outstanding PARs, two awards, etc. over more than 2 years that were completely "overruled" by INSD's shoddy two-week investigation.

6. Most of the people making LOE recommendations are **not on the Whistleblower disclosure list** according to 28 CFR 27.1(a).

Suggested Question: In Section 8.4 you state that an LOE transfer may be recommended by INSD, an ADIC, SAC, AD, or EAD, and in Section 8.6 you state that these recommendations must be approved by the AD of HRD. Why shouldn't ALL these individuals be considered as Whistleblower disclosure recipients if they are the ones that would potentially commit reprisal against Whistleblowers?

FBI surveillance teams frustrated by nepotism and internal politics

Whistleblower: War on terror hampered by culture of favoritism

By Kelly Riddell - The Washington Times - Monday, March 2, 2015

Members of the FBI surveillance teams that secretly track terrorists, spies and mobsters on U.S. soil are increasingly frustrated their mission is being hampered by internal politics and nepotism, according to interviews and documents.

FBI memos reviewed by The Washington Times show at least three younger relatives of high-ranking bureau supervisors have landed jobs on the elite surveillance teams in recent years, with two fast-tracked to full special agent status.

In addition, some FBI local offices that ranked high on a threat and needs matrix for surveillance were passed over for new teams last year in favor of more politically connected offices that ranked lower, the records show.

The worries have grown so widespread that one longtime decorated surveillance team member has sought whistleblower protection, taking his colleagues' concerns to both the Justice Department's inspector general and the Senate Committee on the Judiciary.

The whistleblower told The Times he initially went to supervisors, who dismissed the problems and then gave him a poor personnel review. So he then went to Congress because he fears current practices are jeopardizing the war on terror and the bureau's counterintelligence operations.

"Who gets what surveillance teams — it's now all about bias and favoritism and the good ol' boy system," the whistleblower said in an interview with The Times, speaking only on condition of anonymity because his identity is supposed to remain secret during surveillance. "My division — although we had the statistics to prove we needed more personnel — got skipped over because executive management had an ax to grind."

FBI officials readily acknowledge a handful of top managers' children or relatives landed jobs on the surveillance teams, but they insist the hirings were governed by the bureau's strongly worded policy that outlaws favoritism in hiring.

"All applicants go through a rigorous selection process, including structured interviews and security background investigations," the bureau said. "Personnel matters that have the potential of being viewed as an act of nepotism are subject to appropriate administrative action."

The FBI also confirmed that some offices that scored high for surveillance needs were skipped over in favor of lower-ranked offices.

Officials said that while the matrix evaluation was carefully conducted, it also allowed for some discretion by managers to change rankings.

"Due to limited resources, not all field offices that qualified for an additional surveillance team were provided one. Both the selection process and the final determinations were subjected to an extensive review process and approved by executive management," the bureau said in its statement to The Times.

The whistleblower disclosures come at a sensitive time for the bureau, which still faces questions as to why it had not more aggressively tracked the Tsarnaev brothers, who are suspected in the 2013 Boston Marathon bombing, after Russian authorities had tipped the agency about the pair.

Congress concerned

Senate Judiciary Committee Chairman Chuck Grassley, Iowa Republican, said his office is examining the whistleblower's concerns, particularly on how the FBI initially handled the accusations and their employee when he came forward.

"Whenever an employee comes forward like this with concerns about waste and mismanagement, the Bureau should be grateful that it has someone willing to step up and point out problems," Mr. Grassley said in a statement to The Washington Times. "But too often, the whistleblower gets punished for doing the right thing."

The whistleblower's personnel file shows that, for most of the last two decades, he received high ratings and frequent praise for his surveillance work, including numerous awards and commendations as well as personal letters of gratitude directly from FBI directors when he worked in the Washington, D.C., area. He received a rating of "excellent" in 2013 in his new division.

But after he questioned management in 2014 as to why his division was passed over for a new surveillance team it had earned in the rankings, the whistleblower was given a first-ever negative evaluation.

"I've been retaliated against just for asking a fair question," he told The Times.

The surveillance units — often known as "G-teams" — consist of covert tracking specialists who do not have the rank of special agents, and they are funded through the black budget since they work on counterterrorism and counterintelligence.

Their exact whereabouts and numbers are generally kept secret from the public — as are the identities of the team members. But a nonclassified memo obtained by The Times indicated there are 54 field offices spread across the country, with about eight people on an average team, and many cities qualify for multiple teams.

Data accuracy questions

Congress gets regular reports on the program because of its sensitive work and the possibility that surveillance of Americans could violate privacy rights. Reports of activities are prepared about every six months, but Congress at any time can request the information, and has been doing so more as terrorist jihad groups grow overseas.

But some team members, including the whistleblower, expressed concerns that Congress was being kept in the dark about surveillance staffing decisions and hirings that aren't being made on merits.

One email shows a supervisor directly dismissed the whistleblower's concerns that Congress should be notified.

"The Senate has much more important work to do than worry about which offices received assets," Scott Brunner, a former FBI assistant special agent in charge, wrote in an April 2014 email to the whistleblower.

Mr. Brunner has since left the division, becoming the legal attache for the FBI's Bogota, Colombia, office. He did not return phone calls seeking comment.

The whistleblower related a story about how his division superiors wanted to promote an older FBI employee to the surveillance team because his appearance and skills matched the job, but they were turned down by Washington. They also were rejected for an additional team after scoring high on the list of offices in need of surveillance expansion.

The whistleblower said he was told the reason for both rejections was office politics, essentially bad blood between a supervisor in his division and the surveillance brass in Washington.

Politics at play in terror war?

The whistleblower's account is echoed in an email from a senior official in Washington who handled the surveillance program scoring system.

The email says his effort to alert his bosses that resources may not be properly delegated was altered by Washington bureaucrats. "They changed my white paper, the degree to which I don't know," the Washington supervisor wrote in 2014.

He noted that the unit leadership held "disdain" for the whistleblower's office that affected decisions. And some surveillance team members across the country were disturbed that the unit boss "has so much power" and "exercises most of it with little oversight, if any, from superiors," he wrote in the email.

Other "G-team" leaders voiced similar frustrations in interviews or contemporaneous documents. FBI offices with just one team would like to either have a staff member added to handle their administrative work or be paid more to do the extra workload themselves.

After voicing these complaints, another team member in a Midwestern division was told by Washington brass that an additional team may happen if the complaints stopped. He responded he couldn't be bought. Statistically, that division didn't qualify for another team on a needs basis, but it did want an added coordinator, according to interviews.

The FBI now investigates an average of more than six new terrorist threats per day, according to the most recent statistics, which were compiled back in 2004, and the G-teams often find themselves as part of some of the FBI's biggest cases. The teams started operations in the 1970s in New York City as a pilot program using their spycraft to help track and monitor potential Soviet threats.

One of their greatest successes was helping to discover Robert Hanssen, a former FBI official who spied for the Soviet Union for 20 years, all the while working for U.S. intelligence.

Shortly after their pilot program, the G-teams went national. The organization has grown from a few employees into a sprawling bureaucracy.

Nepotism concerns surface

Growth of those units has created an opportunity, however, for some of the FBI's top management to place adult children into the surveillance teams as a way of getting them on a fast track to becoming an agent.

According to documents and interviews, there have been at least three paternal hirings in recent years within the FBI's special surveillance group. Two of those operatives advanced to become FBI special agents, and the third remains on a G-team.

In addition, a fourth nepotism case has been alleged involving a resident agency that, alongside the local G-team, reports to the Little Rock, Arkansas, FBI office. That person later landed a plum job in the Washington office of FBI Director James B. Comey.

G-team members told The Times they did not oppose hiring agents' relatives if they were qualified and willing to learn the craft of surveillance, but many seemed to just be passing through as ticket punchers, and one had serious skill deficiencies.

For example, a G-team member hired in the late-'90s was the son of a well-known FBI legal attache and special agent in charge in Europe.

The son was retained by the FBI even though he failed his map-reading test six times before being placed on a surveillance team, according to a source inside the bureau who requested anonymity for fear of retaliation. Usually one failure would be enough to remove an operative from the elite program, insiders say, because map reading is a necessary skill within the espionage world.

Eventually, the agent's son was promoted to a supervisory special agent in New York City, records show.

In another case, a G-team operative hired last year was the child of an assistant unit chief in the surveillance program. The candidate got to choose which office he wanted to work in — a rarity in the surveillance unit, which sends personnel where surveillance is most needed. He chose an office where his father had good friends and therefore would receive good treatment, according to interviews.

A third G-team member, hired a few years ago, was the daughter of a high-ranking and decorated FBI official key to the bureau's languages program, and was a highly decorated agent. The woman has now risen to become an agent herself in the Washington, D.C., area.

Separately from the G-teams, in a resident agency that reports to Little Rock, Arkansas, a position within the FBI was held for the offspring of an agency supervisor until the child graduated from college. The woman ended up graduating from school a semester late, but the division held the position open until she could graduate.

The student's job was to report directly to her father, so the FBI, not wanting to set off alarm bells, hired another supervisor so she could report to a nonrelative.

Later, when the father was transferred to a legal attache office overseas, the daughter was given a plum position in Washington, D.C., working in the FBI director's office — just a year after graduating from college.

The Times chose not to name any of the three G-team operatives or the FBI hire to avoid compromising their current or past undercover surveillance work or alerting terrorists to their identity.

Watchdogs worry

Government watchdogs say the surveillance team members and the public have reason to be concerned about the hiring pattern.

"When hiring decisions are based on who you know rather than what you know, the federal government isn't operating to its fullest potential," said Scott Amey, the general counsel at the nonpartisan Project on Government Oversight. "We don't like cozy relationships and sweetheart deals when it comes to contractors or grantees, and the same holds true for pulling strings to benefit family and friends."

Concerns about possible nepotism stretch far beyond the FBI.

The Justice Department, which oversees the bureau, has been plagued with nepotism charges over the past decade.

A DOJ inspector general report released last month found the head of the International Crime Police Organization, another law enforcement agency, used his position to secure a job for his son and other relatives.

And a November investigation discovered certain offices in the DOJ had a "pervasive culture of nepotism and favoritism," making it at least the fifth inspector general report since 2004 to find hiring problems at the agency.

In response to the repeated nepotism charges, Justice said it would strengthen its hiring training for employees, especially regarding the agency's nepotism rules.

Lawmakers remain unhappy.

"There is no room for nepotism in the federal government's hiring practices," Rep. Bob Goodlatte, Virginia Republican and House Judiciary Committee chairman, said recently. "Those hired to serve taxpayers must earn — not be given — the job."

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