

Congress of the United States
Washington, DC 20515

November 3, 2021

VIA ELECTRONIC TRANSMISSION

The Honorable Gene Dodaro
Comptroller General
Government Accountability Office
441 G St., N.W.
Washington, D.C. 20548

Dear Comptroller General Dodaro:

In January 2015, the Government Accountability Office (GAO) published a report describing the weaknesses of statutory protections for whistleblowers from the Federal Bureau of Investigation (FBI) and the failures of the FBI and the Department of Justice (DOJ) to effectively administer them.¹ In 2016, Congress enacted GAO's recommendation to more closely align protections for the FBI with those available to other federal employees.² Specifically, Congress expanded the definition of "protected disclosure" to include not only disclosures to key FBI and DOJ leadership but also employees' immediate supervisors and chain of command, Congress, and the Office of Special Counsel.³

Despite these efforts, problems remain. DOJ still has not promulgated regulations to implement Congress' changes.⁴ Our offices also continue to receive reports that many of the previous flaws found in the GAO report persist and that additional issues, such as retaliation against FBI employees via revocation of security clearances, are on the rise. Finally, unlike other federal employees, FBI employees still are required to make their claims internally and have no recourse to an independent appeals process.

¹ U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-112, WHISTLEBLOWER PROTECTION: ADDITIONAL ACTIONS NEEDED TO IMPROVE DOJ'S HANDLING OF FBI RETALIATION COMPLAINTS (2015), <https://www.gao.gov/assets/gao-15-112.pdf>; see also 5 U.S.C. § 2303 (pertaining to FBI employees).

² Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, S. 2390, 114th Cong. (2016); see also 5 U.S.C § 101.

³ Compare 5 U.S.C. § 2303, with 5 U.S.C. § 2303 (Supp. 2018).

⁴ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 1; see also *Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints*, GOVERNMENT ACCOUNTABILITY OFFICE (Jan. 23, 2015), <https://www.gao.gov/products/gao-15-112> (noting the open priority recommendation).

DOJ's failure to update its regulations presents significant challenges for FBI whistleblowers. Even now, the GAO notes that the FBI has not clarified "to whom FBI employees may make protected disclosures" nor have they explicitly stated if employees will have access to recourse if they experience retaliation for reporting alleged wrongdoing to someone not designated in DOJ's regulations.⁵

This delay has had real-world consequences for FBI whistleblowers. One prominent example is the case of Special Agent John Parkinson. Parkinson reported that FBI employees were using government planes to take personal flights to Reno, Nevada, as well as other egregious abuses of taxpayer funds and government property.⁶ He was subsequently fired and since then has been shuffled from review to review, as multiple bodies have attempted to decipher the FBI's opaque internal rules.⁷ Similarly, Supervisory Contract Specialist Darin Jones was fired in 2016 after disclosing over \$40 million in improper spending.⁸ But he has had few routes to seek justice since he reported this impropriety to a direct supervisor under prior rules that did not protect those disclosures.⁹ Instead of heeding the calls of numerous members of Congress and giving him a fair hearing after the passage of the Federal Bureau of Investigation Whistleblower Protection Enhancement Act (FBI WPEA), the DOJ refused to re-hear his case and has yet to update many of the rules that caused him to be fired.¹⁰

For these whistleblowers and the vast majority of FBI employees, there is no one else they can appeal to outside the silo of the Justice Department. Only FBI employees that are also military veterans are allowed to have their wrongful termination case heard before the Merit Systems Protection Board (MSPB), a "quasi-judicial agency" that decides cases regarding federal employment.¹¹ Despite this significant hurdle, multiple FBI whistleblowers have been reinstated to their positions after bringing and winning their cases before the MSPB only to have their clearances subsequently revoked by the FBI.¹² In some cases this occurs on their first day back with the FBI citing to the very same charges the MSPB overturned.¹³ Unfortunately, the MSPB does not have the authority to restore clearances. That power lies only with the agency that revoked

⁵ *Id.*

⁶ Kevin Gosztola, *FireDogLake: FBI Whistleblower Was Allegedly Terminated for Reporting Fraud and Sexual Misconduct Involving Prostitutes*, GOVERNMENT ACCOUNTABILITY PROJECT (Aug. 28, 2013), <https://whistleblower.org/in-the-news/firedoglake-fbi-whistleblower-was-allegedly-terminated-reporting-fraud-and-sexual/>.

⁷ *Id.*; see also Parkinson v. DOJ, 691 F. App'x 909 (Fed. Cir. 2016).

⁸ Darin Jones v. Department of Justice, NATIONAL WHISTLEBLOWER CENTER, <https://www.whistleblowers.org/amicus-curiae-briefs/in-the-matter-of-darin-jones-fbi/> (last visited Oct. 27, 2021).

⁹ Letter from Sen. Charles E. Grassley to the Hon. Sally Yates, Deputy Attorney General of the Department of Justice (Jan. 9, 2017), [https://www.judiciary.senate.gov/imo/media/doc/2017-01-09%20CEG%20to%20DOJ%20Yates%20\(Darin%20Jones\).pdf](https://www.judiciary.senate.gov/imo/media/doc/2017-01-09%20CEG%20to%20DOJ%20Yates%20(Darin%20Jones).pdf).

¹⁰ Letter from Sen. Charles E. Grassley to the Hon. Sally Yates, Deputy Attorney General of the Department of Justice (Sept. 29, 2015), <https://www.judiciary.senate.gov/download/grassley-to-department-of-justice--darin-jones-follow-up>; see also Letter from the Hon. Michael Horowitz, Inspector General of the Department of Justice, to Sen. Chris Van Hollen, et al. (Apr. 12, 2019), https://federalnewsnetwork.com/wp-content/uploads/2019/08/041219_horowitz_md_response_FNN.pdf.

¹¹ *File an Appeal with MSPB*, U.S. MERIT SYSTEMS PROTECTION BOARD, <https://www.mspb.gov/> (last visited Oct. 27, 2021).

¹² Gosztola, *supra* note 6; see also Jane Turner, *Mike Zummer*, WHISTLEBLOWER NETWORK NEWS (June 23, 2021), <https://whistleblowersblog.org/whistleblower-of-the-week/mike-zummer/>.

¹³ *Id.*

it and there seems to be little incentive for them to act unless they are forced to do so under Presidential Policy Directive-19 (PPD-19).¹⁴ FBI whistleblowers have reported that it is known in the bureau that the only way to regain a revoked clearance is to beg forgiveness from the FBI's deciding authority for tarnishing the FBI's reputation.¹⁵

These extensive issues with the FBI's current whistleblower program make the bureau one of the most difficult places in the federal government to report malfeasance. One attorney in the Office of Integrity and Compliance even reportedly told a prospective whistleblower that the FBI's current rules "[do] not guarantee that you will not be retaliated against, even though retaliation/reprisal for making protected disclosures is illegal."¹⁶

To this end, we request that you review the following:

1. How do FBI whistleblower protections compare to those available to other federal employees? Do current FBI whistleblower protections adequately shield whistleblowers from retaliation?
2. What is the current basis and rationale for the two separate mechanisms for making protected disclosures and reprisal complaints?¹⁷ What concerns does this separate system seek to address? Are those concerns valid?
3. Why hasn't the FBI fully implemented the aforementioned GAO recommendations first published on January 23, 2015?¹⁸
4. How has DOJ monitored and improved timeframes for adjudicating complaints, if at all, since GAO's 2015 report?
5. What is DOJ's timeline for issuing new regulations for FBI whistleblowers, and what steps will DOJ take to ensure that FBI whistleblower regulations are consistent with statutory provisions enacted in 2016?
6. What controls does DOJ have in place over its security clearance process?

¹⁴ Memorandum and Modification to Agreement Between Facilities, Security and Contracting, the Personnel Security Appeals Board, and the Office of the Inspector General, U.S. Office of Personnel Management on Roles and Responsibilities for Implementing Presidential Policy Directive 19, <https://www.opm.gov/our-inspector-general/whistleblower-protection-information/ppd-19-moa.pdf> (last visited Oct. 27, 2021).

¹⁵ This statement paraphrases multiple whistleblower reports regarding common negative experiences of challenging an unjust FBI appeals system to regain revoked clearances.

¹⁶ Kelly Riddell, *FBI Email Warns Whistleblower of Retaliation if Surveillance Program Concerns Reported*, THE WASHINGTON TIMES (Mar. 3, 2015), <https://www.washingtontimes.com/news/2015/mar/3/fbi-email-warns-whistleblower-of-retaliation-if-su/>.

¹⁷ Note: Department of Justice employees in the National Security Division have had full whistleblower protections and the right to file complaints with both the Office of Special Counsel and MSPB since their inception. This stands in stark contrast to their FBI counterparts.

¹⁸ *Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints*, GOVERNMENT ACCOUNTABILITY OFFICE (Jan. 23, 2015), <https://www.gao.gov/products/gao-15-112>.

7. To what extent do DOJ and FBI ensure that those who have been found to have retaliated against whistleblowers are subject to appropriate disciplinary action? Please provide data on retaliations and related disciplinary actions.
8. How many whistleblowers have made protected disclosures since the enactment of the FBI WPEA and how do those numbers compare to the years prior to its passage?
9. What percentage of those whistleblowers reported their allegations to direct supervisors?
10. How many FBI employees have made reprisal claims following protected disclosures since the enactment of the FBI WPEA, and how do those numbers compare to the years prior to its passage? How many claims have proceeded through to the adjudication phase? How many claims were successful, and what were the results of those claims, including any relief granted?
11. What effect are the case outcomes described in question 6 likely to have on potential future FBI whistleblowers' willingness to make protected disclosures?
12. What is the FBI's process for revoking and reinstating clearances? What is the process for individuals who have their clearances suspended or revoked to challenge those determinations?
13. How many times has an FBI whistleblower succeeded in bringing a reprisal claim, and obtained relief, only to face a suspension or revocation of their clearance?
14. How does the FBI's ability to revoke a clearance impact potential whistleblowers from coming forward?
15. When a whistleblower believes that their clearance has been revoked because of retaliation they can bring the issue before the DOJ OIG and have the matter heard by a panel of intelligence-related inspectors general.¹⁹ How does this process affect whistleblower reporting for the FBI?
 - a. How often does this panel find for the employee?
 - b. How often does this panel find for the agency?
 - c. Please provide statistics regarding agency implementation of the panel's opinions.

¹⁹ THOMAS A. MONHEIM, INSPECTOR GENERAL OF THE INTELLIGENCE COMMUNITY INSTRUCTION 2020.001: EXTERNAL REVIEW PANEL PROCEDURES PURSUANT TO 50 U.S.C. § 3236 AND PRESIDENTIAL POLICY DIRECTIVE/PPD-19 (2020), <https://www.dni.gov/files/ICIG/Documents/Policy/Whistleblowing/ERP%20Procedures.pdf>.

16. What is the justification for the Office of Attorney Recruitment and Management handling FBI whistleblower appeals, instead of an Administrative Law Judge?
17. Does the FBI object to initiating a practice of publishing decisions on FBI whistleblower appeals?

Should you have any questions please reach out to Danny Boatright on Senator Grassley's Senate Judiciary staff at (202) 224-5225. Thank you for your time and consideration regarding this important matter.

Sincerely,



Chuck Grassley
Ranking Member
Senate Committee on the Judiciary



Jackie Speier
Congresswoman
California's 14th District



Gary Peters
Chairman
Senate Committee on Homeland
Security & Governmental Affairs



Rob Portman
Ranking Member
Senate Committee on Homeland
Security & Governmental Affairs



Carolyn B. Maloney
Chairwoman
House Committee on
Oversight and Reform

cc:

The Honorable Merrick Garland
Attorney General
Department of Justice

The Honorable Michael Horowitz
Inspector General
Department of Justice