

NATIONAL WHISTLEBLOWERS LEGAL DEFENSE & EDUCATION FUND

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August 5, 2009

Senator Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate

Senator Chuck Grassley
Senior Member, Committee on the Judiciary
United States Senate

Senator Arlen Specter
Senior Member, Committee on the Judiciary
United States Senate

Dear Senators Leahy, Grassley and Specter:

I am writing in regard to S. 372, which was recently marked up in the Senate Committee on Homeland Security and Governmental Affairs. This bill provided for numerous long-needed reforms in the Civil Service Reform Act. However, we want to call your attention to provisions in the mark-up, not contained in the original version of S. 372, which would have unintended consequences concerning existing whistleblower rights within the Federal Bureau of Investigation ("FBI"). These provisions significantly impact oversight and whistleblower rights in the FBI, which are matters of concern to the Committee on the Judiciary and your offices' longstanding support for FBI whistleblowers.

The mark-up of S. 372 repealed a long-standing whistleblower protection provision that covers employees of the FBI. This provision of law, codified as 5 U.S.C. § 2303, has been on the books since the original enactment of the Civil Service Reform Act in 1978. It is currently implemented under the provisions set forth in 28 C.F.R. Part 27. The law explicitly repeals § 2303, makes that repeal effective against pending cases and transfers authority over FBI cases from the current Inspector General review process to a new board. *See* S. 372, Title II, Sections 121(a)(2)(A); 121(b)(1) (located on pages 58-59 of the printed version of the law) and 121(b)(2).

The repeal of these protections is a significant setback for oversight and accountability of the FBI and is prejudicial to cases currently pending under § 2303. The repeal was added in last-minute changes, and I am certain that none of your offices were familiar with how these changes would impact current law or pending whistleblower cases.



The current Department of Justice regulations implementing § 2303 were enacted as a direct result of the disclosures made by Dr. Frederic Whitehurst, a former supervisory special agent with the FBI. Dr. Whitehurst's disclosures led to major reforms in the FBI crime lab that benefit all Americans. Among the most important reforms was a Presidential memorandum issued by President William Clinton mandating that the Attorney General adopt new procedures in order to ensure that the requirements of § 2303 were properly implemented. At the time Senator Chuck Grassley was deeply involved in ensuring that the rules implemented by the Attorney General were fair. Since the 1997 Clinton Memorandum, numerous FBI employees have used § 2303 to protect their rights and ensure that government misconduct within the FBI was properly reported to the Department of Justice Office of Inspector General. The utility of these provisions in law is clearly demonstrated by a review of some of the reports issued by the Justice Department Inspector General. These reports often directly rely upon information provided by FBI whistleblowers.

We currently represent two such employees: Ms. Jane Turner and Supervisory Special Agent Bassem Youssef. The enactment of S. 372 would result in the dismissal of § 2303 claims filed by these two former/current FBI employees and other FBI employees whose claims are now under investigation or review.

In the past, the Senate Committee on the Judiciary has demonstrated a deep interest in the protection of FBI whistleblowers and the utility of § 2303 remedies. For example, the current § 2303 claim concerning Agent Youssef was actually triggered by a letter from Senators Leahy, Grassley and Specter to the Justice Department Inspector General highlighting concerns over Agent Youssef's treatment. Senators Leahy and Grassley sent similar letters on behalf of former agent Turner.

For your information, Jane Turner served as an FBI agent for 25 years. In 2002 she learned that FBI employees had stolen evidence and property from the 9/11 Ground Zero crime scene. Taking these so-called "souvenirs," most of which were the property of persons who died in the attack, constituted a serious breach of law enforcement ethics, and violated the law. Under § 2303 she took her concerns to the Department of Justice Office of Inspector General. Her claims were investigated and confirmed. The OIG determined that numerous FBI agents had taken improperly property from the 9/11-crime scene. Ms. Turner was fired shortly after she made her protected disclosure to the FBI. Her retaliation case is currently pending in a Part 27 proceeding filed under § 2303.

Agent Bassem Youssef is currently the highest-ranking Arab American FBI agent. For the past twenty years he has loyally dedicated his life to public service, and he is currently a Unit Chief in the Counterterrorism Division. In 2002 he disclosed to the Director of the FBI shortcomings in the FBI's counterterrorism program (directly related to discrimination against Arab Americans). Agent Youssef was subjected to retaliation after making this protected disclosure. He filed

a claim under § 2303. The Department of Justice Inspector General referred the claim to the Department of Justice Office of Professional Responsibility (this referral is permitted under the regulations). The Office of Professional Responsibility found that the FBI had in fact retaliated against Agent Youssef. The FBI appealed this finding, and the claim is currently pending at the Department of Justice.

Not only will the enactment of S. 372 result in severe hardship concerning all persons who have pending Part 27 claims, but it will also have a devastating impact on FBI accountability and oversight. Today, any FBI employee who blows the whistle under 5 U.S.C. § 2303 knows that he or she has certain rights, including the right to an independent Inspector General investigation and the right to a hearing or other review outside of the control of the FBI. Both of these rights would be lost under the current Senate bill. *See* Section 121(c)(1)(A) [granting jurisdiction to agency heads to investigate and adjudicate whistleblower cases].

Under the Senate bill, long-standing due process protections incorporated into the Civil Service Reform Act (which are currently applicable to FBI agents) would be lost. For example, other employees can file claims with the Office of Special Counsel or request hearings before the Merit Systems Protection Board. Under § 2303 FBI whistleblowers are entitled to the same due process and privacy rights. All of these procedural rights would be lost if the Senate Bill becomes law. This would include the right to privacy and confidentiality related to whistleblower investigations, the right to have whistleblower claims investigated outside of the FBI (the Senate Bill would transfer these investigations from the Inspector General to a unit within the FBI) and the right to call witnesses and introduce evidence onto the record when appealing agency adverse actions. The current FBI whistleblower statute has no statute of limitations. Section 121(c)(1)(A) establishes a short 60-day statute of limitations -- a filing requirement that will cause severe hardship on most claimants. The “impartial” agency review procedures set forth in S. 372(c) simply mirror the existing FBI rules concerning “notices of proposed removal.” Unlike current law, secret evidence can be used by the agency against a whistleblower. Section 121(c)(1)(B)(vi).

Moreover, the Senate Bill grants the FBI extraordinary powers over whistleblower cases unknown in the current law. It permits the FBI to make “credibility” determinations against a whistleblower, which can have a devastating impact on an employee’s reputation, career and security clearance. Moreover, there is no effective appeal right concerning agency credibility findings. The review board established under S. 372 is bound by the agency-created record, and “may not hear witnesses or admit additional evidence.” Section 121(c) (4)(B). The prohibition on hearing witness testimony includes board review of adverse credibility determinations made by the FBI. Section 121(c)(4)(D). In other words, the appeals board can make final credibility findings against whistleblowers, even though the board is barred from questioning a witness.

Section 121(e)(4) empowers the Director of the FBI to summarily fire any FBI whistleblower (with no administrative or judicial review).

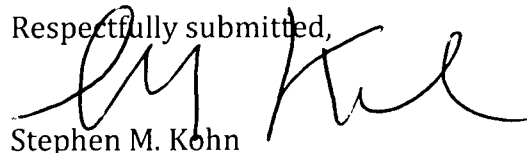
We know that the Committee on Homeland Security and Governmental Affairs is supportive of whistleblowers, and that there was no intent in Congress to undermine the existing protections. But as attorneys who have represented FBI whistleblowers since 1993 and who represented Dr. Frederic Whitehurst during the litigation that resulted in President Clinton's 1997 Memorandum, we are in a unique position to understand the complex relationship between § 2303, the provisions contained in S. 372 and the impact of these changes on current oversight rules. Moreover, as the attorneys for Agent Youssef and former Agent Turner, we fully understand how S. 372 will impact their cases and the cases of other FBI agents who may seek relief from retaliation in the future.

Based on the actual prejudice the Senate Bill will have on the two FBI whistleblowers represented by the Fund (and other FBI employees whose cases are currently pending under Part 27), and the future negative impact that this bill will have on FBI oversight and accountability, we ask that the following corrections be made on S. 372 before it is reported to the full Senate for a vote: (1) The repeal of § 2303 be retracted from the law in its entirety; (2) the provisions in this law that relate to the FBI (i.e. the entire "national security" and "security clearance" procedures contained in the bill) be struck from the law. The FBI should be explicitly carved out of Title II of S. 372, and the Bureau's current status as an agency covered under § 2303 must be fully preserved.

We also have concerns about other important provisions in the Senate bill, and hope that those can be addressed to improve the bill before it becomes law. We look forward to working with you to resolve all of these matters, but we believe our concerns regarding the bill's impact on FBI employees can and should be addressed immediately.

Thank you for your prompt attention to this matter.

Respectfully submitted,



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Attorney for Supervisory Special Agent Bassem
Youssef and retired Special Agent Jane Turner