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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

November 1, 2012

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Via Electronic Transmission

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Holder:

I write today regarding the recent Presidential Policy Directive, PPD-19 (herein Directive), entitled "Protecting Whistleblower with Access to Classified Information" that was issued by the President on October 10, 2012.¹ This Directive is intended to protect whistleblowers with national security clearances against retaliation. Section E of the Directive requires you, in consultation with the Special Counsel and employees of the Federal Bureau of Investigation (FBI), to provide a report to the President assessing the effectiveness of the regulations that protect FBI whistleblowers. While I welcome the Directive and the effort to provide some level of whistleblower protection to government employees in the Intelligence Community, I am deeply concerned about the current state of these protections for FBI employees and the Justice Department's role in adjudicating retaliation claims brought forward by FBI whistleblowers.

As you are aware, Section 2303 of Title 5 defines prohibited personnel practices in the FBI, and Part 27 of Title 28 of the Code of Federal Regulations lays out the process for investigating and adjudicating claims of retaliation filed by FBI employees. This process was created following a Presidential Memorandum issued by President Clinton in 1997.² These regulations detail an investigatory phase conducted by the FBI's Office of Professional Responsibility (OPR) or the Department of Justice's Office of the Inspector General (OIG), an adjudicatory phase conducted by the Office of Attorney Recruitment and Management (OARM), and an appeal phase conducted by the Deputy Attorney General. The regulations also proscribe timelines for each phase of the process to ensure that cases do not linger without a resolution. Unfortunately, as history has shown, the Department has been woeful in meeting these timelines.

Specifically, I remain concerned about the treatment of two FBI whistleblowers whose cases have languished for years at the Department, namely, the cases of Jane Turner and Robert Kobus. In 2002, Special Agent Turner exposed misconduct by FBI agents when she revealed

¹ The White House, Presidential Policy Directive 19: Protecting Whistleblowers with Access to Classified Information, (October 10, 2012), <http://www.fas.org/irp/offdocs/ppd/ppd-19.pdf>.

² Memorandum on Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, 62 Fed. Reg. 23,123 (April 14, 1997), available at <http://www.gpo.gov/fdsys/pkg/FR-1997-04-28/pdf/97-10984.pdf>.

that they removed “souvenirs” from New York’s Ground Zero, the site of the 9-11 terrorist attacks. A decade later, and after a federal jury has ruled in her favor finding discrimination on the part of the FBI, Agent Turner’s case has been continually stalled with appeals and is still open—most recently after Deputy Attorney General Cole remanded the case for additional proceedings before OARM. Mr. Kobus’s case has also faced unwarranted delays. Kobus blew the whistle on timecard fraud in the FBI in 2007 and the OIG found that the FBI retaliated against him for his actions. Despite the unequivocal findings of the OIG, Kobus’ case remains unresolved after five years. Simply put, the delays in both of these cases call into question the Department’s ability, and willingness, to follow through on FBI whistleblower cases in a fair and timely fashion.

The Directive requires you to complete the review of the FBI whistleblower process within 180 days. Given the lengthy delays in retaliation cases that are still pending before the Department, and given the role that the Deputy Attorney General has played in these cases, I have serious misgivings about the ability of the Department to fairly review the FBI whistleblower process and to do so within the 180 day timeframe.

The Directive’s requirement that the review involve the Special Counsel and FBI employees—which should, at the very least, include those who currently have whistleblower complaints pending before OARM—creates the possibility of a conflict of interest in reviewing the Department’s performance. Accordingly, I ask that you delegate this review to the Department’s Inspector General. The OIG would offer a more objective and accountable analysis of the regulations prescribed in the Directive. Further, it would allow you to continue to focus resources on closing these cases that continue to languish before the Department, instead of devoting resources to this review.

I strongly support whistleblower protections and will continue to work hard to see that all FBI employees who reveal fraud, waste, and wrongdoing receive fair and equitable treatment at the FBI and within the Department. This Directive, if implemented properly, could provide temporary relief for whistleblowers within the Intelligence Community. However, the Department has a lot to prove to FBI employees, the Congress, and the American people that whistleblowers will be treated fairly. As a first step toward this, I encourage you to strongly consider my request to designate the OIG to conduct the review of FBI whistleblower protections as outlined in the President’s Directive.

Sincerely,



Charles E. Grassley
Ranking Member

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

The Honorable Patrick Leahy
Chairman