

March 17, 2016

The Honorable Chuck Grassley, Chairman
The Honorable Patrick Leahy, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Support for the FBI Whistleblower Protection Enhancement Act of 2015

Dear Chairman Grassley and Ranking Member Leahy:

The undersigned groups and whistleblowers applaud your bipartisan leadership at the Judiciary Committee in introducing badly-needed good government legislation: the Federal Bureau of Investigation Whistleblower Protection Enhancement Act (FBI WPEA) of 2015 (S. 2390). By upgrading one of the least effective whistleblower policies in the U.S. Code, the legislation modernizes whistleblower rights where they may be needed most.

The Civil Service Reform Act authorized the FBI to create its own equivalent system for merit system principles, including whistleblower protection. Unfortunately, the policy was nonexistent for over a decade and since has been a caricature of rights in the Whistleblower Protection Act of 1989 (WPA). The FBI thus has been among the very weakest links in government accountability, and the nation has suffered when whistleblowers were silenced or removed. The government's lack of accountability has been demonstrated in several cases including the revelations on the government's continuous use of inaccurate laboratory tests that continue to threaten the integrity of high stakes federal prosecutions; security breaches that were a contributing factor in failing to prevent 9/11; and participation in mass surveillance practices deemed unlawful by some federal courts and fundamentally redesigned under the USA Freedom Act.

Disturbingly, the system of rights to protect FBI whistleblowers, for all practical purposes, is the FBI's internal management issuing unpublished decisions that routinely rubber-stamp whatever retaliation is challenged. Under the FBI WPEA, mechanisms will be put in place to effectively protect public servants at the FBI from adverse employment actions for challenging abuses of power that betray the public trust. This pending legislation would transform the agency's current whistleblower "rights" from a trap to a credible free speech shield by:

- * Expanding coverage to all relevant witnesses, including applicants for employment or new positions;

- * Closing loopholes that previously excluded protection for disclosures to supervisors, within the chain of command and to Congress;

- * Granting authority for the Office of Inspector General to obtain temporary relief against retaliation through "stays" while an appeal proceeds;

- * Establishing parity for protected activity with the WPA to cover the full scope of relevant misconduct, including illegality, gross waste, gross mismanagement, or a substantial and specific danger to public health or safety;

* Increasing transparency into how the Act works in practice, through publication of its track record ranging from the number of cases filed and completed, to the whistleblowers' won-loss record;

* Commissioning independent review by the Government Accountability Office of the Act's track record, to facilitate further improvements based on lessons learned; and

* Providing parity with the WPA in many critical respects, including by:

- protecting FBI employees who refuse to violate the law;
- affording employees the right to seek due process remedies if the Office of Inspector General (OIG) has not issued a ruling within 120 days;
- establishing identical burdens of proof for all fact-finding under the Act;
- conferring the right to independent due process before an Administrative Law Judge;
- fostering due process rights generally by requiring the publication of decisions on whistleblower complaints; and
- adopting the Administrative Procedures Act's requirements for judicial review.

Your efforts are particularly significant, because recent history has demonstrated that the FBI is not willing to take the necessary actions to provide credible rights to whistleblowers and take responsibility. In 2012, Presidential Policy Directive 19 required an FBI self-assessment to set the stage for reform. Three years later, with the exception of peripheral changes on the margin, the FBI has reported it is content with the status quo.

As you and your fellow cosponsors clearly recognize, the status quo is insufficient. The FBI has abused its mission with impunity, in large part because its employees are not afforded substantive rights and protections. The FBI Whistleblower Protection Enhancement Act is vital to ensuring that the nation's top law enforcement agency is held accountable to the rule of law.

Thank you again for your leadership. We stand ready to assist you in any way that we can to quickly advance S. 2390 through Committee to the Senate floor, and on to the President's desk.

Sincerely,

Advocacy for Principled Action in Government

American-Arab Anti-Discrimination Committee (ADC)

American Civil Liberties Union

American Library Association

Bill of Rights Defense Committee and Defending Dissent Foundation

Campaign for Liberty

Coleen Rowley, retired FBI Agent and former Minneapolis Division Legal Counsel

Constitutional Alliance

Demand Progress

Elaine Mittleman, Department of the Treasury Whistleblower
Federal Law Enforcement Officer's Association (FLEOA)
Fight for the Future
Government Accountability Project
Liberty Coalition
OpenTheGovernment.org
National Center for Transgender Equality
National Security Counselors
National Whistleblower Center
The Niskanen Center
Marvell D. Lavy, Department of Veterans Affairs Whistleblower
PEN American Center
Project On Government Oversight
Public Citizen
Restore The Fourth
The Rutherford Institute
Taxpayers Protections Alliance
Whistleblower Source Protection Program (WHISPeR)
World Privacy Forum
X-Lab