

**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.

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

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.