Questions for the Record from Senator Charles E. Grassley
for Inspector General Michael Horowitz
U.S. Senate Committee on the Judiciary
Hearing on "Whistleblower Retaliation at the FBI: Improving Protections and Oversight"
Submitted on March 10, 2015

1. **FBI Cooperation in Whistleblower Investigations**

On February 3, 2015, as required by Section 218 of the 2015 Department of Justice Appropriations Act, your office informed appropriations committee leadership in the House and Senate that the FBI "has failed, for reasons unrelated to any express limitation in Section 6(a) of the Inspector General Act (IG Act) to provide the Department of Justice Office of the Inspector General (OIG) with timely access to certain records." According to that letter, the OIG requested those records in connection with its investigations of two FBI whistleblower complaints.

The letter states that the FBI failed to meet deadlines to produce a portion of these records for the "primary reason" that the FBI "desire[d] to continue its review of e-mails requested by the OIG to determine whether they contain any information which the FBI maintains the OIG is not legally entitled to access." Further, the letter states that the FBI "informed the OIG that, for any such information it identified, it would need the authorization of the Attorney General or Deputy Attorney General in order to produce the information to the OIG."

However, as the letter correctly states, Section 218 plainly contemplates that the OIG will have access "to *all* records, documents, and other materials," subject to the sole limitation of Section 6(a) of the IG Act. Section 6(a) does not limit the OIG's access to the categories of records the FBI has identified.

Since February 3, OIG also has issued three additional Section 218 notices regarding the FBI's failure to produce documents in response to the OIG's requests.

Can you please explain how these delays affect your inquiries and describe the problems caused when FBI lawyers conduct their own internal document review before responding to your requests?

Response: As you reference above, on February 3, 2015, the OIG sent a letter to report to Congress the FBI's failure to provide the OIG with timely access to certain records regarding two investigations being conducted by the OIG under the Department's Whistleblower Protection Regulations for FBI Employees, 28 C.F.R. pt. 27. The FBI has taken the position that its Office of General Counsel must conduct a pre-production review of documents responsive to the OIG's requests, because they have questioned the OIG's legal authority to have access to certain records. As a result, the Department has imposed a process whereby the Attorney General or the Deputy Attorney General must grant permission to the DOJ OIG to access such records if they conclude that specific reviews will assist them in the performance of their duties, and they have done so in each such review so far where the issue has arisen. However, no such permission is necessary under Section 6(a) of the Inspector General Act. Moreover, requiring

an OIG to obtain permission from agency leadership in order to review agency documents seriously impairs Inspector General independence by subjecting our ability to review documents in the course of our oversight work to the approval of Department leadership.

The FBI's current process of reviewing documents prior to production in whistleblower matters raises three main concerns. First, having the FBI conduct a pre-production review of documents that the OIG has requested in order to decide what records it should provide to the OIG regarding reprisal claims made against FBI supervisors creates, at a minimum, a significant appearance of a conflict of interest. This is particularly the case in light of the FBI OGC's direct involvement in the document review, given that in any subsequent adjudication of the whistleblower retaliation complaint before OARM, the very same FBI OGC will be responsible for defending the FBI and its managers against that claim of reprisal.

Second, they have resulted in a failure to timely produce documents to the OIG, thereby seriously impeding our reviews and delaying or preventing our ability to detect waste, fraud, abuse, misconduct, or other mismanagement. Most recently, two FBI whistleblower retaliation investigations that are currently underway in the OIG have been significantly delayed. More than six months after our document requests, the FBI still has not produced the attachments to over one hundred e-mails. A major factor in the delays is the FBI's practice of reviewing e-mails requested by the OIG to determine whether they contain any information that the FBI maintains the OIG is not legally entitled to access, such as grand jury, Title III electronic surveillance, and Fair Credit Reporting Act information.

Third, these pre-production reviews result in a substantial waste of FBI and OIG resources, and the significant delays erode the morale of the dedicated professionals at the OIG. These consequences are particularly acute in reviews and investigations with statutory or Congressionally-mandated deadlines, such as whistleblower cases. The FBI OGC's practice of delaying document productions to complete these pre-production reviews threatens to compromise the ability of the OIG to complete its investigations within a timely fashion consistent with the FBI Whistleblower Retaliation Regulations.

In May 2014, the Department's leadership asked the Office of Legal Counsel (OLC) to issue an opinion addressing the legal objections raised by the FBI. However, nearly one year later, we are still waiting for that opinion even though, in our view, this matter is straightforward and could have been resolved by the Department's leadership without even requesting an opinion from OLC. I cannot emphasize enough how important it is that OLC issue its opinion promptly because the existing process at the Department, which as described above essentially assumes the correctness of the FBI's legal position, undermines our independence and impairs the timeliness of our reviews by requiring us to seek permission from the Department's leadership in order to access certain records. The status quo cannot continue indefinitely.

2. FBI Whistleblower Investigations

According to the Justice Department report examining the FBI whistleblower regulations, the Office of Professional Responsibility and the OIG will frequently "take turns" investigating FBI whistleblower complaints. The U.S. Government Accountability Office (GAO) report on the Department's handling of FBI whistleblower cases makes clear that the two offices differ in how they handle these cases.

Wouldn't cases be handled more consistently if complaints were reviewed by one independent office? Why or why not?

Response: As you reference above, pursuant to the Department's FBI Whistleblower Regulations, either the OIG or the Department of Justice's Office of Professional Responsibility (DOJ OPR) conducts an investigation of allegations of illegal reprisals against FBI employees. Both offices are bound by the same legal standards outlined in the regulations. The GAO report indicated that the OIG and DOJ OPR had differing records of success in complying with some of the time requirements of the FBI whistleblower regulations, and we agree that both offices should meet the requirement of the regulations.

We also continue to believe that the OIG should have authority to investigate all allegations of misconduct by Department employees, including those by DOJ attorneys acting in their capacity as lawyers. Currently, however, the OIG does not have that authority as to DOJ attorneys; pursuant to the Inspector General Act, this role is exclusively reserved for the Department's own OPR. The OIG has long questioned this special carve-out exception since OPR is managed as a DOJ component, and has no institutional independence. Providing the OIG with the authority to exercise jurisdiction in attorney misconduct cases would also unify the independent review of whistleblower cases in the OIG, which we agree would result in a more consistent handling of these whistleblower retaliation cases.

3. Substantiated FBI Whistleblower Retaliation

During the March 4 hearing, I asked you how often the OIG has substantiated an FBI whistleblower's claim of retaliation, only to see that finding languish in internal appeals because the Department disagreed. You stated that you believed there were six such cases, but indicated you would provide confirmation in written answers after the hearing. Please provide the number of cases, whether they address FBI whistleblower complaints or complaints arising from another Department component, the duration of each stage of the complaint process (your investigation, and, to the extent available, OARM adjudication and appeals), and the findings at each stage of the complaint process (your office's findings, and, to the extent available, OARM findings and the ultimate outcome of the case).

Response: Under the FBI whistleblower regulations, the Conducting Office (the OIG or DOJ OPR) makes a determination of whether there are "reasonable grounds to believe that there has been or will be a reprisal for a protected disclosure." 28 C.F.R. § 27.3(f). The next step under the regulations is for the Conducting Office to report its conclusion to the Director of the Office of Attorney Recruitment and Management (OARM) for formal adjudication of the allegations, a process which typically involves fact discovery and in some cases a hearing.

The OIG has compiled data on FBI Whistleblower Retaliation investigations that it has conducted since 2005. During that period, the OIG has sent a total of 6 cases to OARM after making a finding of "reasonable grounds." One of the cases was referred for OARM's information only because the FBI took corrective action on its own initiative after the OIG report. It was never adjudicated. One case settled during the OARM phase. OARM found retaliation in two cases. Two cases remain pending in OARM at this time. The duration of the OIG phase of these investigations are shown in the table below. The OIG does not currently have information about the duration of adjudication or appeal phases of these cases; it would be appropriate to obtain such information from the Department itself.

Case No.	Duration of OIG Investigation	Result after adjudication and appeal
1	616 days	OARM found retaliation.
2	469 days	OARM found retaliation.
3	70 days	FBI took immediate corrective action; no OARM adjudication required.
4	352 days	Adjudication pending in OARM.
5	478 days	Adjudication pending in OARM.
6	390 days	Settled without adjudication.

QUESTIONS FOR THE RECORD – Ranking Member Leahy
3/4/15 FBI Whistleblower Hearing

Questions for DOJ IG Horowitz

1. In your written testimony, and in recent appearances before several congressional committees, you described significant impediments the IG's office faces in obtaining timely and complete access to documents and materials needed for audits, reviews, and investigations.

    a. Are there any categories of information that the FBI is permitted to withhold from OIG? If so, what types of records?

    Response: Pursuant to the plain language of the Inspector General Act, the OIG does not believe there are any categories of information that the FBI is permitted to withhold from the OIG. Section 6(a) of the Inspector General Act authorizes the Inspector General to have access to "all records" and other materials available to the Department related to programs and operations for which the Inspector General has responsibilities under the Act. Prior to 2010, neither the Department nor the FBI raised legal objections to the OIG's ability to obtain records that the OIG requested for its oversight work. As a result, the OIG obtained – including from the FBI – the exact same categories of records that the FBI is now claiming it does not have legal authority to provide to the OIG. Indeed, over the course of the OIG's 27 year history, we have been provided access to some of the most sensitive information available to the Department, including information that allowed us to conduct reviews related to the Robert Hanssen matter, the Aldrich Ames matter, the September 11 attacks, the post-September 11 surveillance program initiated by President Bush, and the FBI's use of its authorities under the Patriot Act and the FISA Amendments Act.

    An Inspector General must have timely and complete access to documents and materials needed for its audits, reviews, and investigations. Access to this information is crucial for the OIG to make the most informed analysis of available data and develop the most useful recommendations.

    b. What are the implications of allowing the FBI to withhold certain records from your office?

    Response: Allowing the FBI to withhold certain records from the OIG imperils our independence, and impedes our ability to provide effective and independent oversight that saves taxpayers money, ensure national security programs are being conducted consistent with civil rights and civil liberties, and improve the operations of the federal government. The process by which the Department reviews and eventually grants the OIG access to documents imposes unnecessary delays and impinges on our independence by requiring permission from agency leadership to conduct our oversight work. These delays impede our work, delay our ability to discover the significant issues we ultimately identify, waste

Department and OIG resources during the pendency of the dispute, and affect our confidence in the completeness of our review. In addition, this process significantly erodes the morale of the dedicated professionals of our OIG staff.

This is not a hypothetical concern. Rather, we have faced repeated instances over the past four years in which our timely access to records has been impeded, including on very significant matters such as the FBI's use of National Security Letters, the Boston Marathon Bombing, the Department's use of the material witness statute, the FBI's use of National Security Letters, and ATF's Operation Fast and Furious. In addition, as we noted in our recent report on Sexual Misconduct by the Department's law enforcement components, not only was our access to documents significantly delayed, but we determined that when we finally did get production of materials from the FBI and DEA, we did not receive all of the records we requested.

The Congress recognized the significance of this impairment to the OIG's independence and ability to conduct effect oversight, and included a provision in the Fiscal Year 2015 Appropriations Act — Section 218 — which prohibits the Justice Department from using appropriated funds to deny, prevent, or impede the OIG's timely access to records, documents, and other materials in the Department's possession, unless it is in accordance with an express limitation of Section 6(a) of the IG Act. Despite the Congress's clear statement of intent, the Department and the FBI continue to proceed exactly as they did before Section 218 was adopted – spending appropriated funds to review records to determine if they should be withheld from the OIG. The effect is as if Section 218 was never adopted. The OIG has sent four letters to Congress to report that the FBI has failed to comply with Section 218 by refusing to provide the OIG, for reasons unrelated to any express limitation in Section 6(a) of the IG Act, with timely access to certain records.

c. What steps does the Inspector General's office take to ensure information it receives from the FBI is properly controlled to prevent inappropriate disclosures?

Response: The OIG has handled some of the most sensitive information in the Department's possession in the course of numerous highly classified reviews. Since 2001, when the OIG assumed primary oversight responsibility for the FBI, the OIG has undertaken numerous investigations which required review of the most sensitive material, including grand jury material and documents classified at the highest level of secrecy, for example:

- *The President's Surveillance Program;*
- *FBI's Handling of Intelligence Information Prior to the September 11 Attacks;*
- *FBI's Performance in Deterring, Detecting, and Investigating the Espionage Activities of Robert Philip Hanssen;*

- *FBI's Performance in Uncovering the Espionage Activities of Aldrich Hazen Ames;*
- *FBI's Handling and Oversight of FBI Asset Katrina Leung;*
- *FBI's Use of Authorities pursuant to the FISA Amendments Act of 2008;*
- *FBI's Use of National Security Letters and Section 215 Business Records orders;*
- *FBI's Use of Exigent Letters and Other Informal Requests for Telephone Records required the OIG to review grand jury information and material classified at the TS/SCI level;*
- *FBI's Use of Authorities pursuant to Section 702 of FISA; and*
- *Department's Use of the Material Witness Statute.*

In all of its reviews and investigations, the OIG scrupulously protects sensitive information and has never made an unauthorized disclosure of information it has received from the FBI. This record is attributable to OIG investigators' and auditors' careful adherence to Department requirements and procedures for handling and storing Department information, and to the OIG's practice with public reports to request that the FBI and Department conduct sensitivity reviews to identify information that the Department determines is too sensitive for public release.

Further, it is the OIG's long-standing practice that before publicly releasing a report, we provide a draft copy to the Department and relevant components to conduct a sensitivity review in order to ensure that national security classified information is properly marked and sensitive information is not inappropriately disclosed. The OIG is not aware of any instance in which it was responsible for an improper disclosure of sensitive or classified material.

Moreover, if the Department has concerns about the public disclosure of one of our reports, the Attorney General may invoke the provision pursuant to Section 8E(a) of the Inspector General Act and restrict the disclosure of OIG reports or prohibit the OIG from carrying out its work. The Attorney General may impose such restrictions in five statutorily-designated areas: (A) ongoing civil or criminal investigations or proceedings; (B) undercover operations; (C) the identity of confidential sources, including protected witnesses; (D) intelligence or counterintelligence matters; and (E) other matters the disclosure of which would constitute a serious threat to national security. If the Attorney General decides to invoke this authority, he/she must notify the OIG in writing, and the OIG will then transmit the notification to Congress. This provision, as enacted by Congress, permits the Attorney General to object to the disclosure of information in an OIG report in these limited instances. The Attorney General has only exercised this provision on one occasion in the 26 years since the establishment of the DOJ OIG, when the provision was invoked to delay the issuance of the OIG report entitled "CIA-Contra-Crack Cocaine Controversy: A Review of the Justice Department's Investigations and Prosecutions" by seven months (from December 1997 until July 1998).

2. On February 10, 2015, your office transmitted a classified report on the FBI's use of Section 215 authority under FISA entitled, *A Review of the FBI's Use of Section 215 Orders: Assessment of Progress in Implementing Recommendations and Examination of Use in 2007 through 2009*. As you mentioned in your letter accompanying the report, despite the fact that OIG submitted its draft report to the agency responsible for reviewing certain classification markings in June 2014, the classified report contains redacted information. That agency has thus far failed to review significant portions of the report and provide a formal response. With Section 215 set to expire on June 1, 2015, I appreciate the willingness of OIG to transmit the partial report to Congress instead of delaying its release indefinitely.

   However, this unnecessary delay has prevented Congress from reviewing the full report and prevented the release of a public version, inhibiting accountability and oversight. With this provision of the USA PATRIOT Act set to expire in a few months, it is critical that Congress and the American people have the full results of this important review.

   a. Please provide an update on the status of the declassification review by the agency responsible for reviewing the redacted portions of this report.

      Response: On April 15, 2015, we received the final results of the classification review from the agency. We immediately incorporated those comments and sent the updated classified version and the final unclassified version of the report to the FBI to obtain the required classification authority block, which identifies the source of the classification decision and the declassification instructions. Once we receive the report back from the FBI with the required classification authority block, we intend to immediately proceed with producing the public, unclassified version of this report, as well as the updated classified version of the report. We have not been given a date by the FBI regarding when we will receive the report back from them.

   b. Please provide a fulsome description of the reasons that the agency has provided OIG for failing to review this report.

      Response: The agency has not provided a full explanation or description of the reasons it has been unable to complete the final classification review we requested. We provided a final draft of the report for classification review in June 2014, but did not receive the results of the classification review until April 15, 2015, as noted above.

   c. Please provide the name of the agency responsible for reviewing the classification markings in this report.

      Response: The agency referenced in the response above is the National Security Agency.

As you may be aware, the OIG has also been reviewing the FBI's use of information derived from the National Security Agency's collection of telephony metadata obtained from certain telecommunications service providers under Section 215. That review has been significantly affected by the FBI's failure to timely produce relevant records to the OIG, especially e-mail communications that were first requested in October 2014. We reported this situation to the House and Senate Appropriations Committees on February 25, 2015, pursuant to Section 218 of the Department of Justice Appropriations Act. Since that time, the OIG has received additional productions from the FBI, but we understand that a substantial volume of responsive material has still not been produced by the FBI, and the FBI has not committed to a date certain for the completion of this production. The FBI's inability to timely produce this information continues to compromise the OIG's ability to conduct a thorough review of this subject matter, and is especially consequential given the June 1, 2015, expiration date for Section 215.

3. In addition to the report on Section 215, your office is also conducting a review of the FBI's use of the pen register and trap-and-trace authority under FISA.

    a. Has your office completed this report?

    Response: Yes, the OIG long ago completed this report. However, similar to our report about the FBI's use of Section 215 authority, its release has been substantially delayed by classification reviews conducted by the FBI and the Intelligence Community. Because of this substantial delay and our inability to obtain a date by which the FBI and the Intelligence Community would complete its review, the OIG agreed to provide a briefing about the completed report to staff from the Committee on the Judiciary on June 20, 2014. That briefing also included summaries of our then-pending reports on the FBI's use of Section 215 authority and National Security Letters.

    b. When can Congress expect to receive a final version of this report?

    Response: On April 8, 2015, we received the final results of the classification reviews. We immediately incorporated those comments and sent the final classified report to the FBI to obtain the required classification authority block, which identifies the source of the classification decision and the declassification instructions. We received the report back from the FBI with the required classification authority block today, April 30, 2015, and are proceeding with producing the classified report to the relevant Congressional oversight and intelligence committees.

    c. Has the OIG faced similar obstacles in the declassification review of the pen register report?

Response: Yes, as stated above, the release of this report has also been significantly delayed by the classification reviews conducted by the FBI and the Intelligence Community. We completed a draft of this report in February 2014. At that time, we provided the draft report to the FBI, Department, and the Intelligence Community for comment and to conduct classification reviews. We circulated a revised draft report in May 2014. As indicated above, we did not receive the final results of the classification reviews until April 2015.