

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

“Whistleblower Retaliation at the FBI: Improving Protections and Oversight”

Testimony of Stephen M. Kohn¹

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Chairman Grassley, Senator Leahy, and Members of the Committee. The Department of Justice’s program for protecting FBI whistleblowers is broken. My testimony will focus on the devastating impact caused by the prolonged delays in deciding these cases.

By way of background, since 1993 I have continuously represented FBI employees in whistleblower proceedings. My law firm filed the federal lawsuit that forced President Clinton in 1997 to order the Justice Department to implement the FBI protections contained in the Whistleblower Protection Act, resulting in the formation of the current OARM process.

I want to focus my remarks on the cases of three heroic Americans who faced prolonged retaliation at the FBI for reporting serious misconduct: Former Special Agents Jane Turner² and Bassem Youssef³, and current FBI employee Robert Kobus.⁴ Together they have 86 years of exemplary FBI service protecting Americans.

Although working in different FBI offices and on different programs, the whistleblower protection program failed them all.

Robert Kobus has worked in the New York Field Office for 34 years as an FBI operations manager. He is nearing retirement. His commitment to law enforcement is both professional and deeply personal. His sister was murdered by al-Qaeda on September 11, 2001.

Mr. Kobus reported budget and time card fraud in his office. It was a simple case, and fully documented. But retaliation was swift – the FBI stripped him of his duties and literally isolated him by assigning him to work as the only person on a vacant floor amongst 130 empty desks. The DOJ Office of Inspector General (OIG), after a thorough investigation, found that the FBI retaliated against Mr. Kobus and ordered corrective action. It should have ended there and Mr. Kobus should have been restored to his former duties no later than 2007.

Instead, for more than nine years the FBI spent our taxpayers' money frivolously fighting Mr. Kobus. In the end he won. But ask him about this "victory" and the 9-year process he lived through waiting until December of 2014 to finally receive corrective action. The FBI's uncontrolled bullying tactics, which went on continuously while DOJ endlessly reviewed his very simple case, ruined Mr. Kobus' promising career.

Jane Turner's case is even worse. She was one of the first female agents in the FBI and once had a stellar career. However, after disclosing to the Inspector General that FBI agents had illegally stolen property (by taking souvenirs) from those who died in the 9/11 attacks, she was subjected to brutal retaliation, including downgraded performance because she "embarrassed the FBI," stripped of all investigatory duties and was completely isolated (to the point where agents explicitly stated they commenced bringing their guns into the office because Ms. Turner blew the whistle). While her whistleblower case was pending, Ms. Turner resigned from her job after being given a bogus Notice of Proposed Removal.

Ms. Turner filed a whistleblower complaint in 2002, but it languished for 11 years. She finally "won" her case, and the Notice of Proposed Removal was withdrawn. But this happened years after she met the mandatory retirement age. Because of the delays in her case, the relief she obtained did nothing to make her whole or properly correct the abuses she suffered.

Finally, there is Supervisory Special Agent Bassem Youssef. Before blowing the whistle he received the highly prestigious DCI award from the Director of Central Intelligence for his spectacular contributions in counterterrorism. He also served as the FBI's first legal attaché in Riyadh, Saudi Arabia and in the 1990's he successfully infiltrated the terrorist organization now known as al-Qaeda.

His case has been pending before the DOJ for more than nine years, with no end in sight. The corrective action he sought from the FBI was simply to be assigned work on operational counterterrorism cases – an area Mr. Youssef was exceptionally qualified to perform. Although the DOJ Office of Professional Responsibility (OPR) investigated Mr. Youssef's whistleblower complaint and quickly ruled in his favor, ordering him reinstated to operational counterterrorism work, the FBI appealed, and the case remains pending.

Regardless of the ultimate outcome of his case, the OARM process failed. Mr. Youssef's request to utilize his unique skills to fight America's war on terror will never come to pass. This past September, frustrated and humiliated by the prolonged delays and with the continuous stigma whistleblowers face within the FBI, Mr. Youssef finally retired, one year from his mandatory retirement date. Given his background and skills, this was a major loss for all Americans.

The prolonged delays in processing these claims send a clear message to all FBI agents: Don't blow the whistle.

Thank you.

SUPPLEMENTAL WRITTEN TESTIMONY

A. Summary of Needed Reforms

1. The law should be amended to include protections for FBI employees who make disclosures to their supervisors and/or through their chain of command. Without such protections the majority of whistleblowers will not be protected. This recommendation is consistent with the recommendation made by the U.S. General Accounting Office, "Whistleblower Protection: Additional actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints," GAO-15-112 (January 2015), p. 41. <http://bit.ly/1M3Ijw2>

2. Strict time limits must be placed on the adjudicatory process. Currently, if the OIG or OPR does not conclude their investigation in a specific time period, and FBI employee has the right to immediately appeal his or her case to the Office of Attorney Recruitment and Management ("OARM"). This process is appropriate, and puts real pressure on the OIG or OPR to issue timely decisions. A similar process, with real teeth, must be placed on the two adjudicatory offices with responsibility over the FBI Whistleblower Program: the OARM and Deputy Attorney General ("DAG"). We recommend the following:

A. The OARM shall issue its initial decision on the merits and any final decision on remedy within 12 months of the filing of an appeal, not including enlargements of time requested and obtained by the employee. The failure to meet these deadlines will give the employee the right to remove his or her case to U.S. District Court, and have the case heard *de novo* in that forum.

B. The DAG shall issue the final order of the Department of Justice within six months of the filing of an appeal before the DAG, not including enlargements of time requested by the employee. The failure to meet these deadlines will give the employee the right to remove his or her case to U.S. District Court, and have the appeal heard *de novo* in that forum.

3. In order to clear up any ambiguity in the law, Congress should explicitly clarify the law in order to ensure that any final decision of the DAG is subject to judicial review pursuant to the Administrative Procedure Act. Under 5 U.S.C. § 706 this review would be limited to ensuring that the DAG did not abuse his discretion in issuing the final order, and that the Department of Justice's final order was not arbitrary, capricious or in violation of law. Without such review the DAG could issue final decisions that explicitly violate the law, and the whistleblower would have no avenue to correct that manifest injustice.

4. Other needed improvements in the law are set forth in the Joint Recommendations submitted to the Department of Justice by the American Civil Liberties Union and the National Whistleblower Center on February 4, 2013. A copy of these recommendations can be found at <http://bit.ly/ChangesPart27>.

B. Background to the Whistleblowers

Former Supervisory Special Agent Bassem Youssef: Background on Mr. Youssef's 27-year career at the FBI, his whistleblower allegations and extensive documentation regarding his concerns can be found at http://bit.ly/Bassem_Youssef.

FBI Employee Robert Kobus: Background on Mr. Kobus's 34-year career at the FBI and copies of the OARM decision ruling in his favor can be found at

http://bit.ly/Robert_Kobus.

Former Special Agent Jane Turner: Background information on Jane Turner, her whistleblower allegations, the OIG report finding that her allegations had merit and information on the retaliation she faced can be found at

http://bit.ly/Jane_Turner.

¹ Stephen M. Kohn serves *pro bono* as the Executive Director of the National Whistleblower Center (www.whistleblowers.org). He is a partner in the Washington, D.C. law firm of Kohn, Kohn & Colapinto, LLP (<http://www.kkc.com>) served in the 1980's as the Director of Corporate Litigation for the Government Accountability Project. His ninth book on whistleblowing is, *The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself* (Lyons Press, 3rd edition, 2013). The *Handbook* retold, for the first time, the history behind America's first whistleblower law, enacted by the Continental Congress in 1778. For over thirty years Mr. Kohn has successfully represented whistleblowers, including FBI employees such as Dr. Frederic Whitehurst, Jane Turner, Robert Kobus and Bassem Youssef. He also represents numerous whistleblowers in tax, securities and government contracting fraud cases. The disclosures made by his clients have triggered over \$15 billion in recoveries for the United States. Mr. Kohn has a B.S. in Social Education from Boston University, an M.A. in Political Science from Brown University and is a graduate of the Northeastern University School of Law.

² Detailed information on Jane Turner's case can be found at http://bit.ly/Jane_Turner.

³ Detailed information on Mr. Youssef's case can be found at http://bit.ly/Bassem_Youssef.

⁴ Detailed information on Mr. Kobus' case can be found at http://bit.ly/Robert_Kobus.