



Testimony
of
Michael German
Policy Counsel, American Civil Liberties Union,
Former Special Agent, Federal Bureau of Investigation

before the
Subcommittee on Crime, Terrorism, and Homeland
Security
House Judiciary Committee

May 21, 2008

*The FBI Whistleblowers: Corruption and Retaliation
Inside the Bureau*



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Chairman Scott, Ranking Member Gohmert, members of the Committee, thank you for inviting me to speak with you about the treatment of whistleblowers at the Federal Bureau of Investigation. I represent the American Civil Liberties Union, a non-partisan organization dedicated to defending the Constitution and protecting civil liberties. The ACLU vigorously supports meaningful legal protections for all whistleblowers, but particularly for employees and contractors within the law enforcement and intelligence communities, where abuse and misconduct can have serious and direct effects on our rights and liberties, as well as our security.

The House of Representatives passed a comprehensive whistleblower protection bill last year, H.R. 985, which would significantly improve the legal protections for all whistleblowers and extend protection to employees of the FBI, CIA, NSA and other intelligence agencies that are currently exempt from the Whistleblower Protection Act.¹ Companion legislation in the Senate, S. 274, passed without a provision extending protection to the FBI or other intelligence agencies. I hope my testimony today will explain why the current systems designed to protect FBI whistleblowers are simply inadequate, and why legislative reform is so necessary.

Unfortunately, my experience with the FBI's treatment of whistleblowers is all too personal. I entered on duty as a Special Agent of the Federal Bureau of Investigation in June of 1988. My journey from the FBI to the ACLU began in 2002, when I made a protected disclosure about management failures and violations of law in an FBI counterterrorism investigation. I didn't know at the time that the FBI was exempt from the Whistleblower Protection Act, but I also didn't think I needed to be concerned about retaliation. I had fourteen years of experience as a Special Agent, an unblemished disciplinary record, a medal of valor from the Los Angeles Federal Bar Association, and a consistent record of superior performance appraisals. Twice during my career I had successfully infiltrated domestic terrorist organizations, recovered dozens of illegal firearms and explosive devices, resolved unsolved bombings, and prevented acts of terrorism by winning criminal convictions against terrorists. As the FBI shifted to a terrorism prevention focus I assumed this experience would be in high demand.

Moreover, earlier that summer President George W. Bush expressly called on agents to report any breakdowns in national security:

“If you’re a front-line worker for the FBI, the CIA, some other law enforcement or intelligence agency, and you see something that raises suspicions, I want you to report it immediately. I expect your supervisors to treat it with the seriousness it deserves. Information must be fully shared, so we can follow every lead to find the one that may prevent a tragedy.”²

Likewise, FBI Director Robert Mueller repeatedly vowed to protect FBI whistleblowers. In the wake of public disclosures regarding FBI failures surrounding the September 11, 2001 terrorist attacks, Director Mueller urged FBI employees to report any problems that impeded FBI counterterrorism operations, and he offered his personal assurance that retaliation against FBI whistleblowers would not be tolerated:

“I issued a memorandum on November 7th reaffirming the protections that are afforded to whistleblowers in which I indicated I will not tolerate reprisals or intimidation by any Bureau employee against those who make protected disclosures, nor will I tolerate attempts to prevent employees from making such disclosures. In every case where there is even intimation that one is concerned about whistleblower protections, I immediately alert Mr. Fine and send it over so that there is an independent review and independent assurance that the person will have the protections warranted.”³

I listened and obeyed the Director’s orders. When I became aware of serious misconduct in a terrorism case, I reported as directed, through my chain of command. I did my duty. Unfortunately Director Mueller did not uphold his end of the bargain. Retaliation was tolerated, accepted, and eventually successful in forcing me to leave the FBI.

I am here today to tell you about a system that is broken. The Department of Justice Inspector General’s report on my case,⁴ and Senator Chuck Grassley’s dogged pursuit of the underlying documentation of that investigation, provide a glimpse into the dysfunctional management practices at the DOJ that continue to allow FBI managers to retaliate against agents who report their misconduct.

In early 2002 I was asked to assist in a Tampa Division counterterrorism operation that began when a supporter of an international terrorist organization met with the leader of a domestic white supremacist terrorist organization. The meeting, which occurred on January 23, 2002, was an effort to establish operational ties between the two groups, based on their shared hatred of Jews, and it was recorded by an FBI Cooperating Witness as part of an ongoing FBI domestic terrorism investigation. I quickly became aware of deficiencies in the case, but my informal efforts to get the case on track were met with indifference by FBI Supervisors.

In August of 2002 I learned that part of the January meeting had been recorded illegally, in violation of Title III wiretap regulations. When I brought this to the attention of the Orlando Supervisor responsible for the investigation, he told me we were just going to “pretend it didn’t happen.” In fourteen years as an FBI agent I had never been asked to look the other way when I saw a violation of federal law. I felt I had no choice but to report this information to his superiors.⁵

Following the FBI chain-of-command and the protocols in the Director’s November 7, 2001 memorandum, I advised my Assistant Special Agent in Charge (ASAC) that I was going to report this matter to the Tampa Special Agent in Charge (SAC). My ASAC directed me to instead document the information in a letter, which he would deliver to the Tampa SAC. This detail might seem insignificant, as it did to me at the time, but the FBI would later argue that making my complaint through my ASAC deprived me of any protection from retaliation because the regulations regarding FBI whistleblowers only authorize disclosures to “the Department of Justice's Office of Professional Responsibility (OPR), the Department's Office of Inspector General (OIG), the FBI Office of Professional Responsibility (FBI OPR), the Attorney General, the Deputy Attorney General, the Director of the FBI, the Deputy Director of the FBI, or to the highest ranking official in any FBI field office.”⁶ Fortunately the Inspector General ruled that my complaint was a “protected disclosure” under the regulations because it was intended to be forwarded to the appropriate officials, but this anomaly in the law must be addressed because its impracticality could easily leave well-meaning FBI employees without protections for appropriately reporting misconduct matters through their chain-of-command.

My letter, dated September 10, 2002, was sent to the Tampa SAC and the Assistant Director for the Counterterrorism Division, John Pistole. The reaction was swift, but it was not what I expected. Tampa officials began uploading backdated documents into the file, while I was ostracized from the Tampa investigation, and ultimately the Tampa SAC removed me from the investigation. Moreover, Tampa officials forwarded my complaint letter to the Unit Chief of the Undercover and Sensitive Operations Unit, who threatened that I would never work undercover again. I reported the retaliation in an e-mail to Assistant Director Pistole in October of 2002, but he did not respond to the e-mail or subsequent telephone messages.

In November of 2002 I reported the entirety of this matter to the DOJ OIG, and I provided a signed sworn statement, which included allegations of retaliation, to the OIG and the FBI OPR in December of 2002. I was told by the OIG that OPR would do an initial investigation, which OIG would review later to determine if further investigation was necessary. In reality, neither OPR nor the OIG opened an investigation, in direct violation of the FBI’s whistleblower protection regulations.⁷ Worse, both the OIG and OPR would leak information from my complaints directly to the FBI officials I was complaining against.

In January of 2003 an OIG investigator asked me if I still had a copy of the transcript of the January 23, 2002 meeting that initiated the investigation. He alerted me to a Tampa Division electronic communication (EC) written after my complaint, which stated that the January 23rd meeting was not recorded and did not involve discussions of terrorism. I was asked to come back to Washington, DC, for a second interview. On February 11, 2003 I provided a copy of the transcript to the OIG and OPR. An OPR Unit Chief came into the interview room and advised that the tape had been located in the Tampa Supervisor's desk. I immediately, and colorfully, expressed concern to the OIG interviewer that this disclosure of the information I provided would subvert a subsequent OIG or OPR investigation (I later learned that Tampa Division was allowed to write a "clarification" EC that same day, which "corrected" their previous false statement that the meeting had not been recorded). I again alleged in writing that I was suffering reprisals, but neither the OIG nor OPR pursued an investigation. I remained in regular contact with the OIG investigator regarding the ongoing reprisals, but was repeatedly told the OIG could do nothing until the FBI performed its own investigation of my allegations.

I also sent an e-mail to Director Mueller, advising him of the ongoing problems with this investigation. I received no reply, but months later I was contacted by FBI Inspectors who were reviewing the Tampa Division investigation and asked to speak with me. I asked them if they had read my previous signed, sworn statements to the OIG and OPR, and they replied they were unaware of any such statements. During my interview with the Inspectors they advised me that they had looked into allegations that I had engaged in unauthorized travel and misspent \$50 in case funds, but that their investigation had cleared me. They refused to tell me who made these allegations. I advised them that I considered their inquiry a retaliatory investigation and requested that they document their investigation. I also sent a letter to the Inspector in Charge, demanding the allegations and the inquiry be documented, but the OIG later found no evidence this inquiry was ever documented.

Meanwhile I was working on a separate terrorism investigation in Portland, Oregon, that was being stalled by the Undercover and Sensitive Operations Unit (USOU), in retaliation for my previous complaint. In the summer of 2003, the Assistant Director over OPR, Robert Jordan, was given a reassignment to Portland after he was disciplined for retaliating against an OPR Unit Chief who publicly complained of uneven treatment in FBI internal investigations. As the new SAC of Portland, Jordan told both the case agent and supervisor that my continued participation in the investigation was "problematic" because I was a whistleblower, and he encouraged them to replace me. I reported this incident to the OIG investigator, who asked me to write a letter to the IG, documenting this incident and the other ongoing retaliation, which I did in an October 2003 letter. Years later, through documents obtained by Senator Grassley's investigator, I learned that SAC Jordan was advised of my complaint against him almost immediately after I submitted the complaint to the OIG, in direct violation of the Inspector General Act of 1978.⁸ The OIG could hardly argue that this disclosure was necessary during the course of the investigation, as it had not yet opened an investigation.

In fact, the OIG never made any effort to protect me from the ongoing retaliation and in December of 2003 the OIG investigator finally advised that the OIG would not pursue an investigation regarding any of my allegations. I asked for confirmation in writing and was refused. I pointed the OIG investigator to the FBI whistleblower regulations, which require the OIG to write a letter stating the reasons for closing a reprisal investigation.⁹ In January of 2004 I received instead a letter advising me that the OIG would investigate the retaliation allegations. No investigative activity took place however, until OIG interviewed me again in April of 2004, and took a third signed, sworn statement. At that point I was told that the OIG General Counsel would review my third statement to determine if further investigation was warranted.

By this point I had worked within the system for two years to try to get the deficiencies I saw addressed, with no success. My career was effectively ended while the managers responsible for the failed investigation and the cover-up that followed were promoted. When it became clear that no one within the FBI or DOJ would address this matter appropriately, I chose to report the matter to Congress and to resign from the FBI in protest. Fortunately Senator Grassley championed my cause, despite the fact that the FBI issued a press release challenging my integrity and denying that a meeting between a supporter of an international terrorist group and a domestic white supremacist group took place. Senator Grassley, together with the Chairman and Ranking Member of the Senate Judiciary Committee, Senator Arlen Specter and Senator Patrick Leahy, began requesting documents from the FBI, including the transcript of the January 23, 2002 meeting.

The public exposure of this matter finally compelled the IG to act as well. In January of 2006, a full year and a half after I resigned, three years after my first formal complaint to the IG, and four years after these events took place, did the IG finally issue a report of its investigation.

The report confirms many of the allegations in my original complaint, including: that the Tampa Division terrorism case was not properly investigated or documented; that Tampa supervisors failed to address investigative deficiencies in the case in a timely manner; that Tampa officials backdated and falsified official FBI records in an effort to obstruct the internal investigation of my complaint, including using correction fluid to alter documents; that the FBI failed to properly investigate my allegations; and finally, that the FBI retaliated against me for reporting official misconduct within the FBI, though only in that the USOU Unit Chief did not allow me to participate in undercover training exercises.

The OIG report detailed a continuous, collaborative effort to punish me for reporting misconduct by FBI managers, yet only grudgingly admitted that I was retaliated against. An Orlando Supervisor justified removing me from one case because I “unilaterally” discussed the case with Supervisors at FBI Headquarters. The Portland SAC told his staff that my participation in a second terrorism investigation was “problematic” because I was a whistleblower who requested to speak to members of Congress. The Unit Chief of the Undercover Unit told his staff that I would never work undercover again, yet none of this was considered retaliation. Meanwhile FBI managers

who backdated, falsified and materially altered FBI records were given a pass. Moreover, the OIG report directly conflicted with documents the Senate Judiciary Committee had already obtained from the FBI.

On February 3, 2006 Senators Grassley, Specter and Leahy sent a letter to Inspector General Glenn Fine asking him to explain the conflicts between his report and the documents in the possession of the Senate Judiciary Committee.¹⁰ IG Fine submitted a written explanation on March 8, 2006, admitting some errors but reiterating his position that the transcript showed the subjects of the meeting did not discuss “any willingness to engage in terrorist activities.”¹¹ The response quoted a misleading portion of the transcript to give the false impression that terrorism was not discussed in the meeting.

In the summer of 2006 Senator Grassley finally received a redacted version of the transcript he requested from the FBI in 2004. As he said in a December 6, 2006 FBI oversight hearing, “it is a lot closer to what Michael German described than what the FBI described.”¹² He went further in a subsequent FBI oversight hearing in March of 2007:

...after years of effort by this Committee, the FBI finally provided a transcript of the meeting, and it flatly contradicts statements made by Bureau officials trying to downplay the incident and discredit Michael German. The transcript clearly shows a white supremacist and an Islamic militant talking about building operational ties between their organizations. Moreover, it is clear that what brings them together was anti-Semitism. According to the transcript these two groups also discussed (1) shooting Jews, (2) their shared admiration for Hitler, (3) arms shipments from Iran, (4) their desire for a civil war in the United States, (5) their approval of suicide bombings, and (6) assassinating pro-Israeli journalists in the United States. This was all the very first time they met.¹³

We all have great respect for Inspector General Fine, and the detailed and critical oversight he has performed over the FBI for the last eight years. That such a competent and energetic watchdog failed to protect this whistleblower and failed to properly evaluate the evidence demonstrates that this is a structural problem that requires a legislative solution. The failure of the structures designed to protect FBI whistleblowers became even more apparent after the OIG’s finding that I was retaliated against.

With a finding of retaliation by the OIG the FBI whistleblower regulations require that the Director of the DOJ Office of Attorney Recruitment and Management (OARM) determine what corrective action by the FBI is appropriate. I was immediately hopeful that I would be given some relief because the OARM Director, based upon a simple reading of the OIG report, found a prima facie case that the Tampa SAC did retaliate against me by removing me from the Tampa investigation after my complaint, despite the OIG’s contrary conclusion. Yet I still had to prove both the USOU Unit Chief and the Tampa SAC retaliated against me in a de novo review in front of the OARM Director. Neither the OIG’s finding against the USOU Unit Chief nor the OARM Director’s

decision regarding the Tampa SAC were dispositive. I was expected to depose witnesses and discover documents at my own expense, and argue why the earlier findings were correct. This effort seemed entirely redundant, as the OIG had just completed a two-year investigation into the same events. I requested that the OIG simply provide a copy of the investigative file to the OARM. I was confident that even where the OIG did not find retaliation, the underlying documentation would reveal the truth. The OIG refused to release the file, and after negotiations, OARM only ordered that records relevant to the USOU Unit Chief and the Tampa SAC be turned over.

Because I had resigned from the FBI as a result of the retaliation, my only hope for appropriate compensation from OARM was that I could show I was constructively removed from my position. Constructive removal is when the agency takes actions that make working conditions so intolerable that the employee was driven to an involuntary resignation. The DC Circuit has held that to objectively determine whether a reasonable person in the complainant's position would have felt compelled to resign, a deciding tribunal must consider the totality of the circumstances:

“...in measuring the voluntariness of an employee's resignation or retirement, all of the activities surrounding his or her resignation or retirement, even events not immediately preceding the leave of employ, must be considered. Indeed, this court has recently stated that “[i]n determining whether an alleged act of coercion caused an employee's involuntary retirement, a court need not limit itself to any particular timeframe.”¹⁴

Yet the OARM Director refused to look at the rest of the OIG investigative file, or to accept or consider any evidence or argument regarding the other retaliation, the refusal of the OIG to investigate the retaliation prior to my resignation, or the misconduct of the OIG in passing information from my compliant to the subject of the complaint. This was a fundamentally unfair proceeding where the decider of fact had a clear conflict of interest. I was in no financial position to pursue a claim before such a dubious tribunal.

In closing, my odyssey is the clearest example possible of the need for greater congressional oversight of the FBI and DOJ. If an FBI agent with proven counterterrorism experience can be so easily drummed out of the FBI for truthfully reporting failures the FBI and DOJ do not want to admit, we will be neither safe nor free. The system that is intended to protect FBI whistleblowers is broken, if it ever worked at all, and is in need of legislative reform to provide real protections to those agents willing to confront waste, fraud, abuse and misconduct within the ranks of the FBI. This is not a question of balancing security interests against liberty interests; it is a question of competence and accountability in the agencies that are responsible for our national security. Neither our security nor our civil liberties are protected when incompetent FBI managers can so easily suppress evidence, falsify FBI records to cover up their misconduct, and retaliate against agents who dare report their abuse. But Congress cannot perform effective oversight unless informed federal employees and contractors are willing to tell the truth about what is happening within these agencies. And it is simply

unfair to expect them to tell you the truth if they know it will cost them their jobs. Congress should extend meaningful protection to the workforce that is charged with protecting us all by granting them full due process rights when they blow the whistle during government investigations or refuse to violate the law, with the right to jury trials in federal court once administrative measures are exhausted and “full circuit” review. Thank you for the opportunity to present our views.

¹ See 5 U.S.C. § 2302(a)(2)(C)(ii), which states that a “covered agency” under the Act does not include, “the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities.”

² Karen Hosler, FBI must slim down and change culture, whistle-blower says,” BALTIMORE SUN, June 7, 2002, at 1A.

³ See, *Oversight Hearing on Counterterrorism Before the S. Comm. on the Judiciary*, 107th Cong., S. HRG. 107-920, at 16-17 (2002).

⁴ UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REPORT OF INVESTIGATION INTO ALLEGATIONS OF MICHAEL GERMAN, Jan. 12, 2006 (on file with author).

⁵ For a detailed description of these events, please see, *National Security Whistleblowers in the post-September 11th Era: Lost in a Labyrinth and Facing Subtle Retaliation Before the Subcomm. on National Security, Emerging Threats and International Relations, H. Comm. on Government Reform*, 109th Cong. (Feb. 14, 2006) (written statement of former FBI Special Agent Michael German in Response to the Department of Justice Office of Inspector General Draft Report into Retaliation for Making Protected Disclosures Against FBI Managers on September 10, 2002) (on file with author).

⁶ 28 C.F.R. § 27.1 (2006).

⁷ 28 C.F.R. § 27.3(c): “Within 15 calendar days of the date the allegation of reprisal is first received by an Investigative Office, the office that will conduct the investigation (Conducting Office) shall provide written notice to the person who made the allegation (Complainant) indicating—

- (1) That the allegation has been received; and
- (2) The name of a person within the Conducting Office who will serve as a contact with the Complainant.

(d) The Conducting Office shall investigate any allegation of reprisal to the extent necessary to determine whether there are reasonable grounds to believe that a reprisal has been or will be taken.”

⁸ 5 U.S.C.A., § 7(b) (West 2006): “The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.”

⁹ 28 C.F.R. § 27.3(h): “(h) If the Conducting Office terminates an investigation, it shall prepare and transmit to the Complainant a written statement notifying him/her of—

- (1) The termination of the investigation;
- (2) A summary of relevant facts ascertained by the Conducting Office;
- (3) The reasons for termination of the investigation; and
- (4) A response to any comments submitted under paragraph (g) of this section.”

¹⁰ Letter from Senator Arlen Specter, Senator Patrick Leahy, and Senator Charles Grassley to Department of Justice Inspector General Glenn Fine (Feb. 3, 2006) (on file with author).

¹¹ Letter from Department of Justice Inspector General Glenn Fine to Senator Arlen Specter, Senator Patrick Leahy, and Senator Charles Grassley (Mar. 6, 2006) (on file with author).

¹² *FBI Oversight Hearing Before S. Comm. on the Judiciary*, 109th Cong. (Dec. 6, 2006) (Statement of Senator Charles Grassley).

¹³ *FBI Oversight Hearing Before S. Comm. on the Judiciary*, 110th Cong. (Mar. 27, 2007) (Statement of Senator Charles Grassley).

¹⁴ Shoaf v. Department of Agriculture, 260 F.3d 1336 (Fed. Cir. 2001), citing Terban v. Dep't of Energy, 216 F.3d 1021, 1024 (Fed. Cir. 2000). See also, Perlman v. United States, 490 F.3d 928, 933 (Ct. Cl. 1974) (“This court has consistently examined the surrounding circumstances to test the ability of the employee to exercise free choice.”); Scharf v. Dep't of the Air Force, 710 F.2d 1572, 1574 (Fed.Cir.1983) (“To determine whether a resignation or retirement is voluntary, a court must examine the surrounding circumstances. . . .”); Covington v. Dep't of Health and Human Servs., 750 F.2d 937, 941-42 (1984) (same); Braun v. Dep't of Veterans Affairs, 50 F.3d 1005, 1007-08 (Fed.Cir.1995) (same); Heining v. General Services Admin., 68 M.S.P.R. 513, 519-20 (1995) (“[T]he voluntariness of the resignation or retirement [is] based on whether the totality of the circumstances supported the conclusion that the employee was effectively deprived of free choice in the matter.”).