September 24, 2024

The Honorable Jim Jordan
Chairman
House Judiciary Committee
2142 Rayburn House Building
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
House Judiciary Committee
2138 Rayburn House Building
Washington, DC 20515

The Honorable James Comer
Chairman
House Committee on Oversight and Reform
2157 Rayburn House Building
Washington, DC 20515

The Honorable Jamie Raskin
Ranking Member
House Committee on Oversight and Reform
2105 Rayburn House Building
Washington, DC 20515

The Honorable Michael Turner
Chairman
House Permanent Select Committee
on Intelligence
HVC-304 Capitol Visitor Center
Washington, DC 20515

The Honorable Jim Himes
Ranking Member
House Permanent Select Committee
on Intelligence
HVC-304 Capitol Visitor Center
Washington, DC 20515

Dear Chairman Comer, Chairman Jordan, Chairman Turner, Ranking Member Raskin, Ranking Member Nadler, and Ranking Member Himes:

We, the undersigned advocacy organizations, write to urge you to pass legislation to protect FBI whistleblowers by (1) eliminating their special statutory exception from the whistleblower protection process to which all other federal law enforcement whistleblowers have access, and (2) overturning or narrowing *Department of the Navy v. Egan*, 484 U.S. 518 (1988) in order to authorize judicial review of retaliatory agency security clearance decisions.

1. Eliminate FBI's Special Exemption from Prohibited Personnel Practice Coverage

The Civil Service Reform Act of 1978 established at 5 U.S.C. § 2302 a list of "prohibited personnel practices" (PPPs) which are proscribed at almost all non-intelligence community federal agencies, such as nepotism, whistleblower retaliation, and coercing political activity.[1] Such PPPs are investigated by the U.S. Office of Special Counsel (OSC), and remedies can be imposed by the U.S. Merit Systems Protection Board (MSPB).

Yet thanks to an amendment adopted on the floor of the House during consideration of the bill, the FBI was excluded from the coverage of Section 2302. The amendment instead established

[1] The list has grown to 14 such practices due to statutory amendments in recent years.

5 U.S.C. § 2303, which applies to the FBI only the prohibition on whistleblower retaliation, and none of the other prohibitions. It also provides no right to submit complaints to the OSC, and until less than two years ago, provided no right of appeal to the MSPB.[2] In short, the FBI is treated differently in statute from every other federal law enforcement agency—like the U.S. Secret Service; the Drug Enforcement Administration; the U.S. Marshals Service; and the Bureau of Alcohol, Tobacco, Firearms, and Explosives—as well as the Department of Justice (DOJ) of which it is a part.

Under regulations subsequently promulgated by DOJ, FBI employees must take whistleblower retaliation complaints to DOJ's Office of Inspector General (OIG) and Office of Professional Responsibility (OPR), which alternate investigating the claims. Neither of these offices has the same depth of experience investigating whistleblower complaints as OSC, which was created primarily for this purpose. Furthermore, OSC has access to legal remedies neither the OIG nor OPR do, such as obtaining from MSPB a stay of a personnel action under 5 U.S.C. § 1221(c).

We have concluded that earlier proposed reforms, including some pending in the current Congress, do not go far enough. We recommend that Congress remove the FBI from the list that Section 2302(a)(2)(C)(ii)(I) exempts from the definition of an "agency" for these purposes, and strike 5 U.S.C. § 2303 altogether.

Such a reform would also have the effect of subjecting the FBI to the requirement at 5 U.S.C. § 7515 that agencies must propose at least a three-day suspension to any supervisor who retaliates against a whistleblower, and removal of the supervisor for a second offense of retaliation. Congress passed this requirement in 2017 to establish greater accountability for whistleblower reprisal and deter potential retaliators.[3]

2. *Overturn or Narrow* Department of Navy v. Egan

Second, we urge Congress to redress the effects of the Supreme Court decision in *Navy v. Egan*, 484 U.S. 518 (1988). The manner in which *Egan* has been expanded and applied by the MSPB and some courts has rendered security clearance decisions immune from judicial review. The MSPB will not even look to see if there are obvious indications a clearance decision was made in retaliation for whistleblowing. This lack of review has enabled and encouraged many agencies—including the FBI—to use security clearances as a tool to retaliate against whistleblowers and infringe the First Amendment rights of its employees.

In practice, the FBI indefinitely suspends a whistleblower's security clearance. Then, because FBI employees must have a security clearance as a condition of their employment, the FBI employee is suspended without pay. The MSPB and some courts have accepted that it is *never*

[2] Pub. L. 117–263, div. E, title LIII, § 5304(a), Dec. 23, 2022, 136 Stat. 3250.

[3] Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. 115-73, Sec. 104, 131 Stat. 1235, 1236 (Oct. 26, 2017); see also S. Rep. No. 115-44, at 6-8, https://www.congress.gov/115/crpt/srpt44/CRPT-115srpt44.pdf.

possible for a court to review a decision related to security clearances, even though that reading goes beyond what the *Egan* Court held. Under this interpretation of *Egan*, the FBI has the unreviewable and unappealable discretion to suspend and revoke the security clearances of its employees for any number of otherwise protected reasons, including but not limited to race, religion, or national origin in violation of the constitutionally protected right to equal protection of the laws. And, as there are no enforceable deadlines within which the FBI is required to compete its investigation during the pendency of the indefinite suspension of the employee's security clearance, the employee is left in limbo – unable to perform the duties of his FBI job, with no FBI pay, and with strict limitations on the ability of the employee to seek work outside the FBI. All too frequently, the economically hamstrung employee has no choice but to submit his resignation – a result that provides a perverse incentive for the FBI to continue to utilize this tactic for retaliating against whistleblowers.

Among other errors, this extension of *Egan* failed to apply the fundamental principle that courts should avoid constructions that would immunize violations of rights from judicial review. The rationale upon which the *Egan* Court relied is a policy in favor of national security, to the utter neglect of complementary, stronger policies in favor of constitutional rights. While recognizing the importance of a strong and robust national security and law enforcement structure, the recently and increasingly politicized FBI has breached its trust with the American people and their representatives, Congress. The status quo must be corrected. The balance between national security and individual liberties must be restored.

Congress should legislatively overrule or, at the very least, narrow the *Egan* decision so that the rights of whistleblowers are properly protected. We urge Congress to reject the DOJ's attempt to claim for itself unfettered authority to make unreviewable decisions, regardless of the constitutional rights of its employees. *Egan*'s reach must at least be limited to ensure that constitutional rights cannot be infringed with impunity.

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We urge your Committees to fix this disaster. As it stands, FBI whistleblowers are left without a remedy or any way to see the restoration of their rights when they are victimized by reprisal. We need to fix this to do right by our FBI agents and employees, and their families. But we also must fix this for the sake of our Nation. The Nation's health suffers when sunlight is blocked.

American Center for Law and Justice (ACLJ)
Binnall Law Group
Empower Oversight
Government Accountability Project
National Security Counselors
Whistleblowers of America