

## LAST-MINUTE INCLUSION OF PROTECTIONS FOR HOMELAND SECURITY WHISTLEBLOWERS

The administration's original draft of the Homeland Security Act effectively exempted DHS employees from the protections of the Whistleblower Protection Act (WPA). Senator Charles Grassley (R-IA), co-author of the WPA in 1989, led the fight to ensure that the final version of the Homeland Security Act included strong whistleblower protections.<sup>1</sup> In explaining why such protections are important, Senator Grassley emphasized:

Whistleblowers are the key to exposing a dysfunctional bureaucracy.... Government agencies too often want to cover up their mistakes, and the temptation is even greater when bureaucracies can use a potential security issue as an excuse. At the same time, the information whistleblowers provide is all the more important when public safety and security is at stake.<sup>2</sup>

Senator Grassley cosponsored an amendment to preserve whistleblower protections for all DHS employees, and the amendment was incorporated into the final version of Act. In the end, Congress made clear that the executive may not "waive, modify, or otherwise affect" the "protection of employees from reprisal for whistleblowing." DHS whistleblowers who believe they have been retaliated against may file complaints with the Office of Special Counsel and appeal their agency's response to the Merit Systems Protection Board (MSPB).

Another example of congressional independence is the Senate Judiciary Committee's review of the administration's powers under the Foreign Intelligence Surveillance Act (FISA), a statute governing the FBI's collection of foreign intelligence information (see chapter 2). In February 2003, the Senate Judiciary Committee released a preliminary report identifying serious problems in the FISA process, including the widespread misunderstanding of the governing law among FBI agents and a pervasive lack of accountability in implementing FISA procedure.<sup>3</sup> Following from this, the Senate committee noted that when the administration fails to use its FISA powers properly, "pressure is brought on the Congress to change the statute in ways that may not be at all necessary."<sup>4</sup> The committee then emphasized, "From a civil liberties perspective, the high-profile investigations and cases in which the FISA process appears to have broken down is too easily blamed on the state of the law rather than on inadequacies in the training of those responsible for implementing the law."<sup>5</sup>

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<sup>1</sup> See Chuck Grassley, "Grassley Seeks Whistleblower Protections for New Federal Employees Senator Says Public Safety and Security at Stake," Press Release, June 26, 2002, available at <http://www.senate.gov/~grassley/releases/2002/p02r6-26b.htm> (accessed January 19, 2003).

<sup>2</sup> Ibid.

<sup>3</sup> Senators Patrick Leahy, Charles Grassley, and Arlen Specter, "Interim Report: FBI Oversight in the 107<sup>th</sup> Congress by the Senate Judiciary Committee: FISA Implementation Failures," pp. 5-6, February 2003, available at <http://specter.senate.gov/files/specterspeaks/ACF6.pdf> (accessed March 5, 2003).

<sup>4</sup> Ibid., p. 32.

<sup>5</sup> Ibid.

The Senate Judiciary Committee’s oversight is laudatory. Yet this was the “first comprehensive review of the FBI in nearly two decades.”<sup>6</sup> Without ongoing oversight, Congress cannot adequately resist the outside pressure to enact new and unnecessary executive powers. Indeed, Congress has already expanded the administration’s FISA powers under the USA PATRIOT Act (as discussed extensively in chapter 2) — without the benefit of the information the Senate Judiciary Committee has uncovered in this review.

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<sup>6</sup> *Ibid.*, p. 1.