EMPOWER OVERSIGHT
Whistleblowers & Research

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August 7, 2024

The Honorable Joseph V. Cuffari
Office of Inspector General
U.S. Department of Homeland Security
245 Murray Lane, SW
Washington, D.C. 20528-0305

Dear Inspector General Cuffari:

Two days ago I contacted you on behalf of a Federal Air Marshal (FAM) seeking to make additional protected disclosures about Transportation Security Administration (TSA) and Federal Air Marshals Service (FAMS) engaging in an abuse of authority and gross waste of funds by improperly targeting Americans for enhanced flight surveillance—including former U.S. Representative and presidential candidate Tulsi Gabbard.[1]

I have since become aware that TSA has initiated an investigation into what it considers a "leak" of Sensitive Security Information (SSI) regarding the surveillance of Ms. Gabbard. As you know, however, a protected whistleblower disclosure is not a "leak." Seeking to punish a lawful whistleblower as an illegal leaker is classic retaliation and is itself illegal. The Supreme Court ruled in 2015 in *Department of Homeland Security (DHS) v. MacLean* that information TSA calls SSI is not specifically prohibited by law from being disclosed pursuant to the Whistleblower Protection Act.[2]

In an *amicus curiae* brief in that case I helped author on behalf of a bipartisan, bi-cameral group of members of Congress, we noted TSA "has misused its SSI designation to withhold embarrassing information."[3] And we wrote about the utility of whistleblowers sometimes using the media or others to make protected whistleblower disclosures:

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[1] Press Release, Empower Oversight, *Whistleblowers: Air Marshals Improperly Targeting Americans for Surveillance*, Aug. 6, 2024, https://empowr.us/whistleblowers-air-marshals-improperly-targeting-americans-for-surveillance.
[2] *Dep't of Homeland Sec. v. MacLean*, 575 U.S. 383 (2015).
[3] Brief for Members of Congress as Amici Curiae Supporting Respondent at 6, *Dep't of Homeland Sec. v. MacLean*, 575 U.S. 383 (2015) (No. 13-894), https://www.wyden.senate.gov/imo/media/doc/Members%20of%20Congress%20MacLean%20Amicus%20Brief.pdf.

> As a practical matter, moreover, Congress commonly learns of agency misconduct indirectly, when employees blow the whistle to the media or other intermediaries first. Some whistleblowers may view Congress as too politicized or intimidating. But they may see the media as a disinterested Fourth Estate willing to take up a cause in the public interest, or as the quickest and surest way to impose accountability. Other whistleblowers may want to convey information to Congress but not see a clear route to the right offices or committees. In such cases, disclosure to the press is an effective way to disseminate information widely to Members of Congress and their staffs. It can also attract public attention and generate momentum for Congressional oversight in a way that contacting Congressional offices privately might not.[4]

The Whistleblower Protection Act protects from adverse personnel actions TSA employees who disclose information they reasonably believe constitutes a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety—*regardless* of who they make their disclosure to, whether that be to your office, to Congress, to a professional association such as the Air Marshal National Council, or directly to the press.[5] Here, there is a clear basis for Federal Air Marshals to reasonably believe that assigning three Air Marshals and countless other resources to *eight flights* of Ms. Gabbard's under the Quiet Skies program constitutes a gross waste of funds and an abuse of authority.

It is possible the TSA is in possession of information about Ms. Gabbard that the FAMS whistleblowers are not. In *DHS v. MacLean*, the Court noted:

> Finally, the Government warns that providing whistleblower protection to individuals like MacLean . . . would make the confidentiality of sensitive security information depend on the idiosyncratic judgment of each of the TSA's 60,000 employees. And those employees will "most likely lack access to all of the information that led the TSA to make particular security decisions." . . . Those concerns are legitimate. But they are concerns that must be addressed by Congress or the President, rather than by this Court.[6]

Since *MacLean* was decided nine years ago, neither Congress nor the President has opted to enhance TSA's classification authorities or to give its SSI categorization the force of law. Thus, however much the TSA would prefer Air Marshals not publicize actions they consider to be abuses, the law prohibits TSA from retaliating against employees who make such protected disclosures in good faith.

A retaliatory investigation that hunts for whistleblowers in order to intimidate them into silence is exactly the wrong step for the agency to take. Instead, agency leadership should be investigating the abuses on which FAMs are blowing the whistle. Your office has a duty to help protect whistleblowers—especially those like our client who have asked your office to investigate

[4] *Id.* at 29-30.
[5] 5 U.S.C. § 2302(b)(8).
[6] *MacLean*, 575 U.S. 398-99 (internal citations omitted).

these abuses. Your office can also play a valuable role in refocusing agency leadership's attention on the abuses being reported rather than the whistleblowers reporting them.

Accordingly, we request to meet with your office's Whistleblower Coordinator to ensure your office is fully informed of the facts involving our client's protected disclosures and your office takes appropriate steps to protect FAM whistleblowers from unlawful reprisal in the guise of a bogus "leak" investigation.

Cordially,

/Tristan Leavitt/
Tristan Leavitt
President

cc: The Honorable Hampton Dellinger
Special Counsel, U.S. Office of Special Counsel