

EMPOWER OVERSIGHT

Whistleblowers & Research



August 13, 2024

VIA ELECTRONIC TRANSMISSION

U.S. House Committee on Transportation and Infrastructure
U.S. House Committee on Homeland Security
U.S. House Committee on Oversight and Accountability
U.S. House Select Subcommittee on the Weaponization of the Federal Government

U.S. Senate Committee on Commerce, Science, and Transportation
U.S. Senate Committee on Homeland Security and Governmental Affairs
U.S. Senate Permanent Subcommittee on Investigations
U.S. Senate Whistleblower Protection Caucus

Dear Chairmen and Ranking Members:

Empower Oversight represents several Federal Air Marshals from the Federal Air Marshals Service (FAMS) within the Transportation Security Administration (TSA). Pursuant to the Lloyd-La Follette Act,¹ the Lloyd-La Follette anti-gag appropriations rider,² and the

¹ 5 U.S.C. § 7211 (“The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.”).

² Further Consolidated Appropriations Act, 2024, Pub. L. 118-47 Div. B § 713 (Mar. 23, 2024) (“No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who—(1) prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the department or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee[.]”).

Whistleblower Protection Act,³ we write on behalf of our FAMS clients to make protected disclosures of gross waste and abuse of authority by TSA in its selection of individuals for additional airport screening and flight surveillance—particularly Tulsi Gabbard.

Our clients have previously made protected disclosures about TSA surveillance, including its surveillance of Ms. Gabbard, to the Department of Homeland Security (DHS) Office of Inspector General (OIG) and to the media.

Background

After the terrorist attacks of September 11, 2001, the federal government developed the Terrorist Screening Database (TSDB), also known as the Terrorist Watchlist.⁴ The Federal Bureau of Investigation (FBI), which maintains the TSDB, has acknowledged in the past that the Terrorist Watchlist contains hundreds of thousands of individuals;⁵ however, they claim “[m]ost people on the terrorism watchlist are not Americans, and they have no known connection to the U.S.”⁶

Of the individuals in the TSDB, a portion are on a “Selectee List” or “Expanded Selectee List” to receive additional airport screening from TSA.⁷ (An even smaller number of individuals are on TSA’s “No Fly” list and prohibited from flying in or out of the United States.⁸) For individuals on the Selectee List or Expanded Selectee list, TSA assigns Special Mission Coverage (SMC) when they fly. SMC entails additional airport screening, such as canine teams, pat-downs, and luggage search, and sometimes additional screening at the gate.⁹ TSA also assigns multiple Air Marshals to surveil SMC subjects inside the airport and monitor them on the flight.

As part of its Secure Flight vetting program, in April 2012 TSA implemented the Quiet Skies program, which assigns SMC to passengers who are *not* on the Selectee List or Expanded Selectee List—or even on the Terrorist Watchlist at all. Rather, the Quiet Skies rules (which are

³ 5 U.S.C. § 2302(b)(8)(A) and (C) (“Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of . . . any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences any violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . .”).

⁴ See *Terrorist Screening Center*, Federal Bureau of Investigation, <https://www.fbi.gov/investigate/terrorism/tsc>.

⁵ See Federal Bureau of Investigation, “Terrorist Screening Center,” <https://archives.fbi.gov/archives/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/terrorist-screening-center-1>.

⁶ *Terrorist Screening Center*, Federal Bureau of Investigation, <https://www.fbi.gov/investigate/terrorism/tsc>.

⁷ *Step 1: Should I Use DHS TRIP?*, Department of Homeland Security, <https://www.dhs.gov/step-1-should-i-use-dhs-trip>; Government Accountability Office, *AVIATION SECURITY: TSA Coordinates with Stakeholders on Changes to Screening Rules but Could Clarify Its Review Processes and Better Measure Effectiveness*, GAO-20-72, Nov. 2019, at 5, <https://www.gao.gov/assets/gao-20-72.pdf>.

⁸ *DHS Traveler Redress Inquiry Program*, Transportation Security Administration, <https://www.tsa.gov/travel/security-screening/travel-redress-program>.

⁹ See *Security Screening*, Transportation Security Administration, <https://www.tsa.gov/travel/security-screening>.

classified) are criteria under which a passenger is flagged for the additional screening. While an individual is on the Quiet Skies list, their boarding pass is supposed to display the “SSSS” (so-called “quad-S”), notifying TSA of the additional screening requirement.¹⁰

TSA describes the Quiet Skies program as a “risk-based, intelligence-driven” way to mitigate the threat posed by “unknown or partially known terrorists.”¹¹ Yet when TSA expanded the Quiet Skies program in 2018 to include not just TSA screening but also the assignment of Air Marshals for surveillance, Air Marshals blew the whistle to the *Boston Globe*.¹² Congress and the public were outraged about the extent of the surveillance of ordinary American citizens, who were being treated like terrorists. One Air Marshal, for instance, reported surveilling a Southwest Airlines flight attendant during a Quiet Skies mission, remarking to colleagues, “Cannot make this up.”¹³ Air Marshals are required to answer a series of questions about the subject of the Quiet Skies surveillance.¹⁴

In October 2018, as part of the TSA Modernization Act, Congress required that TSA conduct regular assessment of the Quiet Skies rules. In a study mandated by the law, the Government Accountability Office found TSA had not determined a way to fully assess the rules’ effectiveness “because it was difficult to measure.”¹⁵ But a November 2020 DHS OIG report found that over the three and a half years from October 2015 to February 2019, TSA was unable to confirm that a single passenger who received SMC under Quiet Skies was an aviation security threat.¹⁶

That same DHS OIG report concluded TSA “did not properly plan, implement, and manage the Quiet Skies program[.]”¹⁷ Specifically, DHS OIG found TSA “lacked sufficient, centralized oversight to ensure the Quiet Skies program operated as intended” and therefore

¹⁰ Department of Homeland Security, Office of Inspector General, *TSA Needs to Improve Management of the Quiet Skies Program (REDACTED)*, OIG-21-11, Nov. 25, 2020, at 8, <https://www.oig.dhs.gov/sites/default/files/assets/2020-11/OIG-21-11-Nov20-Redacted.pdf>.

¹¹ Transportation Security Administration, *Facts About the “Quiet Skies,”* Aug. 22, 2018, <https://www.tsa.gov/blog/2018/08/22/facts-about-quiet-skies>; see also Jana Winter, *In ‘Quiet Skies’ Program, TSA is Tracking Regular Travelers Like Terrorists in Secret Surveillance*, *Boston Globe* (July 28, 2018), <https://apps.bostonglobe.com/news/nation/graphics/2018/07/tsa-quiet-skies>.

¹² Jana Winter, *In ‘Quiet Skies’ Program, TSA is Tracking Regular Travelers Like Terrorists in Secret Surveillance*, *Boston Globe* (July 28, 2018), <https://apps.bostonglobe.com/news/nation/graphics/2018/07/tsa-quiet-skies>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Government Accountability Office, *AVIATION SECURITY: TSA Coordinates with Stakeholders on Changes to Screening Rules but Could Clarify Its Review Processes and Better Measure Effectiveness*, GAO-20-72, Nov. 2019, at 15, <https://www.gao.gov/assets/gao-20-72.pdf>.

¹⁶ Department of Homeland Security, Office of Inspector General, *TSA Needs to Improve Management of the Quiet Skies Program (REDACTED)*, OIG-21-11, Nov. 25, 2020, at 30, <https://www.oig.dhs.gov/sites/default/files/assets/2020-11/OIG-21-11-Nov20-Redacted.pdf>.

¹⁷ *Id.* at 2.

“did not . . . always adhere to its own Quiet Skies guidance.”¹⁸ For example, the DHS OIG found “TSA may not have always removed passengers from the Quiet Skies list” like its implementation plan required.¹⁹ According to the DHS OIG, “The removal guidelines are intended to preserve travelers’ privacy, civil rights, and civil liberties[.]”²⁰ The DHS OIG also criticized TSA for using SMC guidance for the Quiet Skies program, which “applies to high-risk travelers on active Federal Government watchlists and is not designed for Quiet Skies passengers who are unknown risks.”²¹

After January 6, 2021, TSA improperly assigned SMC to all individuals who attended President Trump’s January 6, 2021 speech at the ellipse in Washington, D.C., including an 8-week-old infant.²² In the summer of 2021, an Air Marshal learned his wife had been added to the Terrorist Watchlist and assigned SMC; she had been nowhere near the U.S. Capitol complex on January 6, yet her FAMS file falsely stated she “unlawfully entered the United States Capitol Building on 1/06/2021.” Empower Oversight assisted the Air Marshal in blowing the whistle to the Office of Special Counsel and the DHS OIG in 2022,²³ and the Air Marshal National Council has repeatedly attempted to get Congress to investigate TSA over this issue since then.²⁴ DHS OIG had indicated it was referring the Air Marshal whistleblower’s case to its Office of Investigations but never contacted the whistleblower with a follow-up about TSA’s abuse of authority.

Addition of Tulsi Gabbard to Quiet Skies

Tulsi Gabbard served as a Member of Congress from 2013 to 2021, and in 2020 was a candidate for president of the United States. She was in the National Guard from 2003 to 2020, during which time she deployed to Iraq and Kuwait. She also received the Combat Medical Badge and the Meritorious Service Medal. She currently serves as a Lieutenant Colonel in the Army Reserves. Ms. Gabbard is known for being outspoken in her political and foreign policy views.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 7.

²⁰ *Id.*

²¹ *Id.* at 10.

²² Wendi Strauch Mahoney, *Infant Son of J6 Defendant Placed on Quiet Skies Suspected Terrorist Watchlist*, UncoverDC (Nov. 13, 2023), <https://uncoverdc.com/2023/11/13/infant-son-of-j6-defendant-placed-on-quiet-skies-suspected-terrorist-watchlist>.

²³ See 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>.

²⁴ Letter from David Londo and Sonya Hightower-LaBosco, Air Marshal National Council, to Speaker Kevin McCarthy, U.S. House of Representatives, et al., Jan. 16, 2023, https://mr.cdn.ignitecdn.com/client_assets/uncoverdc_com/media/attachments/6559/236e/f57c/cd0e/d85c/ee42/6559236ef57ccd0ed85cee42.pdf?1700340590.

On July 22, 2024, Ms. Gabbard appeared on Fox News's *The Ingraham Angle*, where she significantly criticized Vice President Kamala Harris, the then-presumptive Democrat Party presidential nominee.²⁵ The next day, TSA added Ms. Gabbard to the Quiet Skies list. Her first flight receiving SMC was on July 25, 2024.

Protected whistleblower disclosures about Ms. Gabbard's SMC coverage were first reported on August 4, 2024.²⁶ In response to media coverage, TSA issued the following statement:

TSA uses multi-layered security processes to protect the nation's transportation systems to ensure freedom of movement for people and commerce. TSA's Quiet Skies program uses a risk-based approach to identify passengers and apply enhanced security measures on some domestic and outbound international flights. To safeguard sensitive national security measures, TSA does not confirm or deny whether any individual has matched to a risk-based rule. These rules are applied to a limited number of travelers for a limited period of time. Simply matching to a risk-based rule does not constitute derogatory information about an individual.²⁷

Yet contrary to TSA's statement, because Quiet Skies assignments are included in the same system all SMCs are assigned through, the reasoning for Quiet Skies inclusion (i.e. explaining which Quiet Skies rules were triggered) *is* listed in a field for "derogatory" information. The completion of a subject's SMC profile requires manual entry by a TSA employee (as does addition to the Quiet Skies list and the assignment of SMCs). While most SMC assignments spell that derogatory information out in plain English, whoever entered the SMC assignments for Ms. Gabbard instead used only the codes for the two rules Ms. Gabbard triggered: "Rule: [REDACTED]" and "Rule: [REDACTED]".

While TSA seemed to obscure the reason for Ms. Gabbard's inclusion on the Quiet Skies list, it conversely used a photo in the internal SMC assignment system that generated significant buzz within FAMs. Typically, TSA uses the subject's passport photo from the Department of State for the SMC photo. In Ms. Gabbard's case, whoever added her to the list chose to use her official congressional photo instead, removing any doubt that TSA knew Ms. Gabbard was a former Member of Congress.

²⁵ See Tulsi Gabbard (@TulsiGabbard), X (July 23, 2024, 6:34 AM), <https://x.com/TulsiGabbard/status/1815697038371397993>.

²⁶ Wendi Strauch Mahoney, *EXCLUSIVE - Federal Air Marshal Whistleblowers Report Tulsi Gabbard Actively Under Surveillance via Quiet Skies Program*, UncoverDC (Aug. 4, 2024), <https://uncoverdc.com/2024/08/04/fams-whistleblowers-report-tulsi-gabbard-on-quiet-skies-list>.

²⁷ See, e.g., Matt Taibbi, *Comment from the TSA on Tulsi Gabbard and the "Quiet Skies" Program*, Racket News (Aug. 9, 2024), <https://www.racket.news/p/comment-from-the-tsa-on-tulsi-gabbard>.

Further, Ms. Gabbard was assigned SMC surveillance for *eight flights*—one of which it appears she may not have had the quad-S designation for.²⁸ Even after the quad-S designation was no longer on her own boarding passes, her husband continued to have the quad-S designation on his. Unless Air Marshals observed something during one of the eight flights suggesting Ms. Gabbard posed some sort of risk, it is a gross waste of funds and an abuse of authority for TSA to have assigned so many resources to surveilling Ms. Gabbard rather than focusing on actual potential threats.

To get to the bottom of TSA’s surveillance of Ms. Gabbard, Congress should demand a briefing—classified if necessary—on why such a known individual as Ms. Gabbard was added to Quiet Skies. If Ms. Gabbard truly posed a potential threat, Congress should assess what other notifications should have been made, such as to Ms. Gabbard’s Army Reserve unit. But if Ms. Gabbard—and others like her selected for SMC surveillance—pose no threat whatsoever to aviation security, Congress should consider whether to discontinue the Quiet Skies program.

Since whistleblowers made protected disclosures to the Air Marshal National Council, the media, and the DHS OIG, TSA had opened a retaliatory investigation into the so-called “leak” of Sensitive Security Information (SSI). Yet the Supreme Court has specifically held that the whistleblower protections established by Congress take precedence over TSA’s ability to hide information it designates as SSI.²⁹ We will be meeting with the DHS OIG General Counsel and Whistleblower Protection Coordinator on this issue in coming days,³⁰ and would also appreciate Congress’s assistance in ensuring the courageous Air Marshal whistleblowers who made these disclosures are protected from retaliation.

Cordially,

/Tristan Leavitt/
Tristan Leavitt
President

²⁸ See Matt Taibbi, *American Stasi: Tulsi Gabbard Confirms “Quiet Skies” Nightmare*, Racket News (Aug. 7, 2024), <https://www.racket.news/p/american-stasi-tulsi-gabbard-confirms>.

²⁹ *Dep’t of Homeland Sec. v. MacLean*, 575 U.S. 383 (2015).

³⁰ See Letter from James M. Read, DHS OIG General Counsel, to Tristan Leavitt, Empower Oversight President, Aug. 10, 2024 (Attachment).

Attachment



OFFICE OF INSPECTOR GENERAL

U.S. Department of Homeland Security

Washington, DC 20528 | www.oig.dhs.gov

August 10, 2024

BY ELECTRONIC TRANSMISSION

Tristan Leavitt, Esq.
President
Empower Oversight
Fairfax, VA

Re: Your letters to Inspector General Cuffari dated August 5, 2024 and August 7, 2024

Dear Tristan:

Inspector General Cuffari has asked me to meet with you to discuss the matters raised in your letters to him dated August 5, 2024 and August 7, 2024. The Department of Homeland Security (DHS) Office of Inspector General (OIG) Whistleblower Protection Coordinator (WPC) would also attend the meeting. As background for the meeting, I would like to share the following information.

DHS OIG has four functions directly related to whistleblowing disclosures and complaints of retaliation for whistleblowing:

- Investigation of disclosures -- By longstanding arrangement with the Department, DHS OIG has a right of first refusal over disclosures referred by the Special Counsel to DHS for investigation under 5 U.S.C. § 1213(c). This means that the Department will investigate the referred disclosure only if DHS OIG declines to do so.
- WPC -- The DHS OIG WPC educates DHS employees about their rights and remedies under the authorities prohibiting whistleblower reprisal; assists the Inspector General in the timely and appropriate handling and consideration of protected disclosures and allegations of reprisal; and assists the Inspector General “in facilitating communication and coordination with the Special Counsel, the Council of the Inspectors General on Integrity and Efficiency, the establishment, Congress, and any other relevant entity regarding the timely and appropriate handling and consideration of protected disclosures, allegations of reprisal, and general matters regarding the implementation and administration of whistleblower protection laws, rules, and regulations.” 5 U.S.C. § 403(d)(1)(C). The WPC does not act as a legal representative, agent, or advocate of a whistleblower. 5 U.S.C. § 403(d)(2). The WPC has direct access to the Inspector General as needed, 5 U.S.C. § 403(d)(3), but on a day-to-day basis the WPC reports to the Deputy Counsel to the Inspector General.

- Whistleblower Protection Division (WPD) -- The DHS OIG WPD, which resides in the Office of Counsel, receives, investigates, and reports on complaints of whistleblower retaliation arising under the Military Whistleblower Protection Act, 10 U.S.C. § 1034 (covering, inter alios, uniformed members of the Coast Guard, which is part of DHS); government contractor whistleblower protections found at 41 U.S.C. § 4712; and Presidential Personnel Directive 19 / 50 U.S.C. § 3341(j) (prohibiting the making of an adverse security clearance determination in reprisal for an individual's whistleblowing). In addition to these three specialized authorities, WPD has the discretion to investigate and report on alleged violations of the Whistleblower Protection Act, as amended, 5 U.S.C. §§ 1221, 2302(b)(8).
- Alternative Dispute Resolution (ADR) -- With the consent of the complainant and the relevant DHS component (or contractor), a DHS OIG ADR attorney, who is also a trained mediator, will assist the parties in achieving a negotiated resolution of a retaliation complaint. If the parties do not reach an agreement, the ADR attorney has no involvement in a WPD investigation.

Apart from the four programs described above, DHS OIG has authority to conduct investigations, audits, inspections, and special reviews, with the aim of detecting and correcting deficiencies in DHS programs and operations. *See* 5 U.S.C. §§ 404, 406. DHS OIG takes seriously an employee's right to provide information to DHS OIG on a confidential basis. *See* 5 U.S.C. §§ 407(b), 2302(b)(13)(B).

The above information is likely to inform our meeting, at which I would like to discuss how DHS OIG might best exercise its authority regarding the matters you raise in your two letters to Inspector General Cuffari, consistent with the interests of your client and other stakeholders such as Congress and the public. DHS OIG is not committed to any particular course at this time.

Finally, due to my schedule, which includes upcoming official travel, I will be unable to meet before August 20, 2024. Someone from my office will be in touch before then to schedule the meeting. If you would like to meet in person instead of via Teams, please let me know by e-mailing me directly. I look forward to speaking with you.

Sincerely,

James M. Read
Counsel to the Inspector General

cc: Jason Foster, Esq.
Founder & Chair
Empower Oversight