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The Special Counsel

January 15, 2025

The President
The White House
Washington, DC 20510

Subject: OSC File Nos. DI-16-2046, DI-18-5205 and DI-19-0778

Dear Mr. President:

I am forwarding to you two reports separately transmitted to the U.S. Office of Special Counsel (OSC) by the U.S. Department of Homeland Security (DHS), Transportation Security Administration (TSA) and the U.S. Department of Transportation (DOT), Federal Aviation Administration (FAA) in response to the Special Counsel's referral of disclosures of wrongdoing in DI-16-2046.[1] I am also forwarding to you two additional reports transmitted by DOT and DHS in DI-18-5205 and DI-19-0778.[2]

The whistleblower, Robert MacLean, a former longtime Federal Air Marshall (FAM) for TSA, who consented to the release of his name, alleged that TSA and FAA officials engaged in conduct that constituted a violation of law, rule, or regulation, gross mismanagement, as well as a substantial and specific danger to public safety. The following is a summary of those findings and comments.

[1] On January 18, 2018, OSC referred the allegations to then-Secretary of DHS Kirstjen Nielsen, pursuant to 5 U.S.C. § 1213(c) and (d). The Secretary referred these allegations to TSA for investigation and response, and delegated her authority to TSA Deputy Administrator Patricia F.S. Cogswell. DHS provided its initial report on October 11, 2018, and supplemental reports on June 16, 2020, and May 18, 2022; collectively, these responses comprise DHS' report. In light of this report, OSC also referred the allegations to then-Secretary of DOT Elaine L. Chao, who delegated her authority to [redacted], General Counsel, Office of the Secretary for Transportation, for investigation and response. DOT provided its initial report on July 14, 2020, and a supplemental report on March 3, 2023; collectively, these responses comprise DOT's report.

[2] On December 18, 2018, OSC referred the allegations to then-Secretary of DHS Kirstjen Nielsen, pursuant to 5 U.S.C. § 1213(c) and (d), who referred these allegations to TSA for investigation, and delegated authority to TSA Deputy Administrator Patricia F.S. Cogswell. DHS provided its initial report on February 7, 2020, and supplemental reports on April 28, 2021, and September 2, 2022; collectively, these responses comprise DHS' report. In light of this report, on July 29, 2022, OSC also referred the allegation in DI-18-5205 to the Secretary of DOT Pete Buttigieg, who delegated his authority to the General Counsel. FAA's Office of Aviation Safety was charged with investigating and preparing the report. DOT provided its report on November 14, 2023.

DI-16-2046

The Allegations

In his disclosure, the whistleblower alleged that TSA failed to require aircraft operators: (1) to strengthen and implement flight deck doors that open outward and away from the flight deck; and (2) to install secondary barriers, which function as a second layer of protection between the passenger area and the flight deck. In consideration of FAA's role regulating aircraft, and the whistleblower's comments on the TSA report, OSC also referred very similar allegations to DOT with regard to FAA's failure to take these referenced actions.

In particular, FAA is responsible for proscribing regulations and minimum safety standards for procedures that are deemed necessary for aviation safety or national security.[3] TSA is tasked with working in conjunction with FAA concerning any actions or activities affecting aviation safety or air carrier operations.[4] Further, the Aviation Act charges FAA with developing policies, strategies, and plans for dealing with transportation safety issues.[5]

The Investigative Findings of DHS, TSA

The agency did not substantiate the whistleblower's allegations. In its report, TSA noted that Congress tasked TSA to work in conjunction with the FAA regarding such aviation issues. However, the FAA retains primary regulatory authority over flight deck doors and secondary barriers on commercial aircraft.[6]

Specifically, with respect to the first allegation, TSA found that the FAA is aware of the potential vulnerabilities and has addressed them over the years through the following measures. First, it promulgated new standards in 2002 for strengthening cockpit doors to protect cockpits from forcible intrusion and small-arms fire or fragmentation devices, such as grenades.[7] Second, it issued a final rule on August 15, 2007 (Flightdeck Door Monitoring and Crew Discreet Alerting Systems), requiring a means for flight crews to visually monitor the door area outside the flight deck and requiring that flight attendants have a means to discreetly notify the flight crew of suspicious activity or security breaches in the cabin.[8] Third, it collaborated with TSA FAMs, which resulted in a 2011 report by the Radio Technical Commission for Aeronautics (RTCA) that identified methods to protect the flight deck door during a period of transition. Fourth, it issued Advisory Circular (AC) No. 120-110 on April 14, 2015, which provided the three acceptable methods of secondary flight deck security listed in the RTCA study: installation of physical secondary barriers; use of improvised non-installed

[3] *See* 49 U.S.C. §§ 106(g) and 44701(a)(5).
[4] *See* Aviation Act, 49 U.S.C. § 114(f)(3), (13).
[5] *See* 49 U.S.C. § 44701(a)(5).
[6] *See* 49 U.S.C. § 114(f)(13).
[7] *See* 14 C.F.R. § 25.795.
[8] TSA further explained that the regulation does not specify which direction flight deck doors must open as various factors are involved, such as decompression, geometric limitations, and other engineering issues. *See* 14 C.F.R. §§ 121.582 and 121.584; 72 FR 45629; and 14 C.F.R. Part 121.

secondary barriers; and human secondary barriers, i.e., flight crew members.[9] In its report, TSA asserted that all aircraft carriers are in compliance with the AC by utilizing one of those three methods. TSA further indicated that, according to the FAA, compliance with 14 C.F.R. § 121.584 is verified by the FAA through reviews of airline manuals and in-person inspections of procedures.

TSA asserted that the TSA Administrator sought assistance from the Aviation Security Advisory Committee (ASAC) in 2018 to review the secondary barriers currently in use on board some commercial aircraft and to evaluate the security risk of not having secondary barriers. ASAC completed its report, "Secondary Barriers on Commercial Passenger Aircraft," in December 2018 and agreed on the need for a secondary barrier system to protect against cockpit intrusions but did not reach consensus on whether the physical secondary barriers needed to be *installed*. In addition, TSA concurred with the FAA that the benefit of requiring airlines to design/install secondary barriers in *existing* aircraft did not outweigh the burden and cost to the industry, in light of the layered security measures already in place. Further, the ASAC report recognized that Congress passed a law in 2018 directing the FAA to ensure *future* aircraft are constructed with secondary barriers.

The Whistleblower's Comments on the DHS, TSA Report

The whistleblower communicated his overall dissatisfaction with the DHS report. He indicated that DHS failed to meet the minimum reporting requirements under 5 U.S.C. § 1213 because its response was neither complete nor reasonable.[10] In particular, the whistleblower asserted that it was unacceptable for DHS to absolve itself of all responsibility, find no illegality, and conclude that there will be no corrective action, both with respect to the requirements of the Whistleblower Protection Act, and the Aviation Transportation Security Act (ATSA), Pub. L. No. 107-71 (Nov. 19, 2001). Specifically, he believed that the report was deficient in the following respects: (1) it failed to provide a reasonable basis for finding that TSA honored its minimum duties under ATSA; (2) it was incomplete for failing to make a finding on the multiple instances of alleged gross mismanagement, abuse of authority, and substantial and specific danger to public health or safety that were documented in TSA's report;[11] and (3) it failed to recommend corrective action for current public safety threats caused by ongoing vulnerabilities. The whistleblower reiterated his stance that physical secondary barriers need to be installed in all aircraft and that there are too many inherent weaknesses in other types of secondary barriers that could compromise safety. The whistleblower provided examples of various instances and scenarios reported in the media and elsewhere to illustrate his point regarding aviation safety. He maintained that TSA, like FAA, is responsible for meeting the industry standards and ensuring the public's safety.

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[9] While the RTCA study found all three options acceptable, it seemed to favor improvised or installed barriers.

[10] The whistleblower submitted his comments regarding both the TSA and FAA reports in two main parts. One part contained his legal commentary, and the other discussed the overall effects of these issues on the aviation community and public, which the whistleblower refers to as the White Paper.

[11] Specifically, the whistleblower claimed that commercial aircraft remain defenseless against significant threats for which terrorists are aware. For example, he asserted that commercial aircraft are vulnerable during those moments when the flight deck is not locked during the flight and to exploitation of its inward opening doors for unauthorized entry.

The whistleblower also expressed concerns regarding two TSA investigators assigned to this case and to other matters involving the whistleblower, which he believes is a significant conflict of interest.

The Investigative Findings of DOT, FAA

The agency did not substantiate the whistleblower's allegation that the FAA failed to require aircraft operators to implement flight deck doors that open outward and away from the flight deck. The FAA found that there are no specific laws, rules, or regulations that require flight deck doors to open into the cabin. However, the FAA noted that there are important care standards governing the certification and manufacturing of aircraft that must be considered when discussing the direction of flight deck doors to ensure the safety and well-being of the public. For example, certification standards require that airplane designs, such as separate compartments, provide a method to compensate for a sudden decompression of the airplane in a manner that avoids significant damage to the airplane. Flight deck doors often provide the pressure compensation by being vented or swinging open a particular direction to equalize the pressure between the cabin and the flight deck. Further, the FAA explained that there are geometric considerations regarding which way the door opens given that some flight deck floors are not at the same level as the main cabin.

With regard to the allegation that the FAA failed to require aircraft operators to install physical secondary barriers between the flight deck and cabin, the FAA again found that there were no specific laws, rules, or regulations that require the installation of physical secondary barriers on *existing* aircraft. However, while the FAA did not substantiate this allegation, it did explain that pursuant to section 336 of the FAA Reauthorization Act of 2018 (Pub . L. No. 115-254), FAA issued a final rule mandating installation of a physical secondary flight deck barrier on *newly manufactured* passenger airplanes. With respect to existing aircraft, FAA stated that it does not have data indicating that any relative increase in security from a mandatory retrofit would justify the additional costs and potential reduction in resources that could be used for other important safety initiatives. In addition, the agency noted that Section 1961 of the FAA Reauthorization Act required FAA (in conjunction with TSA) to assess threats to flight deck security and safety regarding unauthorized access, and that the report issued following that assessment did not identify the need for any design changes.

The Whistleblower's Comments on the DOT, FAA Report

The whistleblower commented that the FAA also failed to meet the minimum reporting requirements under 5 U.S.C. § 1213. Further, he indicated that the FAA has not complied with its legal requirements or duty to the public to safeguard flight deck doors and ensure that there are appropriate and effective secondary barriers in place. He maintained that installed physical secondary barriers are the most reliable and effective type of barrier and should therefore be used in all aircraft.

In light of the whistleblower's comments, OSC requested a supplemental report from the FAA containing additional information about the conduct of the investigation and a summary of the evidence obtained from the investigation, pursuant to 5 U.S.C. § 1213(d). OSC

sought additional information clarifying the agency's position, the status of its pending rulemaking, and the materials it relied upon to conclude that that there was no substantial or specific danger to public safety or other wrongdoing.

In its response, the FAA clarified that it views all three options for secondary barriers as acceptable options to meet the industry safety standards, which it states differs from the RTCA report that tends to prefer the use of improvised or installed secondary barriers.[12] On June 26, 2023, the FAA published a final rule titled Installation and Operation of Flightdeck Installed Physical Secondary Barriers on Transport Category Airplanes in Part 121 Service.[13] As stated in the *Federal Register* notice, this final rule implements the mandate described above that certain airplanes used to conduct domestic, flag,[14] or supplemental passenger-carrying operations have installed a physical secondary barrier that protects the flightdeck from unauthorized intrusion when the flightdeck door is opened. Accordingly, all applicable future aircraft will contain installed secondary barriers.

In addition, the whistleblower asserted that the reports from DHS and DOT were not reasonable and complete because they do not comply with 5 U.S.C. § 1213(d)(1), which requires that "[a]ny Report required under subsection (c) shall be reviewed and signed by the head of the agency . . ."

DI-18-5205 and DI-19-0778

The Allegations

In his disclosures, the whistleblower alleged that TSA failed: (1) to properly protect flight crews and the public from potential opioid attacks; and (2) to prevent significant security breaches because of its policy exempting religious food trucks from airport inspections. After reviewing DHS' report, OSC also referred a modified version of the first allegation to DOT, with regard to FAA's failure to take the referenced action.

The Investigative Findings of DHS, TSA

The agency did not substantiate the whistleblower's allegations. In particular, with regard to fentanyl, which is a type of opioid, potentially being exposed on an aircraft, TSA asserted that screening procedures are designed to prevent unknown powders from being brought aboard an aircraft. Transportation Security Officers (TSOs) screen property for powders

[12] In addition, in attachment two of its report, the FAA included a threat assessment memo entitled "Limited Risk to Commercial Aircraft Flight Decks," which it created in response to OSC's inquiries and provides an update to the 2019 threat assessment on flight deck safety and security that TSA produced, in consultation with the FAA, as directed in Section 1961 of the FAA Reauthorization Act of 2018.
[13] The Final Rulemaking can be found at Federal Register :: Installation and Operation of Flightdeck Installed Physical Secondary Barriers on Transport Category Airplanes in Part 121 Service.
[14] *Flag operation* means any scheduled operation conducted by any person operating any aircraft described in paragraph (1) of this definition . . . (1) Airplanes or powered-lift that: (i) Are turbojet-powered; (ii) Have a passenger-seat configuration of more than 9 passenger seats, excluding each crewmember seat; or (iii) Have a payload capacity of more than 7,500 pounds and that are at certain locations. *See* 14 CFR § 110.2.

at the screening checkpoint. In May 2018, TSA implemented Enhanced Accessible Property Screening, which provides for screening of both organic powder-like material and inorganic powder-like material and increases the search rates of powders. Specific procedures for screening powders include visual and physical inspections, explosive trace detection searches and colorimetric testing. Further, TSA clarified that, depending on the testing method, it has the capability to detect fentanyl in amounts as small as a fingerprint or a few visible grains of powder.

Although, TSA intelligence reporting found no indication that terrorist or criminal adversaries intend to release fentanyl in the civil aviation sector, the agency continues to monitor these issues regarding fentanyl in the transportation domain. In addition, to minimize potential exposure at the screening checkpoint, TSA has made a number of safety and procedural changes, including equipping TSOs with thicker gloves (5mil Nitrile), providing awareness briefings, and establishing employee handling and response procedures.

With respect to the allegation involving religious food trucks, TSA explained that there is no difference in requirements for "religious food trucks" vis-a-vis any other catering truck. As there is an insider threat risk throughout the transportation sector, TSA has a layered security approach to secure catering trucks. It begins at the catering facility where catering carts are visually inspected and there is a random pull of food trays to examine for signs of tampering. Catering food must either be sealed or escorted/monitored from the time it leaves the catering facility, and the seal cannot be broken except by the aircraft operator or an authorized representative.

Further, catering operations are consistently subjected to inspections, testing and oversight, including comprehensive inspections of the air carrier covering all regulated areas, targeted inspections, supplemental inspections, or Special Emphasis Assessments or Special Emphasis Inspections that are scheduled as needed. Inspectors also perform covert testing, such as testing to ensure appropriate procedures are followed if there is a broken security seal.

There are also requirements that must be met for the individuals performing the catering security functions. In particular, the employees of the catering companies do not perform security measures; these are performed by a designated aircraft operator employee or an authorized representative who is not employed by a catering company and who has undergone extensive identification and screening checks.

The Investigative Findings of DOT, FAA

The agency did not substantiate the whistleblower's allegation that FAA failed to take reasonable steps to protect flight crews and the public from potential opioid attacks and related medical emergencies. The FAA regularly reviews intelligence community reporting and remains engaged with interagency partners regarding threats to civil aviation operations around the globe, in an effort to safeguard the traveling public. While an opioid attack is a conceivable scenario, the FAA's threat assessment did not identify any credible reporting about testing or planning for this type of attack on civil aviation operations.

The FAA also considered the whistleblower's suggestion that the FAA could mandate opioid antidotes, such as Narcan, in emergency medical kits onboard commercial flights. However, it found that provisioning antidotes in sufficient quantity for each crew member and passenger onboard would prove costly and have questionable effectiveness, as flight crews would have to be trained to recognize or distinguish symptoms from a vaporized opioid attack from other medical conditions or emergencies, and then quickly administer antidotes to passengers without endangering themselves.

The FAA plans to continue reviewing intelligence reporting related to an opioid dispersal attack on board an aircraft, and to take appropriate action if the threat assessment changes.

The Whistleblower's Comments on the Reports

DI-18-5205

In his comments, the whistleblower maintained that installing a nonporous secondary barrier would alleviate both of the safety concerns he identified, as the secondary barrier would reinforce the protection of the flight deck and also have the capability to minimize the effects of any airborne opioids. Further, he asserted that Narcan should be provided on aircraft and disagreed with the agencies' decision not to do so. He also referenced the recent law mandating secondary barriers on existing aircraft, not only future ones.

In addition, the whistleblower enquired about classified information referenced in the FAA's report. After ensuring the appropriate clearance, OSC reviewed that classified information, and ultimately did not identify any information that contradicts the statements provided in the agency's report. Specifically, that the review and assessment conducted by FAA and TSA did not identify the whistleblower's concerns as an active threat to aviation safety.

DI-19-0778

The whistleblower restated his view regarding religious food trucks and asserted that law enforcement random inspections cause minimal disruption and are cost effective. He also submitted testimonial excerpts and other information that he believes demonstrate the threat that religious food trucks and the current inspection process present. The whistleblower disagreed with the agency's findings, indicating that the agency ignored important information in its assessment. He also reiterated many of his previous concerns regarding the need for implementing installed secondary barriers.

The Special Counsel's Findings

I have reviewed the disclosures, the agencies' reports, and the whistleblower's comments, and in accordance with 5 U.S.C. § 1213(e), have determined that, with respect to DI-19-0778, DHS' report contains the information required by statute and the findings appear reasonable. As to DI-16-2046, I have determined that the findings are not reasonable, in part. On May 16, 2024, the FAA Reauthorization Act of 2024 (2024 Act) was signed into law. Section 350 of the 2024 Act requires installation of secondary flightdeck barriers on *existing* aircraft.

Both agencies have informed OSC that they plan to comply with the new law. However, in light of Congress' decision to now require that existing aircraft have secondary barriers, which validates and demonstrates the legitimacy of the whistleblower's concerns, I have concluded that DHS and DOT's findings pertaining to the need to install secondary barriers on all aircraft were unreasonable. With respect to DI-18-5205, I appreciate the efforts of DHS and DOT to address this matter. However, I have been unable to reconcile the agencies' conclusions with the growing public safety concerns of the use and potential weaponization of opioids identified by the whistleblower and others. Given the totality of the circumstances, I am unable to determine whether the agencies' findings appear reasonable.

In addition, I agree with the whistleblower's concern regarding the statutory requirement that the report be reviewed and signed by the head of the agency. OSC has since updated its policy. When an agency submits its report setting forth the findings of its investigation and any proposed corrective action, OSC expects agencies to fulfill the Congressional mandate that the report "shall be reviewed and signed by the head of the agency" or, at a minimum, include a statement that by signing the report, the delegee affirms that the report represents the findings of the agency head.

I appreciate the whistleblower coming forward with his allegations and bringing these important issues to OSC's attention. As required by 5 U.S.C. § 1213(e)(3), I have sent a copy of this letter, the agencies' reports, and the whistleblower's comments to the Chair and Ranking Member of the Senate Committee on Homeland Security and Governmental Affairs and the Committee on Commerce, Science and Transportation, and to the Chair and Ranking Member of the House Committee on Homeland Security and the Committee on Transportation and Infrastructure. OSC has also filed redacted copies of these documents and our original referral letters with accompanying attachments, in our public file, which is available at www.osc.gov. This matter is now closed.

Respectfully,

Hampton Dellinger
Special Counsel

Enclosures