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November 25, 2019

Honorable Henry Kerner
Special Counsel
1730 M Street, NW, #300
Washington, DC 20036
Attention: Olare Nelson and Elizabeth McMurray

Re: Robert MacLean, DI-16-2046

Dear Mr. Kerner:

Pursuant to 5 U.S.C. 1213(e)(1), Mr. Robert MacLean submits these comments on the Department of Homeland Security's (DHS) report into his whistleblowing disclosure evidencing failure to implement legally required post 9/11 aviation security reforms. More specifically, on January 18, 2018 the Office of Special Counsel (OSC) found a substantial likelihood that Mr. MacLean's concerns on two issues were correct. He had alleged illegality, gross mismanagement abuse of authority, and a substantial and specific danger to public health or safety, because the agency has not implemented two essential post-9/11 reforms –

1) secondary barriers to block access from passenger areas to the cockpit, also referred to as a "flight deck" or "flightdeck"

2) cockpit doors that open outward, because cockpit doors that open inward significantly enable hijackers to rush and breach the cockpit, taking over the plane when pilots notify the cabin of their imminent exit and unlock it to leave the cockpit, such as for mandatory cross-ocean flights crew-rests, receiving meals, and lavatory breaks. The OSC ordered the DHS Secretary to investigate and report back.

On October 11, 2018, the DHS / Transportation Security Administration's (TSA) Deputy Administrator, Patricia Cogswell, responded, based on a September 26 Report of Investigation. ("Report" or "ROI") In essence, the TSA official did not deny that both the law and public safety required enhanced protection of the flight deck, and that neither of these two reforms occurred despite an in-depth review and recommendations by an in-depth inter-agency study. However, TSA absolved itself of all responsibility and found no illegality, concluding that there will be no corrective action. Deputy Administrator Cogswell's reasoning was that relevant responsibility rests entirely with the Federal Aviation Administration (FAA) as the agency with primary authority. She resolved the issue with that excuse, although the Aviation Transportation Security Act (ATSA), PL. 107-71 (Nov. 19, 2001) assigns joint FAA-DHS responsibility.

Circumventing accountability is unacceptable, both with respect to requirements of the Whistleblower Protection Act, and the ATSA. In section 1213(c) the WPA requires a report to disclose any findings of illegality, not just the agency's violations. Further, the Report failed to provide a reasonable basis that TSA honored its minimum duties under the Act. The Report also was incomplete for failing to make findings on the gross mismanagement, abuse of authority and substantial and specific danger to public health or safety demonstrated repeatedly in the agency's own record. Finally, the agency was unreasonable in failing to recommend corrective action for those public safety threats from ongoing vulnerabilities.

Mr. MacLean's White Paper comments are enclosed as Exhibit 1. His analysis emphasizes the ongoing aviation security breakdown that neither the FAS nor DHS have mitigated in 18 years. Except for illustrative purposes, this submission will not duplicate his extensive record and aviation security analysis. Rather, summarized below is how the agency response fails to meet the minimum standards of 5 USC 1213 for responsible action on a significant, credible whistleblowing disclosure. Under section 1213(e), the Special Counsel must evaluate whether the agency response is complete and reasonable. This response is neither.

STANDARD OF REVIEW

These comments apply the statutory requirements of 5 U.S.C. § 1213(d):

"Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include—

(1) a summary of the information with respect to which the investigation was initiated;
(2) a description of the conduct of the investigation;
(3) a summary of any evidence obtained from the investigation;
(4) a listing of any violation or apparent violation of any law, rule, or regulation; and
(5) a description of any action taken or planned as a result of the investigation, such as—
    (A) changes in agency rules, regulations, or practices;
    (B) the restoration of any aggrieved employee;
    (C) disciplinary action against any employee; and
    (D) referral to the Attorney General of any evidence of a criminal violation.

OVERVIEW ON AGENCY CHIEF'S FAILURE TO TAKE RESPONSIBILITY

5 U.S.C. § 1213(d)(1) requires that "[a]ny Report required under subsection (c) shall be reviewed and signed by the head of the agency….: The agency head must include his or her findings from the Report. 5 U.S.C. §1213(c)(1)(B). OSC website guidance further explains,

Should the agency head delegate the authority to review and sign the Report,[1] the

[1] There is no statutory authority under § 1213 for an agency chief to pass the buck to subordinates when responding to an OSC order to investigate after finding a substantial likelihood of illegality or other serious public policy misconduct. Nor is this accountability loophole consistent with legislative intent. In 1978 when Congress

delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).

The Secretary of the Department of Homeland Security has not complied. Instead, without explanation the reply came from a Deputy Administrator of the Transportation Security Administration. This violates the fundamental reasons for section 1213: the law seeks to assure that agency heads receive the full record necessary to exercise leadership addressing misconduct, and that they act on it reasonably.

Ignoring the requirement for agency heads to the responsibility is not limited to DHS. It reflects a recent pattern in nearly all whistleblowing disclosures filed through GAP. If the Special Counsel does not start requiring agency chiefs to take responsibility, compliance with that cornerstone of the WPA's accountability structure will be the rare exception, not the rule.

I. APPARENT OR ACTUAL VIOLATIONS OF LAW

TSA does not deny the legal requirement for the agency to reinforce flight deck safety, including secondary barriers and cockpit doors that open away from the cabin.

> "SEC. 104. IMPROVED FLIGHT DECK INTEGRITY MEASURES. (a) IN GENERAL.—As soon as possible after the date of enactment of this Act, the Administrator of the Federal Aviation Administration shall [require] that such flight deck doors remain locked while any such aircraft is in flight except when necessary to permit access and egress by authorized persons"

https://www.tsa.gov/sites/default/files/aviation_and_transportation_security_act_atsa_public_law_107_1771.pdf[2]

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passed the bi-partisan Leahy Amendment that created this structure, the point was that agency chiefs must take personal responsibility to clean their own houses of misconduct that betrays the public trust. Congress reasoned that agencies bury problems within bureaucratic ranks. In a 1978 Dear Colleague letter a bi-partisan group of 17 senators explained that the point of their proposed amendment, which was adopted as part of the Civil Service Reform Act -- to ensure that agency chiefs are aware of serious misconduct, and exercise leadership to address it. (Reprinted in 124 Cong. Rec. S14302-03. (daily ed. Aug. 24, 1978) Allowing the buck to stop below the top circumvents the point of §1213 and accepts agency failure to respect the seriousness of OSC investigative referrals. In this case, there is no hint that the DHS Secretary even has read the Report, let alone taken responsibility for corrective action.

[2] *See* Section 104 of the Aviation Transportation Security Act, Section 336 of the FAA Reauthorization Act of 2018, and 14 CFR 25.795. As the FAA has explained with respect to the latter, The FAA issued a January 15, 2002 mandate that all cockpits be impenetrable from sprinting and diving hijackers and ammunition from small arms fire:

> Section 25.795(a)(1) requires that the flightdeck door installation be designed to resist intrusion by any person who attempts to enter the flightdeck by physically forcing his or her way through the door. In this context, the door installation includes the door, its means of attachment to the surrounding structure, and the attachment structure on the bulkhead itself. The integrity of the locking/latching/hinge mechanism, as well as the door panel itself, can be improved so that intrusion resistance is significantly enhanced....

In fact, the Report of Investigation found, at 4-5, that neither has occurred. Nonetheless, the ROI's conclusion was no apparent or actual violation of law, rule or regulation. (*Id.,* at 5). The agency's reasoning was that responsibility rests with FAA, essentially passing the buck. That is irrelevant to meet minimum WPA standards. There is no language in section 1213(c)(4) that absolves one agency from making findings illegality by blaming another agency for the misconduct. Rather, the law requires disclosure of "any violation of any law, rule or regulation." TSA did not have the option to avoid this requirement, and the disclosure should be sent back to the Secretary for the necessary conclusion of law.

Further, TSA has failed to demonstrate that it has met its minimum statutory duties. Although FAA has primary responsibility, the ATSA requires the TSA Administrator to "work in conjunction" with FAA for aviation security, with authority to recommend rules and corrective action. 49 USC 114(f)(13) *Id.,* at 6. FAA witnesses all agreed that TSA can recommend rules and corrective action to achieve their joint responsibility. Further, by statute TSA has general security authority for all modes of transportation. 49 USC 114(d). As Mr. MacLean accurately summarized to agency investigators, FAA and TSA both are responsible.

TSA did not provide any basis to conclude it has met its minimum statutory duties. Beyond participating in a 2011 Radio Technical Commission Aeronautics (RTCA DO-329) study on the issue, its meaningful efforts in the record for issues raised by Mr. MacLean can be summarized as –

> tasking the Aviation Security Advisory Committee (ASAC) to conduct "an assessment including the advantages and disadvantages to help inform decisions on secondary barriers[,] including evaluation of "the security risk of not having a secondary barrier and … a cost-benefit analysis of requiring barriers. (*Id.,* at 4-5; Supplemental Attachment 6;

Upon request, it also provides "advice and insights." (*Id.*, at 7)

This is an unconcealed abdication of responsibility. There is no attempt to demonstrate that TSA has met its minimum legal responsibilities for public safety on these issues. That would be difficult. It has not done anything, except be on call for informal dialogue. Indeed, when the FAA rejected numerous RTCA recommendations to overhaul aviation security, including secondary barriers, TSA did not even claim to have offered an opinion. (*Id.,* Attachment 1, at 3) The still-incomplete ASAC assessment merely will duplicate work already completed in 2011 by the inter-agency RTCA, without any stated justification to reopen the RTCA findings. In short,

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This final rule requires protection for all features of the flightdeck door to the extent necessary to prevent penetration of likely projectiles. We have determined protection equivalent to Level IIIA of the National Institute of Justice Standard (NIJ) standard 0101.04 is sufficient to protect against the most powerful handgun projectiles and grenade shrapnel that could be encountered on civil airplanes, and have adapted the relevant portions of this standard for this application in AC 25.795-2, Flightdeck Penetration Resistance. Protection would be required at all points where penetration of small arms fire could cause a hazard." https://www.federalregister.gov/documents/2002/01/15/02-965/security-considerations-in-the-design-of-the-flightdeck-on-transport-category-airplanes.

TSA has not defended the legality of shifting all blame to the FAA. Whether primary or secondary, TSA's statutory duty was mandatory and proactive, not passive and discretionary.

II. MISSION BREAKDOWN

Mr. MacLean's disclosure and the issues referred by the Special Counsel for investigation also evidenced abuse of authority, gross mismanagement, and a substantial and specific danger to public health or safety. TSA ignored all those issues. This frustrates the whole purpose of the Whistleblower Protection Act. The point of the merit system generally, and the WPA in particular, is not just to act against illegality, but against all misconduct that disserve the public.[3] Mr. MacLean blew the whistle on the agency's failure to protect the public, not on technical violations of law. Whether or not FAA has primary responsibility, TSA also has generic authority to accomplish that mission. The issues in this referral cannot be responsibility resolved without addressing whether it has made an honest effort.

A. *Substantial or specific threats to public health or safety.* There can be little question that the issues raised by Mr. MacLean represent substantial, specific threats to public safety. His White Paper demonstrates in detail how commercial aircraft remain defenseless against significant threats for which terrorists are aware. To illustrate, his comment begins with an authoritative account how exploitation of inward opening doors was part of the 9/11 strategy, a vulnerability that remains uncorrected.[4] The Air Line Pilots Association long has reinforced this warning.

> The Federal Aviation Administration requires that cockpit doors be locked during flight, according to agency spokesman Les Dorr. But there are times when a pilot may open the door — to visually check wing surfaces, use the bathroom and change flight crews during a long trip. That leaves the possibility the cockpit could be rushed by a hijacker. 'It's a barrier when it's closed, it's an entry when it's open,' said Capt. Steve Luckey, chairman of the Air Line Pilots Association's [(ALPA)] national security committee. …
> Luckey would like to see another safety measure — a [bullet-proof] Kevlar® curtain that acts as a secondary barrier when the cockpit door is opened. He said the curtain would delay a terrorist long enough for passengers to attack him. Luckey wants Congress to order all planes to have it.
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> Israel's national airline, EL AL, has among the most stringent security requirements. All its planes have double doors separated by a narrow hallway, said Offer Einav, former

[3] Mr. MacLean has not seen how the original referral of issues. If there was uncertainty whether TSA was responsible to make findings on these issues, he requests that the Office of Special Counsel clarify that scope and direct the agency to make appropriate findings.

[4] To illustrate, he referenced page 158 of the public 9/11 Commission Report issued on July 22, 2004:

> While in Karachi, ['9/11 principal architect' Khalid Sheikh Mohammed (KSM)] also discussed how to case flights in Southeast Asia. KSM told [the hijackers] to watch the [cockpit] doors at takeoff and landing, to observe whether the [pilots] went to the lavatory during the flight, and to note whether the flight attendants brought food into the cockpit... https://www.nytimes.com/2000/09/21/us/us-declines-to-prosecute-in-case-of-man-beaten-to-death-on-jet.html.

security director for the airline. Pilots must close one door before opening the other, he said." https://www.cbsnews.com/news/bulletproof-cockpit-doors-a-reality/.

Mr. MacLean also provided the TSA investigators with links to an unpublished OIG audit report that referenced and supported the inter-agency RTCA Report's conclusions: Current reliance on flight attendants and good carts as barriers to block attacks on the flight deck were tested and found unsatisfactory. The RTCA called for action to begin implementing secondary barriers. As seen below, the co-chairman of the RTCA study is still waiting.

> We're in a race against time, frankly, because there is going to be another attack,' said Capt. Ed Folsom, a United Airlines pilot who has played an active role in the development of the secondary barrier system since 2002. 'I'm no rocket scientist, so if I can see the vulnerability, so can everyone else.'.... Folsom [was] a co-chairman of the [2011 RTCA DO-329 / Special Committee 221] .... What's more, Folsom added that the drills, while grim, likely offer a best-case scenario. 'We looked at some highly trained [Federal Air Marshals] playing the role of flight attendants and crew members and even they couldn't prevent a breach of the flight deck,' Folsom said. 'If they can't do it, then little 57-year-old, 40 percent body fat Susie isn't going to do it. .... In recent years, according to [2011 RTCA D-329 member and a commercial airline pilot and former president of the Coalition of Airline Pilots Associations Captain Paul] Onorato, the coalition has set up scenarios where a handful of would-be terrorists are seated in the first few rows of an airplane. These scenarios have shown that terrorists are able to 'blow past' both a flight attendant and galley cart and get into the cockpit within three seconds."

https://www.theatlantic.com/national/archive/2011/08/how-to-hijack-an-airplane-in-3-seconds/243631/

The ROI at least contains a contrary view about the inward opening doors, including speculation that they are necessary to maintain steady air pressure and prevent an explosion. (ROI, Atts. 4, 6) However, despite specific requests by TSA investigators, neither TSA nor FAA subject matter experts could provide any documents or studies that support the speculation. (Att. 6, Supp. Att. 4)

B. *Gross mismanagement*. As the Merit Systems Protection Board defined in *Embree v. Department of Treasury*, 70 MSPR 79, 85 (1996), "[g]ross mismanagement" means a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission...."

While TSA is not the *primary* partner, its mission includes being *a* partner to implement and enforce the Aviation Transportation Security Act. Being the secondary partner is an invalid basis for virtually total passivity. TSA's duty is to act "in conjunction" with the FAA to protect the public, not abandon its mission with respect to vulnerabilities disclosed by Mr. MacLean. The agency did not even ask until 2018 for its Advisory Committee to conduct research on the 2011 RTCA warning. Quite simply, it is gross mismanagement for an agency to be AWOL on significant public safety threats that are aprt of its mission to stop. If the Whistleblower

Protection Act is to be a credible channel for employees to make a difference, reports under section 1213 must take responsibility for such fundamental mission breakdowns.

C. *Abuse of authority.* This misconduct occurs when there is arbitrary or capricious actions, or those not grounded in law, that result in favoritism or discrimination. *D'Elia v. Dep't of Treasury,* 60 MSPR 226 (1993). There is no *de minimus* standard for abuse of authority. *Traynor v. Department of Air Force,* 64 MSPR 386, 391-92 (1994).

There can be no question that TSA's passivity was arbitrary. Nor that it discriminated against the public by sustaining unnecessary vulnerabilities to terrorist attack. Mr. MacLean's research has produced the explanation -- favoritism for the aviation industry. As a 2007 CNN secondary barriers article indicated,

> In a June 2005 report to Congress, the Transportation Security Administration said the [secondary] barrier "appears to be a simple solution that offers greater security at a relatively low cost."
>
> "Valuable time is gained in deterring the movement of an unauthorized individual towards the flight deck," the report said.
>
> But the TSA recommended against mandating secondary barriers, citing "the costs of engineering and installation that would be incurred by the [airlines] to retrofit" aircraft. "The economic fragility of the industry due to increasing costs, including persistently rising fuel prices, makes this a decisive recommendation."

https://web.archive.org/web/20070912153145/http://www.cnn.com/2007/TRAVEL/09/10/protecting.cockpits/index.html

III. CORRECTIVE ACTION

The ROI record reinforces why continued passivity is unreasonable. It cites an unpublished 2017 DOT OIG audit that found FAA "had not effectively mitigated … cockpit security vulnerabilities and limitations with existing countermeasures." The audit concluded it was a "missed opportunit[y]" when FAA rejected RTCA recommendations to advance secondary barriers. (As discussed earlier, TSA washed its hands.) Over two years later, the missed opportunity continues.

The OSC cannot due more than enforce the Whistleblower Protection Act's requirement for agencies to address significant breakdowns in public service. But enforcing the Act's mandate for agency chiefs to make a credible record of efforts to deal with those breakdowns is the essential first step toward making a difference. DHS has not made that effort for cockpit security vulnerabilities, and TSA has demonstrated it is close-minded toward honoring this duty.

Mr. MacLean requests that the Special Counsel return his disclosure for renewed investigation by the Department of Homeland Security and a report from the DHS Secretary that

responsibly addresses his disclosure of illegality, gross mismanagement, abuse of authority, and substantial and specific danger to public health or safety.

Respectfully submitted,

Tom Devine

Counsel for Mr. MacLean