



Urgent Reforms Needed at TSA

Prepared for Ranking Member Elijah E. Cummings

**Democratic Staff Report
Committee on Oversight and Government Reform
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EXECUTIVE SUMMARY

On Wednesday, September 26, 2018, the Committee on Oversight and Government Reform will hold a hearing with the Administrator of the Transportation Security Administration (TSA), Vice Admiral David Pekoske. The purpose of the hearing is to review the results of the Committee’s three-year investigation into security deficiencies and personnel management practices at TSA.

This report was prepared by the Democratic staff of the Committee at the request of Ranking Member Elijah E. Cummings to briefly summarize the key results of the investigation and offer concrete proposals for reforms that are critical to safeguarding the American people and protecting TSA whistleblowers from retaliation.

In June 2015, the Inspector General of the Department of Homeland Security (DHS) issued a classified report on TSA screening operations. In response, Ranking Member Cummings and then-Chairman Jason Chaffetz issued a request for documents regarding the Inspector General’s findings and the results of TSA’s own internal covert tests.¹

In November 2015, Ranking Member Cummings and then-Chairman Chaffetz expanded their investigation to include a review of TSA personnel management, including reports that a senior official who engaged in serious misconduct—and was recommended for removal—was given a settlement that included only a two-week suspension and no reduction in pay.

Ranking Member Cummings worked closely with then-Chairman Chaffetz and, subsequently, Chairman Trey Gowdy, across the administrations of both President Obama and President Trump to send more than a dozen letters requesting documents and information from TSA, conduct multiple hearings, interview whistleblowers and agency personnel, and review thousands of pages of documents.

In March 2017, Ranking Member Cummings supported then-Chairman Chaffetz’ subpoena to TSA after the agency refused to provide documents to the Office of Special Counsel (OSC), and Ranking Member Cummings subsequently wrote to Chairman Gowdy in November 2017 to “request that the Committee take steps to enforce its subpoena.”²

Ranking Member Cummings also requested that the Committee “issue subpoenas to compel depositions with three TSA officials—Deputy Administrator Huban Gowadia, Chief Counsel Francine Kerner, and former Acting Assistant Administrator Steven Colon—who have

¹ Letter from Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Acting Deputy Administrator Mark Hatfield, Transportation Security Administration (June 4, 2015) (online at <https://oversight.house.gov/wp-content/uploads/2015/06/2015-06-04-JC-EEC-to-Hatfield-TSA-Covert-Testing-due-6-18-resp-6-12-briefing.pdf>).

² Letter from Ranking Member Elijah E. Cummings to Chairman Trey Gowdy, House Committee on Oversight and Government Reform (Nov. 14, 2017) (online at https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/2017-11-14.EEC%20to%20Gowdy%20re.TSA_.PDF).

all declined to participate voluntarily in transcribed interviews since May.” Following this request, the Committee conducted transcribed interviews with Ms. Kerner on December 5, 2017, Mr. Colon on December 7, 2017, and Dr. Gowadia on December 20, 2017.

Most recently, Ranking Member Cummings supported a subpoena issued by the Committee to depose DHS Principal Deputy General Counsel, Joseph Maher, following his months-long refusal to appear voluntarily for a transcribed interview.

Despite the failure of TSA and DHS to fully cooperate with the Committee’s investigation, this staff report summarizes serious security deficiencies identified during the investigation, as well as numerous examples of arbitrary personnel practices and whistleblower retaliation at TSA.

This report also identifies the need for urgent reforms in three areas—security operations, personnel management, and transparency—to help ensure the safety of the American people, and it sets forth three key recommendations from Ranking Member Cummings:

Recommendation #1—Security Operations:

Based on the classified and unclassified information obtained by the Committee as part of its three-year investigation, Ranking Member Cummings recommends that Congress demand sustained accountability from TSA officials to finally implement unfulfilled security recommendations made by the Inspector General, GAO, and others that have languished in some cases for years.

Although many of these unimplemented recommendations are classified, Congress should launch a one-year oversight effort—including regular meetings, briefings, and if necessary, hearings—to ensure that TSA finally implements these recommendations and resolves security vulnerabilities.

Recommendation #2—Personnel Management:

Ranking Member Cummings recommends that Congress consider legislative proposals to strengthen civil service protections at TSA to prevent retaliation against whistleblowers who report security deficiencies and to ensure that employees are not subject to arbitrary personnel actions, which ultimately degrade security.

Recommendation #3—Transparency:

Ranking Member Cummings recommends that Congress continue oversight and consider legislation to significantly enhance transparency regarding whistleblower claims, settlement agreements, and non-disclosure agreements.

I. REFORMS URGENTLY NEEDED FOR TSA SECURITY OPERATIONS

In November 2015, DHS Inspector General John Roth testified before the Committee regarding his assessment of TSA's security vulnerabilities. He stated:

[W]hat we found in a series of tests, which took place across the country at different airports of different sizes, using a variety of concealment methods by individuals who are auditors with no specialized training or skill, is a universal, disappointing performance by the TSA screening checkpoint.³

When asked by Rep. Gerald Connolly, "Would it be fair to say, without compromising security, that some significant breaches occurred," Inspector General Roth answered, "Yes."⁴

Last fall, two years after Inspector General Roth's testimony, his office issued two new reports: one on TSA security operations, and another on the Federal Air Marshals Service (FAMS). Both reports are classified, but the Inspector General's office issued unclassified executive summaries of the reports.

Regarding TSA's screening operations, the Inspector General warned, "We identified vulnerabilities with TSA's screener performance, screening equipment, and associated procedures."⁵ Regarding its report on air marshals, the Inspector General's unclassified summary did not discuss specific findings, but it did have the following unclassified title: *FAMS' Contribution to Aviation Transportation Security is Questionable*.⁶

On September 11, 2017, the Government Accountability Office (GAO) issued its own report on TSA security measures. With respect to the air marshal program's ability to deter attacks, the unclassified version of the report warned:

TSA does not have information on its effectiveness in doing so, nor does it have data on the deterrent effect resulting from any of its other aviation security countermeasures.⁷

Ranking Member Cummings, then-Chairman Chaffetz, then-Subcommittee Chairman John Mica, and then-Subcommittee Ranking Member Tammy Duckworth requested that GAO

³ House Committee on Oversight and Government Reform, Testimony of John Roth, Department of Homeland Security Inspector General, *Hearing on TSA: Security Gaps*, 114th Cong. (Nov. 3, 2015).

⁴ *Id.*

⁵ Department of Homeland Security, Office of Inspector General, *Covert Testing of TSA's Screening Checkpoint Effectiveness (Redacted)* (Sept. 27, 2017) (online at www.oig.dhs.gov/reports/2017/covert-testing-tsas-screening-checkpoint-effectiveness/oig-17-112-sep17).

⁶ Department of Homeland Security, Office of Inspector General, *FAMS' Contribution to Aviation Transportation Security is Questionable (Redacted)* (Oct. 24, 2017) (online at www.oig.dhs.gov/reports/2018/fams-contribution-aviation-transportation-security-questionable-unclassified-summary).

⁷ Government Accountability Office, *Actions Needed to Systematically Evaluate Cost and Effectiveness Across Security Countermeasures* (Sept. 11, 2017) (online at www.gao.gov/products/GAO-17-794).

“assess TSA’s covert testing program to determine whether it is being fully utilized and integrated into relevant decision-making process.”⁸ GAO’s classified report is due later this year.

According to the Office of Inspector General, 20 recommendations arising out of eight Inspector General reports involving TSA remain open. In one example, eight recommendations remain open from the Inspector General’s September 2017 classified report titled, *Covert Testing of TSA’s Screening Checkpoint Effectiveness*.

In addition, according to GAO’s “Recommendations Database,” numerous recommendations regarding TSA security operations remain open, including recommendations from the following GAO reports: *Federal Air Marshal Service: Additional Actions Needed to Ensure Air Marshals’ Mission Readiness*; *Federal Air Marshal Service: Actions Needed to Better Incorporate Risk in Deployment Strategy*; and *Aviation Security: Actions Needed to Systematically Evaluate Cost and Effectiveness Across Security Countermeasures*.⁹

Recommendation #1:

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Although many of these unimplemented recommendations are classified, Congress should launch a one-year oversight effort—including regular meetings, briefings, and if necessary, hearings—to ensure that TSA finally implements these recommendations and resolves security vulnerabilities.

⁸ Letter from Chairman Jason Chaffetz, Ranking Member Elijah E. Cummings, et al., House Committee on Oversight and Government Reform, to Comptroller General Gene L. Dodaro, Government Accountability Office (June 1, 2016) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2016-06-01%20JEC%20EEC%20JLM%20TD%20to%20Dodaro-GAO%20-%20Red%20Team%20Evaluation%20Request.pdf>).

⁹ Government Accountability Office, *Recommendations Database* (Apr. 18, 2018) (online at www.gao.gov/recommendations/?q=%22Transportation+Security+Administration%22&field=agency_part_ss&list=1&rec_type=all_open#results).

II. REFORMS URGENTLY NEEDED FOR TSA PERSONNEL MANAGEMENT

The Committee's investigation has revealed a pattern of mismanagement at TSA and DHS, including arbitrary and retaliatory personnel practices. The lack of uniform civil service protections has led to numerous deviations from agency and department policy and from government-wide standards, which in turn has chilled whistleblowers, harmed morale, and negatively affected agency operations.

During a transcribed interview with Committee staff on February 23, 2017, former TSA Deputy Administrator Mark Hatfield explained the effect of the agency's structure on TSA in this way:

The structure that gave it the flexibility and the facility and the power to make the extraordinary moves it did when it was created should have evolved, and, unfortunately, some of them have just led to toxicity rather than a healthy agency.¹⁰

Former Deputy Administrator Hatfield also testified that TSA's practice of involuntarily reassigning personnel to new duty stations (referred to as "directed reassignments") was used by at least one senior manager to "manipulate positions in the field and to both help people that were in favor and to punish people that were out of favor."¹¹

In March 2017, Inspector General Roth testified at a Committee hearing regarding the potential security impacts of TSA's arbitrary personnel practices in response to questions from Rep. Brenda Lawrence:

Rep. Lawrence: Inspector Roth, do arbitrary personnel practices deter whistleblowers from speaking out about security deficiencies?

Inspector General Roth: I believe that it's got a chilling effect. Any time there is the threat of some sort of improper personnel practice as a result of making a protective disclosure, for example, of a safety situation or other kind of misconduct on the part of the agency, that there is always that fear that there is a chilling effect that something will happen to that person.

Rep. Lawrence: So if TSA employees are reluctant to raise these deficiencies they observe, couldn't this put aviation security at risk?

Inspector General Roth: Well, that's absolutely the case.¹²

¹⁰ House Committee on Oversight and Government Reform, Interview of Mark Hatfield (Feb. 23, 2017).

¹¹ *Id.*

¹² House Committee on Oversight and Government Reform, Testimony of Department of Homeland Security Inspector General John Roth, *Hearing on Transparency at TSA* (Mar. 2, 2017).

At the same hearing, former Special Counsel Carolyn Lerner explained how the civil service protections afforded under Title V of the U.S. Code, which currently do not fully apply to TSA employees, could benefit the agency:

I think the full protections of Title V applying to TSA would be very helpful so that there's a—more of a feeling of fairness in employment actions so that hiring decisions and promotion decisions are perceived as fair.¹³

In May of this year, the Office of Special Counsel (OSC) announced that it had obtained a settlement with TSA on behalf of three agency employees who were given directed reassignments that required them to move from Hawaii to the U.S. mainland “after making disclosures related to airport operations and safety.” The settlement included “compensatory damages of approximately \$1 million” and required TSA to reassign the two individuals still employed by the agency back to their previous duty stations.¹⁴

Recommendation #2:

Ranking Member Cummings recommends that Congress consider legislative proposals to strengthen civil service protections at TSA to prevent retaliation against whistleblowers who report security deficiencies and to ensure that employees are not subject to arbitrary personnel actions, which ultimately degrades security measures.

¹³ House Committee on Oversight and Government Reform, Testimony of Special Counsel Carolyn Lerner, *Hearing on Transparency at TSA* (Mar. 2, 2017).

¹⁴ Office of Special Counsel, *OSC Obtains Settlements for TSA Whistleblowers in Three Involuntary Reassignment Cases* (May 23, 2018) (online at <https://osc.gov/News/pr-18-30%202.pdf>).

III. REFORMS URGENTLY NEEDED TO IMPROVE TRANSPARENCY AT TSA

During the Committee’s multi-year investigation, TSA has repeatedly attempted to limit or prevent oversight from Congress, OSC, and the public.

During the Committee’s March 2, 2017, hearing entitled “Transparency at TSA,” Inspector General Roth testified:

We have found that TSA has a history of taking an aggressive approach to restricting information from being made public, especially with respect to a category of information known as sensitive security information, commonly known by its acronym as SSI. This problem is well documented.¹⁵

He added: “In addition to these inconsistent SSI designations, we have encountered instances in which TSA redacted information so widely known that redaction bordered on absurd.”¹⁶

During the same hearing, former Special Counsel Lerner explained how TSA was withholding information from OSC that limited the office’s ability to enforce whistleblower protections. Ms. Lerner testified:

[Y]ou need robust enforcement of the law, and the law has no meaning unless it’s enforced, and it really hinders our ability to make findings when we’re not getting full information from the agency.¹⁷

Documents pertaining to the three whistleblowers with whom TSA reached the \$1 million settlement discussed above were among those withheld by TSA until Congress enacted a statutory change to ensure OSC’s access to all agency documents relevant to its investigations of whistleblower retaliation allegations.

On March 6, 2017, the Committee requested documents related to TSA’s decision to withhold documents from OSC.¹⁸ On March 17, 2017, after TSA refused to produce the documents, the Committee issued a subpoena requiring production of the documents by March 31, 2017.¹⁹ To date—more than eighteen months later—TSA has still not produced the full set

¹⁵ House Committee on Oversight and Government Reform, Testimony of Department of Homeland Security Inspector General John Roth, *Hearing on Transparency at TSA* (March 2, 2017).

¹⁶ *Id.*

¹⁷ House Committee on Oversight and Government Reform, Testimony of Special Counsel Carolyn Lerner, *Hearing on Transparency at TSA* (Mar. 2, 2017).

¹⁸ Letter from Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, House Committee on Oversight and Government Reform, to Acting Administrator Huban Gowadia, Transportation Security Administration (Mar. 6, 2017) (online at <https://oversight.house.gov/wp-content/uploads/2017/03/2017-03-6-JEC-to-Gowadia-TSA-Hearing-Follow-up-due-3-10.pdf>).

¹⁹ Subpoena to Huban Gowadia, House Committee on Oversight and Government Reform (Mar. 17, 2017).

of subpoenaed documents, which include documents related to the three whistleblower cases TSA just settled with OSC.

According to both TSA and DHS, the decisions to not produce this information to OSC and to Congress was made by DHS, raising significant concerns regarding a more widespread problem with transparency at DHS.

During a transcribed interview on December 5, 2018, the Chief Counsel of TSA, Francine Kerner, informed Committee staff that then-DHS Acting General Counsel Joseph Maher instructed TSA to withhold documents from OSC. Ms. Kerner stated that “the acting general counsel has made the determination” to withhold documents from OSC on the basis of attorney-client privilege. Ms. Kerner was asked, “Did you participate in that decision at all?” She responded: “No. It’s the decision of the Department.”²⁰

On May 26, 2017, Acting General Counsel Maher confirmed Ms. Kerner’s statements in a letter to the Committee “regarding your May 2, 2017 letter, and your March 17, 2017, subpoena to the Acting Administrator of the Transportation Security Administration (TSA).” He wrote: “The Department—not Dr. Gowadia [then-Acting TSA Administrator]—is making determinations on the handling of the documents.” He asserted that “the Department’s practice is not to release internal, deliberative communications between officials seeking and providing legal advice absent an extraordinary basis for releasing such documents.”²¹

In addition, on February 7, 2017, Ranking Member Connolly and Chairman Mark Meadows of the Subcommittee on Government Operations requested documents from DHS regarding its use of non-disclosure agreements.²² To date, no documents have been produced.

This month, the Inspector General issued a report finding that DHS’ non-disclosure forms and settlement agreements did not always meet the requirements of the Whistleblower Protection Enhancement Act because they did not include a required statement to notify employees that the non-disclosure agreement does not supersede certain rights, including the right to communicate with Congress.²³ TSA issued three of the nine nondisclosure agreement forms that the Inspector General found to be missing the required statements.²⁴

²⁰ House Committee on Oversight and Government Reform, Interview of Francine Kerner (Dec. 5, 2017).

²¹ Letter from Acting General Counsel Joseph B. Maher, Department of Homeland Security, to Chairman Jason Chaffetz, House Committee on Oversight and Government Reform (May 26, 2017).

²² Letter from Chairman Mark Meadows and Ranking Member Gerald Connolly, Subcommittee on Government Operations, House Committee on Oversight and Government Reform, to Secretary John Kelly, Department of Homeland Security (Feb. 7, 2017) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/2017-02-07%20Connolly%20Meadows%20to%20Kelly-DHS%20on%20NDAs.pdf>).

²³ Department of Homeland Security, Office of Inspector General, *DHS Non-Disclosure Forms and Settlement Agreements Do Not Always Include the Required Statement from the Whistleblower Protection Enhancement Act of 2012* (Aug. 10, 2018) (online at www.oig.dhs.gov/sites/default/files/assets/2018-08/OIG-18-73-Aug18.pdf).

²⁴ *Id.*

Recommendation #3:

Ranking Member Cummings recommends that Congress continue oversight and consider legislation to significantly enhance transparency regarding whistleblower claims, settlement agreements, and non-disclosure agreements.