

United States Senate

WASHINGTON, DC 20510

December 12, 2022

The Honorable Michael Horowitz
Inspector General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Inspector General Horowitz:

In July 2021, Senator Wicker published an investigative report documenting misconduct and potential criminal activity within the Department of Commerce's Investigations and Threat Management Service (ITMS).¹ Despite the word "investigation" in their title, ITMS had no legal authority to investigate criminal violations and instead relied on a special deputation they received from the U.S. Marshals Service (USMS) to conduct countless improper searches, seizures, and even several arrests.² Senator Wicker's findings were later reaffirmed by a report from the General Counsel at the Department of Commerce and resulted in the disbandment of ITMS.³ In light of the findings of both reports, it's necessary to investigate the institutional failures that enabled the misconduct and why the Department of Justice (DOJ) never intervened, despite clear evidence that ITMS lacked statutory authority to conduct criminal investigations. For these reasons, we ask that you lead a root cause analysis with other relevant inspector general offices regarding the oversight failures at DOJ and its components, including the USMS and FBI, with respect to their involvement with ITMS.

By way of background, the Special Deputy Marshal program allows the Marshals Service to deputize federal and state law enforcement to perform specific law enforcement duties. Under this program, the USMS is able to deputize anyone with at least one year of law enforcement

¹ MINORITY INVESTIGATIVE STAFF OF THE S. COMM. ON COM., SCIENCE, & TRANSP., 117TH CONG., ABUSE AND MISCONDUCT AT THE COMMERCE DEPARTMENT (Comm. Print 2021), <https://www.commerce.senate.gov/services/files/C4ABC46A-7CB0-4D51-B855-634C26E7CF70> [hereinafter CST Report].

² Letter from Roger F. Wicker & Charles E. Grassley, Ranking Members, S. Comm. on Com. Sci., & Transp., and S. Comm. on the Judiciary, to Donald W. Washington, Director, U.S. Marshals Serv. (May 26, 2021), https://www.grassley.senate.gov/imo/media/doc/wicker_grassley_to_us.marshalscommercedeputationitms.pdf; Letter from Charles E. Grassley and Roger F. Wicker, Ranking Members, S. Comm. on the Judiciary and Com., Sci., & Transp., to Avril Haines, Director, Off. of the Dir. Of Nat'l Intel. (June 9, 2021), https://www.grassley.senate.gov/imo/media/doc/grassley_wicker_to_-_commerce_dept.investigativeandthreatmanagementservice.pdf.

³ Press Release, U.S. Dep't of Com., U.S. Department of Commerce Accepts Findings and Recommendations from Investigations and Threat Management Service Review (Sept. 3, 2021), <https://www.commerce.gov/news/press-releases/2021/09/us-department-commerce-accepts-findings-and-recommendations>; see also OFF. OF GEN. COUNS., U.S. DEP'T OF COM., REPORT OF THE PROGRAMMATIC REVIEW OF THE INVESTIGATIONS AND THREAT MANAGEMENT SERVICE (Sept. 3, 2021) [hereinafter Original CST Report], <https://www.commerce.gov/sites/default/files/2021-09/20210903-ITMS-Report.pdf>; but see OFF. OF INSPECTOR GEN., U.S. DEP'T OF COM., REP. NO. 19-0714 (2020), https://www.oig.doc.gov/OIGPublications/ROI%2019-0714_Redactions%20Applied.pdf; CST Report *supra* note 1, at 5 (stating, "Because of inadequate oversight by the Inspector General's office, the unit's improper exercises of law enforcement powers likely resulted in preventable violations of civil liberties and other constitutional rights, as well as a gross abuse of taxpayer funds.").

experience to perform a specific task.⁴ ITMS agents, despite not having met the minimum experience requirement, were granted special deputy authority for the limited purpose of protecting the Secretary of Commerce and critical infrastructure.⁵

ITMS abused the special deputation to routinely engage in activities outside of that purpose – activities that were illegal and violated the constitutional rights of hundreds of individuals. For example, ITMS investigated a Chinese-born scientist employed at the Department of Commerce on charges of espionage.⁶ They interrogated her for hours, and drafted a criminal referral to federal prosecutors.⁷ ITMS agents initially claimed the scientist provided classified documents to a Chinese national, and DOJ prosecutors relied on this assertion to bring criminal charges.⁸ The charges were later abruptly dropped a week before trial was set to begin when it became clear that the documents were unclassified and publicly available.⁹ It remains unclear why prosecutors and federal investigators did not perform basic due diligence to determine the status of the documents before bringing forth charges. The scientist in question later sued the federal government for wrongful prosecution and was awarded \$1.5 million in damages.¹⁰

⁴ 28 CFR § 0.112; *see also* U.S. MARSHALS SERV., Special Deputation Program Pol’y: § 6(b) Special Deputation Eligibility Requirements 201 (Sept. 30, 2011) (“Applicants must have general law enforcement experience of at least 1 year.”), <https://www.commerce.senate.gov/services/files/7F85FBCD-446C-4798-AC5A-9237DFC79F47>.

⁵ E-mail from [Redacted], Assistant Gen. Couns., Off. of Gen. Couns., U.S. Dep’t of Com., to George Lee, Director, Investigations and Threat Management Service 208 (Nov. 30, 2017, 12:33 PM) (determining that ITMS could use “apprentices” or “[a]nyone seeking deputation” and be “required to complete some degree of training” and “play a supporting role” of providing “assistance to deputized employees”), <https://www.commerce.senate.gov/services/files/7F85FBCD-446C-4798-AC5A-9237DFC79F47>; Original CST Report, *supra* note 3, at 201 (“Security Guards and Personal Protection Employees: These applicants are employed by the United States Government or private agencies that provide security for a specific place or building; or personal protection for dignitary, government official, or other designated person. They do not have general arrest authority. Applicants must have general law enforcement experience of at least 1 year.”); *see also* CST Report *supra* note 1, at 25 (“The ITMS provided an unaccredited Basic Agent Training (BAT), which endangered the safety of participating agents and the general public. In addition, ITMS Director George Lee lacked the proper qualifications to lead a criminal investigative program.”).

⁶ Shawn Boburg, *Commerce Department Security Unit Evolved into Counterintelligence-like Operation*, WASH. POST (May 24, 2021), <https://www.washingtonpost.com/investigations/2021/05/24/commerce-department-monitoring-itms/>; *see also* APA Justice, *Senator Roger Wicker on Investigation of the Misconduct Within the Department of Commerce*, YOUTUBE (Mar. 7, 2022), <https://www.youtube.com/watch?v=EbJ5g0ss3vA> (stating, “In other words, ITMS went rogue. You are familiar with the story of Sherry Chen who was wrongfully targeted and had her life upended by charges stemming from ITMS. Unfortunately, she’s not alone. There have been others like her. Lives and careers have been ruined without just cause. My investigation has found more than enough evidence indicating ITMS acted outside the law on multiple occasions.”)

⁷ CST Report, *supra* note 1, at 12.

⁸ *Id.*

⁹ *Id.*

¹⁰ Kimmy Yam, *After Being Falsely Accused of Spying for China, Sherry Chen Wins Significant Settlement*, NBC NEWS (Nov 15, 2022), <https://www.nbcnews.com/news/asian-america/falsely-accused-spying-china-sherry-chen-wins-significant-settlement-rena56847>; *see also* CST Report *supra* note 1, at 27 (stating that, “Across the Commerce Department, the ITMS often targeted employees renowned in their professional fields, reportedly to display the unit’s ability to uncover purported “threats” within the civil service. A troublingly high quantity of these investigations appear to have lacked any articulable suspicion that the target presented any credible threat. Overzealous and overbroad investigations, which focused on factors related to the subject’s federal security clearance, often failed to reveal misconduct or threatening association with hostile foreign actors. In many cases, these investigations targeted subjects with Chinese or Southeast Asian ancestry.”).

In another instance, ITMS opened a counterintelligence investigation into a class of elementary school students who sent a letter to the Commerce Secretary requesting the addition of a specific whale to the Marine Mammal Protection Act of 1972.¹¹ As part of their investigation, ITMS investigators ran the names of these children through the National Crime Information Center database, which is maintained and operated by the FBI. Accessing criminal databases for unauthorized purposes is a violation of 18 U.S.C. §1030, for which the Department of Justice has prosecuted law enforcement officials in the past.¹² Yet, we are unaware of any investigative or disciplinary action taken against ITMS agents for these apparent violations.

On June 9, 2021, Senator Grassley wrote to Director Wray requesting more information about the FBI's working relationship with ITMS.¹³ The FBI's August 27, 2021, response to Senator Grassley's letter failed to answer key questions and provide records about the FBI's relationship with ITMS, although the FBI admitted that they did provide "analytical and investigative assistance" to ITMS.¹⁴ On October 13, 2021, Senator Grassley sent a follow up letter to the FBI which sought more information on the type of "analytical and investigative assistance" that the FBI provided.¹⁵ The FBI has failed to respond. While our investigation has focused on wrongdoing by ITMS, it is important to understand the FBI's knowledge and awareness, if any, regarding ITMS's illegal activities.

¹¹ ITMS used FBI and Department of Homeland Security databases to investigate elementary students who wrote a letter requesting that a certain type of whale be included in marine wildlife protections. CST Report, *supra* note 1, at 33. ITMS avoided scrutiny for years by saving all their work in a classified network to protect ITMS from Freedom of Information Act requests and allowing ITMS "open" investigations to linger untouched for years. *Id.* at 21-22.

¹² Press Release, Dep't of Justice, U.S. Attorney Charges Former Police Dispatcher for Unauthorized Use of Crime Computers (May 8, 2015), <https://www.justice.gov/usao-ndal/pr/us-attorney-charges-former-police-dispatcher-unauthorized-use-crime-computers>; Letter from Charles E. Grassley, Ranking Member S. Comm. on the Judiciary to Tamara A. Johnson, Principal Deputy Inspector Gen., Off. of the Inspector Gen. of the Intel. Cmty. (June 9, 2021),

https://www.grassley.senate.gov/imo/media/doc/grassley_to_intel_community_inspector_general_-_commerce_investigative_and_threat_management_service.pdf;

Letter from Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Christopher Wray, Dir., Fed. Bureau of Investigations (Oct. 13, 2021)

https://www.grassley.senate.gov/imo/media/doc/grassley_to_fbi_-_itms_follow-up.pdf; Letter from Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Christopher Wray, Dir., Fed. Bureau of Investigations (June 9, 2021),

https://www.grassley.senate.gov/imo/media/doc/grassley_to_fbi_-_commerce_dept.investigativeandthreatmanagementservice.pdf

¹³ Letter from Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Christopher Wray, Dir., Fed. Bureau of Investigations (June 9, 2021).

¹⁴ Letter from Christopher Wray, Dir., Fed. Bureau of Investigations, to Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary (August 27, 2021).

¹⁵ Letter from Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Christopher Wray, Dir., Fed. Bureau of Investigations (October 13, 2021).

We also have reason to believe that ITMS agents relied on their special deputation to fly on commercial airlines while armed.¹⁶ Federal law enforcement agents and state police, in limited circumstances, are allowed to fly on civilian aircraft while armed after receiving TSA approved training.¹⁷ In an effort to determine the basis for ITMS agents flying armed, our staffs requested information regarding how often ITMS agents flew while armed, what type of training ITMS agents received, and for copies of ITMS's application(s) for receiving a Unique Flying Armed Number (UFAN)—a number required by TSA for federal law enforcement agents to fly armed.¹⁸ We were informed that providing information on flying histories of ITMS agents would be too burdensome because the information is kept at individual airports and, due to a "data migration" error, TSA would be unable to provide copies of the ITMS UFAN applications.¹⁹

By acquiring Special Deputy Marshal authorities, ITMS gained access to the very federal law enforcement tools that allowed the aforementioned abuses.²⁰ Even worse, ITMS gained the ability to cloak their bad conduct with a veil of legitimacy.²¹ This cloak of legitimacy appears to have allowed them to go unchecked for years, despite clear signs that they were engaging in illegal activities.

As Senator Wicker has said, "ITMS [] mutated into a rogue, unaccountable, police force without a clear mission."²² They spied on Commerce employees, illegally searched employees' locked cubicles, used the FBI to file erroneous criminal charges against distinguished employees, and collected data on citizens that appropriately exercised their First Amendment rights by visiting or writing to the Commerce Department. These are just a few examples.

In light of the seriousness of the facts outlined above, we request that you lead a root cause analysis with the relevant offices of inspector general regarding the oversight failures at the Department of Justice and its components, including the USMS and FBI, with respect to their involvement with ITMS. Congress needs to know what went wrong, and how these illegal

¹⁶ CST Report, *supra* note 1, at 11; *see also* Letter from Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to David P. Pekoske, Adm'r, Transp. Sec. Admin. (Oct. 13, 2021) https://www.grassley.senate.gov/imo/media/doc/grassley_to_tsa_-_itms.pdf.

¹⁷ *See* TRANSP. SEC. ADMIN., *Special Procedures: Law Enforcement Flying Armed*, <https://www.tsa.gov/travel/law-enforcement> ("Law enforcement agencies with an operational need to fly armed must select a single instructor . . . to instruct the law enforcement officers within their agency who meet federal regulations to fly armed . . ."); *see generally* Memorandum from George Lee, Director of ITMS, on the Office of Security Investigative Legal Authority, at 2-3, 6, 10 (Apr. 13, 2005) (Enclosure 5) (denoting that ITMS lacked law enforcement authorities and would need to petition Congress to gain such authorities and that ITMS agents would be exposed to criminal and civil liability for effectuating custodial arrests without proper law enforcement jurisdiction).

¹⁸ *See also* Letter from Charles E. Grassley, Ranking Member of the S. Comm. on the Judiciary, to Hon. David P. Pekoske, TSA Administrator (Oct. 13, 2021), https://www.grassley.senate.gov/imo/media/doc/grassley_to_tsa_-_itms.pdf

¹⁹ *Id.*; *see also* TRANSP. SEC. ADMIN., *TSA Response to CST Inquiry on Department of Commerce Investigations and Threat Management Service* (on file with S. Comm. on Com. Sci., & Transp.).

²⁰ *See* CST Report, *supra* note 1, at 4, 18 (reporting that ITMS operated outside of their authorities by acting as an investigative police force, relying heavily on delegations of authority from other federal agencies to conduct criminal or counterintelligence investigations; ITMS agents profiled individuals based on immutable racial characteristics as a pretext for initiating investigations).

²¹ *Id.* at 1, 8 ("ITMS agents improperly exercised law enforcement authority by carrying firearms aboard commercial aircraft, conducting warrantless searches and seizures, performing custodial interrogations, and making arrests.")

²² APA Justice, *Senator Roger Wicker on Investigation of the Misconduct Within the Department of Commerce*, YOUTUBE (Mar. 7, 2022), <https://www.youtube.com/watch?v=EhJ5g0ss3vA>.

activities can be stopped from happening again.²³ Thank you for your prompt attention to this matter. If you have any questions, please contact Danny Boatright of the Senate Commerce Committee's Oversight and Investigations Unit at (202) 224-1251 or Dario Camacho of the Senate Judiciary Committee's Oversight and Investigations Unit at (202) 224-5225.

Sincerely,



Roger F. Wicker
Ranking Member
Senate Committee on Commerce,
Science, & Transportation



Charles E. Grassley
Ranking Member
Senate Committee on the Judiciary

Enclosures:

Senate Commerce Report
U.S. Department of Commerce General Counsel Report
Lee Memorandum

cc:

The Honorable Maria Cantwell
Chair
Senate Committee on Commerce,
Science, & Transportation

The Honorable Dick Durbin
Chair
Senate Committee on the Judiciary

The Honorable Joseph Cuffari
Inspector General
U.S. Department of Homeland Security

The Honorable Peggy Gustafson
Inspector General
U.S. Department of Commerce

²³ Shawn Boburg, *Commerce Department Security Unit Evolved Into Counterintelligence-Like Operation*, *Washington Post Examination Found*, WASHINGTON POST (May 24, 2021), <https://www.washingtonpost.com/investigations/2021/05/24/commerce-department-monitoring-itms/>.