OFFICE OF INSPECTOR GENERAL
Department of Homeland Security

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

November 20, 2017

Distinguished Members of Congress
(See enclosed list)
U.S. House of Representatives
Washington, DC 20515

Dear Requesting Members of Congress:

I write you to inform you of the status of our inquiry, initiated after your request, into the Department of Homeland Security's (DHS) implementation of Executive Order 13769 (the EO), regarding the travel into the United States of individuals from seven countries. We have received inquiries from time to time as to our progress.

I am pleased to tell you that we delivered our final 87-page report to the leadership at the Department of Homeland Security on Friday, October 6, 2017. This report represents thousands of hours of investigative and legal work, including over 160 interviews with Customs and Border Protection Officers (CBPOs), senior DHS officials, affected travelers, and others. It also includes an exhaustive review of over 48,000 documents, including emails that were generated during the time in question.

Unfortunately, notwithstanding having received the report over six weeks ago, the Department has not, as we typically request in these matters, made a final determination of what portions of the report contain material covered by the attorney-client privilege, nor have they made a decision as to whether they will claim the privilege or, alternatively, waive the privilege to allow such portions to be released to Congress and the public. Last week, they told us that they are unable to give us an estimate of when they will make these decisions.

Additionally, Department leadership has indicated that they are also reviewing the document for material covered by the "deliberative process privilege," and have yet to decide whether they will invoke that privilege, which would prevent us from releasing to you significant portions of the report. I am very troubled by this development.

The deliberative process privilege is a common law privilege, largely invoked in Freedom of Information Act (FOIA) and civil litigation, which permits (but does not require) the government from disclosing predecisional and deliberative communications because of the potential chilling effect such disclosure would have on the candid deliberations and back-and-forth discussion that effective policy-making requires. However, invoking the privilege can mask discovery of decisions made based on illegitimate considerations, or evidence of outright misconduct. For that reason, in civil litigation the privilege is not absolute but requires a court to balance the competing interests of the parties. This has been interpreted to mean that a party requesting the information may overcome the privilege by showing a "sufficient need for the material in the context of the facts or the nature of the case . . . or by making a *prima facie* showing of misconduct." *Redland Soccer Club Inc., v. Dep't of Army of U.S.*, 55 F.3d 827, 854 (3d Cir. 1995). Unlike civil litigants, however, we are not able to have a federal court or other disinterested party decide these issues, but must rely on the good faith of the Department.

While we do not yet have a final decision on whether and to what extent the Department will invoke these privileges, preliminary discussions indicate that the Department interprets both privileges very broadly. The Department's prior handling of similar privilege assertions has been subject to widespread and bipartisan criticism. See, Letter From Chairman Gowdy and Ranking Member Cummings to Acting U.S. Department of Homeland Security Secretary Regarding Decision to Withhold TSA Documents from the Office of Special Counsel, (November 16, 2017); GOP, Democrats blast TSA for withholding information, *Washington Post*, (March 6, 2017).

I am particularly troubled by the Department's threat to invoke the deliberative process privilege, as this is the first time in my tenure as Inspector General that the Department has indicated that they may assert this privilege in connection with one of our reports or considered preventing the release of a report on that basis. In fact, we regularly have published dozens of reports that delve into the Department's rationale for specific policies and decisions, and comment on the basis and process on which those decisions were made. Indeed, that is at the heart of what

Inspectors General do. See, e.g., Investigation of Allegations Related to Temporary Holding Facilities and Non-Intrusive Inspection Equipment at U.S. Customs and Border Protection (October 16, 2017); Management Alert - U.S. Citizenship and Immigration Services' Use of the Electronic Immigration System for Naturalization Benefits Processing (January 19, 2017); Release of Jean Jacques from ICE Custody (June 2016); IG investigation of employee complaints regarding management of USCIS' EB-5 program (March 24, 2015).

Invoking the deliberative process privilege, in this report and in future reports, would significantly hamper my office's ability to keep "Congress fully and currently informed about problems and deficiencies" of the Department, as required by the *Inspector General Act*. I am also unaware of other Inspectors General who have been prevented from issuing reports on such a basis. With regard to this specific report, it would deprive Congress and the public of significant insights into the operation of the Department. Moreover, because we have concluded that CBP appears to have violated at least two separate court orders, we will be unable to describe the factual basis behind our conclusion.

I would like to stress that the Department has made no final decisions on any of this, but given the passage of time since we submitted the report, and given the inquiries we have received, we believe that the Congressional requesters should be updated on the progress of our work. Because our report is final, we are able to tell you our high-level conclusions regarding our review. We will not be able to provide you with the substance of our work, unfortunately, until the Department makes a decision with regard to the privileges issue they raised. As a reminder, this report focuses on the experience of DHS and affected travelers arriving in the United States, from the signing of the EO on January 27, 2017 through February 3, 2017 when, in *Washington v. Trump*, the U.S. District Court for the Western District of Washington issued a temporary restraining order (TRO) that halted the government's enforcement of the EO nationwide.

We found:

- The leadership of CBP, the DHS entity primarily responsible for implementation of the order, had virtually no warning that the EO

was to be issued or of the scope of the order, and was caught by surprise. Indeed, during the early period of implementation of the order, neither CBP nor the Department was sure of the answers to basic questions as to the scope of the order, such as whether the order applied to Lawful Permanent Residents (LPRs), a significant percentage of the affected travelers and a fundamental question that should have been resolved early in the process. CBP was unable to issue definitive guidance in the early days of implementation of the EO, which contributed to significant delays at the ports of entry.

- With the exception of one matter currently under investigation, we did not substantiate any claims of misconduct on the part of CBPOs at the ports of entry. In fact, we found evidence that many CBPOs went the extra mile and provided water and food from their own personal funds. We were also able to dispel many accusations of misconduct, such as minors being handcuffed, that had been reported via social media. However, we cannot rule out that isolated abuse occurred. We were hampered in our inquiry by an understandable reluctance of affected travelers to be interviewed by our investigators, despite promises of confidentiality.

- The bulk of the travelers affected by the EO who arrived in the United States, particularly LPRs, received national interest waivers. We found that the waiver process was largely pro-forma, and that none of the travelers received scrutiny greater upon referral to secondary inspection than they would have received in the absence of the EO. Nor did we find any evidence that CBP detected any traveler linked to terrorism based on the additional procedures required by the EO.

With regard to the Department's compliance with the various court orders that were issued between the issuance of the EO and the final national injunction issued on February 3, 2017 in *Washington v. Trump*, we found:

- At the ports of entry, CBP largely complied with the court orders. We found some delay and confusion as to the scope of some of the orders. For example, CBPOs in Los Angeles discovered the

existence of one of the early court orders, *Darweesh v. Trump*, by watching television, but did not receive immediate guidance, so continued returning affected travelers. However, we believe that CBP at the ports of entry attempted in good faith to obey court orders. In fact, we found evidence that at some ports, CBP went to extraordinary lengths to comply. For example, at Dulles, to comply with a court order in *Aziz v. Trump*, CBP managed to recall a taxiing aircraft that was about to depart with a denied traveler on board, so she could be admitted.

- We found that the lack of a public or congressional relations strategy significantly hampered CBP. For example, in *Aziz v. Trump*, a federal court had temporarily enjoined CBP at Dulles airport in Virginia from returning LPRs. The court had also ordered CBP to "permit lawyers access to all [LPRs] being detained at Dulles...." CBP complied with the order not to remove LPRs and soon after the TRO issued, processed for entry the remaining five LPRs held in secondary inspection. However, CBP did not communicate that LPRs were not being denied access to lawyers either to the public or in response to Congressional inquiries, resulting in significant public protests and suspicion that CBP was not complying with a court order.

- While CBP complied with court orders at U.S. ports of entry with travelers who had already arrived, CBP was very aggressive in preventing affected travelers from boarding aircraft bound for the United States, and took actions that, in our view, violated two separate court orders that enjoined them from this activity.

    - Specifically, from January 29, 2017 through February 3, 2017, CBP attempted to prevent Boston-bound passengers from the EO affected countries by issuing "no board" instructions to the airlines. This was in violation of an order issued by a Boston court, in *Louhghalam v. Trump*, which required CBP to notify airlines of the exact opposite – that, as a result of the court's order, the affected travelers would in effect be admissible, absent other grounds for inadmissibility, such as document fraud, since the EO could no longer form the basis of finding them inadmissible. All

airlines, save one, obeyed the CBP no-board instructions. Lufthansa, citing the litigation, took the position that it would board EO-affected travelers on flights to the United States, notwithstanding CBP's "no board" instructions. All of the EO-affected passengers on two Lufthansa flights were admitted to the United States upon arrival in Boston.

- Additionally, CBP continued to issue "no board" instructions to airlines after a January 31, 2017 nationwide court order, *Mohammed v. United States*, enjoined CBP from blocking the entry of travelers affected by the EO.

- Finally, while complying with the letter of the January 28, 2017 order in *Darweesh v. Trump*, we have serious concerns about CBP's actions in nevertheless issuing "no board" instructions to airlines, and denying entry to travelers at CBP's overseas preclearance facilities, in light of the court's finding that there was a strong likelihood that the EO "violated [travelers'] rights to Due Process and Equal Protection guaranteed by the United States Constitution."

An identical letter has been sent to the Members of the Senate of Representatives who also requested that we conduct this review.

We would have preferred to give you more detail regarding our findings, but we are bound by the Department's procedures in reviewing our report for privilege issues. Please contact me if you have any questions.

Sincerely,

John Roth
Inspector General

Enclosure

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November 20, 2017

Letter to the Requesting Members of Congress:

The Honorable José E. Serrano
The Honorable Elijah E. Cummings
The Honorable Nydia M. Velázquez
The Honorable Raúl M. Grijalva
The Honorable Betty McCollum
The Honorable James P. McGovern
The Honorable Jerrod Nadler
The Honorable Darren Soto
The Honorable Jamie Raskin
The Honorable Ruben Gallego
The Honorable Keith Ellison
The Honorable Alcee L. Hastings
The Honorable William R. Keating
The Honorable Jan Schakowsky
The Honorable Henry C. Johnson, Jr.
The Honorable Hakeem Jeffries
The Honorable Debbie Wasserman Schultz
The Honorable Ted W. Lieu
The Honorable Grace Meng
The Honorable Yvette D. Clarke
The Honorable Juan Vargas
The Honorable Grace F. Napolitano
The Honorable Katherine Clark
The Honorable Nita M. Lowey
The Honorable Steve Cohen
The Honorable Tony Cárdenas
The Honorable Carolyn B. Maloney
The Honorable Jared Huffman
The Honorable Luis V. Gutiérrez
The Honorable David E. Price
The Honorable Sanford D. Bishop, Jr.
The Honorable John Yarmuth
The Honorable Eleanor Holmes Norton
The Honorable Alan Lowenthal
The Honorable Michelle Lujan Grisham
The Honorable Mark Pocan
The Honorable Niki Tsongas
The Honorable Stacey Plaskett