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February 23, 2017

VIA ELECTRONIC TRANSMISSION

The Honorable Jeff Sessions
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Sessions:

In the midst of ongoing, fast-paced litigation challenging Executive Order 13769, titled “Protecting the Nation from Foreign Terrorist Entry into the United States,” Acting Attorney General Sally Yates ordered the Department of Justice not to defend the Order. In a number of those cases, Justice Department attorneys had only a few days to draft briefs or prepare for hearings at the time of Ms. Yates’ order to stop working on them. Given the very short timeframe the Department attorneys had, Ms. Yates’ instruction to them not to defend the Executive Order meaningfully reduced their preparation time, even though she was fired late on the night of January 30. As a result, the Department attorneys were not as prepared to defend the Executive Order in court as they would have been without Ms. Yates’ interference.

For example, just a few days later at the hearing on the state of Washington’s motion for a temporary restraining order, the Department attorneys did not have relevant factual information on hand to answer the judge’s question about the number of terrorism-related arrests of nationals from the countries at issue in the Executive Order. As a result, they were unable to enter facts into the record to dispute the judge’s false claim that there had been none. This likely affected his decision to grant the motion for a temporary restraining order. In the appeal on that issue, the importance of that omission became clear, and was part of the basis of the appeals court’s ruling against the President.

In short, it looks like Ms. Yates’ action may have substantially harmed the Justice Department’s initial ability to defend the Executive Order. It is important to determine the extent to which Ms. Yates’ actions may have sabotaged the government’s defense in that litigation. Accordingly, please provide Ms. Yates’ emails as well as records of any calls and meetings she had during the relevant period.

President Trump issued Executive Order 13769 on Friday, January 27, 2017. Over that weekend and early into the following week, numerous individuals who were subject to the Executive Order's restrictions filed lawsuits challenging it. On Monday, January 30, the state of Washington also filed a lawsuit challenging it. In a number of the lawsuits, including the one brought by Washington, the plaintiffs immediately moved for temporary restraining orders, seeking to prohibit the government from enforcing the Executive Order.¹ Even in the best of circumstances, government attorneys often work around-the-clock to respond quickly to motions for temporary restraining orders and to prepare for hearings on those motions, sometimes only having a few days to do so. Every minute counts.

On the very same day Washington moved for a temporary restraining order, January 30, Ms. Yates issued her letter ordering Justice Department attorneys not to defend the Executive Order for as long as she was the Acting Attorney General.² Notably, Ms. Yates did not claim that she could not constitutionally defend the President's Executive Order. Nor did she claim that she could not offer good faith defenses of its legality in court. Although the Justice Department's Office of Legal Counsel had approved the legality of the Order, Ms. Yates attempted to justify her decision by claiming that her job is not the same as the job of the Office of Legal Counsel. She asserted that her job included passing judgment on whether a policy choice is "wise or just."

Having decided she personally found the Order neither wise nor just, she apparently chose not to raise her concerns directly with the President, but rather instructed the entire Department to stop defending it in the ongoing litigation. Even commentators who took issue with the Executive Order believed her directive to stop the entire Justice Department from defending the Order in middle of frenetic ongoing litigation was improper.³ Of course, the President fired her late that night.

On January 30, the day Ms. Yates put the brakes on the Justice Department's efforts to defend the Executive Order, there were more than two dozen active cases challenging the Order, with hearings scheduled to take place within a few days in a number of the cases.⁴ Even though Ms. Yates was fired late on the night of January 30, the loss of much of that working day presumably damaged the government's ability to defend itself properly. At the very least, the attorneys had less time to prepare than they otherwise would have. Moreover, the likely results of this truncated prep time were clear at the February 3 hearing in the Washington case.

¹ E.g., *Aziz v. Trump*, 17-cv-116 (E.D. Va.); *Louhghalam v. Trump*, 17-cv-10154 (D. Mass.); *Vayeghan v. Kelly*, 17-cv-00702 (C.D. Ca.); *State of Washington v. Trump*, 17-cv-00141 (W.D. Wash.); *Alqaissi v. Trump*, 17-cv-00487 (E.D.N.Y.); *Doe v. Trump*, 17-cv-00126 (W.D. Wash.); *Hassanpour v. Trump*, 17-cv-00270 (N.D. Tex.).

² Jonathan Adler, *Acting Attorney General Orders Justice Department Attorneys Not to Defend Immigration Executive Order*, THE WASHINGTON POST (Jan. 30, 2017).

³ E.g., Benjamin Wittes, *What Yates Should Have Done*, LAWFARE (Jan. 30, 2017); Jack Goldsmith, *Quick Thoughts On Sally Yates' Unpersuasive Statement*, LAWFARE (Jan. 30, 2017); see Aaron Blake, *Sally Yates Is Now a Martyr For the Anti-Trump Movement, But Legally Speaking, It's More Complicated*, THE WASHINGTON POST (Jan. 31, 2017).

⁴ E.g., *Louhghalam v. Trump*, 17-cv-10154 (D. Mass.); *Vayeghan v. Kelly*, 17-cv-00702 (C.D. Ca.).

At that hearing, the judge asked the Justice Department attorney:

Judge Robart: How many arrests have there been of foreign nationals for those seven countries since 9/11?

Justice Department: Your Honor, I don't have that information.

The judge then erroneously stated:

Judge Robart: Let me tell you. The answer to that is none, as best I can tell. So, I mean you're here arguing on behalf of someone that says: We have to protect the United States from these individuals coming from these countries and there's no support for that. ... I'm ... asked to look and determine if the Executive Order is rationally based. And rationally based to me implies that to some extent I have to find it grounded in facts as opposed to fiction.

The judge's claim is factually incorrect.⁵ But the Justice Department attorneys, whose preparation had been truncated by Ms. Yates, did not have the relevant information on hand to defend the Executive Order against the judge's false factual claims.⁶ The judge then issued the temporary restraining order, taking the extreme step of applying it nationwide, thus temporarily stopping the most of the Executive Order in its tracks. The government filed a motion with the appeals court for a stay of the district court's order pending appeal. But the factual record in the appeals court is limited to the record that was before the district court.⁷ So the damage was done.

Accordingly, at the hearing on that appellate motion, the continuing effects of Ms. Yates' cutting short the Justice Department's preparation time for the initial hearing were apparent. Echoing the question from the district court, Judge Friedland asked the Justice Department attorney: "Has the government pointed to any evidence connecting these countries with terrorism?" Although the Justice Department attorney did not specifically fault Ms. Yates' shortening of their prep time, he stated: "These proceedings have been moving very fast," and referred to the Congressional determination regarding the terrorism risks from the countries. In response, Judge Canby referenced the exchange from the district court hearing, stating:

⁵ Eric Tucker, *Fact Check: No Arrests From 7 Nations in Travel Ban? Judge In Seattle Was Wrong*, THE ASSOCIATED PRESS (Feb. 6, 2017); *White House Fires Back at Immigration Order Critics with List of Terror Arrests*, FOX NEWS (Feb. 8, 2017). In fact, in June of 2016, you and Senator Cruz sent a letter to President Obama containing substantial data from the Justice Department documenting this issue. Letter from Senator Jeff Sessions and Senator Ted Cruz to President Obama (June 14, 2016); see Judson Berger, *Anatomy of the Terror Threat: Files Show Hundreds of US Plots, Refugee Connection*, FOX NEWS (June 22, 2016) (citing the letter and data from spreadsheets attached to it).

⁶ It is unclear why the judge failed to take judicial notice of the numerous convictions of people from those countries on terrorism-related offenses.

⁷ FED. R. APP. P. 10.

In the transcript of the hearing in the district court, the district court asks the representative of the Department of Justice, “you’re in the Department of Justice, how many federal offenses have we had being committed by people who came in with visas from these countries?” and the ultimate answer was there haven’t been any.

The Justice Department attorney responded, stating: “These proceedings have been moving quite fast and we’re doing the best we can.” He went on to begin to correct the judges’ error, describing Somalis connected to Al Shabaab who had been convicted, but before he could provide facts about relevant convictions, Judge Friedland cut him off because those convictions had not been in the record in the district court proceeding, interjecting:

Judge Friedland: Is that in the record - can you point us to where in the record you’re referring?

Justice Department: It is not in the record. There have also been other examples, but again, you’re correct, these are not in the record. ... [W]e definitely would like the opportunity to present evidence back in the district court.

In short, important information about terrorist convictions, which was relevant to the Justice Department’s ability to defend the Executive Order, did not make it into the record, and this very well may have been a result of Ms. Yates’ shortening of the attorneys’ preparation time.

After the appellate hearing, the 9th Circuit panel ruled against the Justice Department’s motion to stay the district court’s temporary restraining order. One of the factors in its decision was weighing the balance of harms, and it sided with the state of Washington against the government because: “The Government has pointed to no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States.”

So, it appears that the government’s loss of the motion and appeal may well be a direct result of Ms. Yates’ action. While the concept of ineffective assistance of counsel is limited to criminal cases, if it applied in civil cases it would surely be relevant here. Ms. Yates was supposed to represent her client, instead she actively took measures intended to ensure her client would lose.

The effects of her action will be felt far beyond the litigation on this Executive Order. Having political appointees from a prior administration stay on during the early days of a new administration encourages stable transitions between administrations while new appointees are in the confirmation process. When a holdover appointee uses that position to sabotage the incoming administration over policy differences, future administrations will be more likely to fire previous political appointees on day one, potentially leading to more dangerously rocky transitions. These stunts have consequences.

In order for the Committee to evaluate the intent behind Ms. Yates' action and determine whether Congress should consider any corrective action to prevent similar disruptions in the future, please provide the following by no later than March 9, 2017:

1. All emails to, from, copying, or blind-copying Ms. Yates from January 20, 2017, through January 31, 2017. Please provide the emails in .pst format. If any emails have been deleted or are otherwise inaccessible, please explain why and make referrals to the National Archives, as appropriate. Please include all emails from both her classified and unclassified accounts.
2. Records of all calls Ms. Yates had from January 20, 2017, through January 31, 2017.
3. Records of all meetings Ms. Yates had from January 20, 2017, through January 31, 2017.
4. Records of all correspondence Ms. Yates sent from January 20, 2017, through January 31, 2017.

The responsive documents may include both unclassified and classified materials. Please send all unclassified material directly to the Committee. In keeping with the requirements of Executive Order 13526, if any of the responsive documents do contain classified information, please segregate all unclassified material within the classified documents, provide all unclassified information directly to the Committee, and provide a classified addendum to the Office of Senate Security. Although the Committee complies with all laws and regulations governing the handling of classified information, it is not bound, absent its prior agreement, by any handling restrictions or instructions on unclassified information unilaterally asserted by the Executive Branch.

Thank you for your attention to this matter. If you have any questions, please contact Patrick Davis of my Committee staff at (202) 224-5225.

Sincerely



Charles E. Grassley
Chairman
Committee on the Judiciary

cc: The Honorable Diane Feinstein
Ranking Member
Senate Committee on the Judiciary

The Honorable Michael E. Horowitz
Inspector General
United States Department of Justice