

Congress of the United States
House of Representatives
Washington, DC 20515

March 19, 2014

Honorable Jeh Johnson
Secretary
Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Johnson:

We write this letter as a follow up to a letter sent by Chairman Goodlatte and Congressman Jason Chaffetz on November 25, 2013. As discussed in the November 25th letter, we became aware of a Department of Homeland Security (DHS) draft final regulation (Billing Code 9111-28) to lift the longstanding prohibition on Libyans entering the United States to work in aviation maintenance, flight operations, or to study or train in nuclear-related fields. Under the terms of this draft final regulation, removal of the prohibition will go into effect without prior notice and comment. The prohibition (at 8 CFR §214.5) was wisely put into place in 1983 after a series of terrorist incidents involving Libyan nationals. The Administration's draft regulation justifies lifting this ban by claiming the United States' relationship with Libya has been "normalized."

We raised concerns, as, clearly, the U.S. relationship with Libya is anything but normal, as evidenced by the September 11th assault on the U.S. compound in Benghazi, Libya and horrific murder of our ambassador to that country over a year ago. Not only did four Americans die on that date, but, as we previously documented, numerous other terror threats have continued from Libya in recent months.

As we discussed in our November 25th letter, the long-standing prohibition was put in place by then-President Reagan's administration in order to protect the homeland against serious threats from terrorists from a particularly unstable and dangerous country – characteristics of Libya that persist today, regardless of any progress that may have been made following the removal of Muammar Gaddafi from power and attempts to improve relations with the fragile Libyan government in Tripoli. Unfortunately, the current regulation is needed as much now as ever before. Any such policy change is not only misguided but dangerous. The terror threat continues, and numerous news reports document recent terror-related activity involving Libyans. Yet the letter we sent to DHS on November 25, 2013 remains unanswered.

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The final draft regulation is neither prudent nor wise. According to the draft final regulation, the rule would allow Libyans to come to the United States to study or obtain training in aviation maintenance, flight operations, or nuclear-related fields. The draft rule also indicates, "DHS is of the opinion that the removal of 8 CFR 214.5 is exempt from §553 (Rulemaking) of the APA [Administrative Procedure Act] because it involves a foreign affairs function of the United States to the extent that it will impact relations with a foreign government." Hence, it appears that the rule is planned to be published as a final rule without any prior public notice and comment – essentially allowing the Administration to elevate and expedite the interests of Libyan nationals over the interests of Americans, including those previously affected by terrorism (Libyan or otherwise) who might wish to have notice and provide comment.

At the time of our prior letter, we understood that the final draft regulation was being circulated within DHS. Therefore we asked the following questions:

1. What is the current status of the draft regulation?
2. Does DHS plan to utilize the foreign affairs exception under the APA and publish this rule without prior public notice and comment?
3. What political appointees at DHS headquarters were involved in the development, promotion, or drafting of this draft regulation?
4. What political appointees in DHS components were involved in the development, promotion, or drafting of this draft regulation?
5. To what extent was the White House aware of this draft regulation?
6. To what extent were the Department of State and the Department of Defense involved in developing this regulation?
7. Has Jeffrey Feltman, the former Assistant Secretary of State for Near East Asian Affairs during the attack on the consulate in Benghazi, been in any way associated with the conception or development of this draft regulation?

Since November 25, 2013, House Judiciary Committee staff has contacted DHS over half a dozen times to determine the status of our inquiry. After these numerous inquiries, staff was informed on February 4, 2013, that the administration would provide a response to the letter "in about one week's time." However, the Committee did not receive a response within the promised timeframe. Staff followed up again, and DHS did not respond until March 1, 2014, when it indicated that it had sent "inquiries to all the relevant offices." On March 10, 2014, DHS again indicated that it had sent "inquiries to all the relevant offices."

On February 7, 2014, your Chief of Staff, Christian Marrone, issued a "Memorandum for All Component Heads," entitled "Secretary's Guidance on Responding to Members of Congress." According to the memo you expect "the Department to respond to Congress in a direct,

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courteous, and timely manner.” This memo implements a process that "affords the Department a ten (10) business day response time from the receipt of the inquiry to the transmittal of the response to Congress." The memorandum further states, "If a Component recognizes that preparation of a complete answer will require additional time, the Component must draft a substantive interim response to the Member of Congress indicating the reason why more time is needed and the date by which the Department will provide the Member(s) our final response."

In the short time that this policy has been in effect, your staff has already failed to comply with it. We have not received a final response or even an interim response to our inquiry. We certainly have not received a "date by which the Department will provide the Member(s) [your] final response."

Of even greater concern, we have learned that DHS already has moved forward with this regulation and sent it to the Office of Management and Budget (OMB) for review. DHS moved forward with the rule after we requested and did not receive information from DHS. A cursory review of the publicly available information on OMB's website demonstrates that DHS sent the regulation entitled, "Rescinding Suspension of Enrollment for Certain F and M non-immigrant Students from Libya and Third Country Nationals acting on behalf of Libyan Entities" (RIN: 1653-AA69) to OMB on January 1, 2014. While this rule is in the final stages of review prior to publication, the Administration continues to ignore Congressional inquiries.

In light of the continued national security threat to America, we find the planned policy reversal to be dangerous and irresponsible. The decision to lift the ban on allowing nationals of such a terror-plagued country to come to the U.S. to engage in flight-related training is particularly disturbing in light of the role such training played in the preparations for the September 11, 2001 terror attacks. Further, lifting the ban on Libyan nationals to come to the U.S. to study nuclear science and related fields is incomprehensible in light of the peril the U.S. and its allies in the Near East face from the potential acquisition of nuclear weapons technology by terrorists or hostile nations in the region.

We will convene a joint hearing between the House Judiciary Committee's Subcommittee on Immigration and Border Security and the House Oversight and Government Reform Committee's Subcommittee on National Security in the immediate future to determine the status of the rule and the impetus behind it. DHS will be called to testify in order to respond to Congress since it has failed to do so as of the date of this letter.

Should you require additional information, please contact House Judiciary Committee Counsel, Dimple R. Shah at 202-225-3926 or House Oversight and Government Reform Committee Professional Staff Member, Sang Yi at 202-225-5074.

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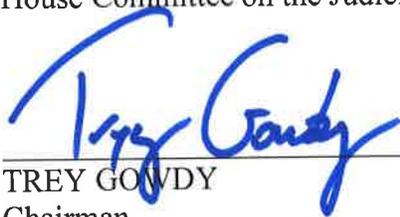
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Sincerely,



BOB GOODLATTE
Chairman
House Committee on the Judiciary



TREY GOWDY
Chairman
Subcommittee on Immigration and Border
Security
House Committee on the Judiciary



DARRELL E. ISSA
Chairman
House Committee on Oversight and
Government Reform



JASON CHAFFETZ
Chairman
Subcommittee on National Security
House Committee on Oversight and
Government Reform