



November 13, 2017

Gen. John Kelly, ret.
Chief of Staff
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Honorable Jeff Sessions
Attorney General
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David Apol
Acting Director
Office of Government Ethics
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Dear Sirs:

We write to request that your offices exercise the appropriate authority to investigate or make recommendations regarding potential violations of federal laws and regulations arising from Department of Homeland Security (DHS) Secretary nominee Kirstjen Nielsen accepting services from a consultant who represents DHS contractors.

On November 6, 2017, *CyberScoop* reported that:

A former lobbyist representing companies with business before the Department of Homeland Security is leading the confirmation preparation for DHS secretary nominee Kirstjen Nielsen, assigning government staffers to prepare policy memos and coordinating her paperwork submissions to the Senate — an unprecedented role that’s causing consternation among some administration officials.¹

The former lobbyist is Thad Bingel, a consultant with the Command Group, “a ‘full service’ security consultancy,” according to *CyberScoop*:

Bingel’s clients, according to former officials, include companies competing for DHS business, an apparent conflict of interest that has caused a lot of heartache at the department, according to current and former officials.

One of them, Elbit Systems, the U.S. subsidiary of an Israeli defense contractor, has a \$145 million DHS deal dating back to 2014 to build part of the department’s virtual border along the southwestern border. Earlier this year, as part of its planning for President Trump’s border wall, the department announced it would be doubling the virtual border, putting tens of millions more contracting dollars on the table.

Therefore, it appears that Nielsen has been guided through the confirmation process by an individual whose clients have hundreds of millions in contracts before the agency she has been nominated to lead. This implicates several potential violations of federal laws and regulations. It also offends common sense notions of the meaning of conflicts of interest.

¹ Shaun Waterman, *Sherpa Leading Nielsen DHS Confirmation Effort Is Lobbyist Tied to Agency Contractors*, *CyberScoop* (Nov. 6, 2016), <https://www.cyberscoop.com/kirstjen-nielsen-dhs-conformation-effort-thad-bingel-border-wall/>.

If Nielsen in her official capacity as Principal Deputy White House Chief of Staff (or, for that matter, any other White House or DHS staffers), are accepting Bingel’s provision of professional services to the government without any compensation, then Nielsen is likely in violation of the Antideficiency Act, which provides that a government employee “may not accept voluntary services for [the] government or employ personal services exceeding that authorized by law.” 31 U.S.C. § 1342.2 An officer or employee who violates this statutory prohibition is subject to disciplinary action, up to and including removal from the federal service. 31 U.S.C. § 1349. In addition, if an executive branch employee violates this provision, the head of the agency “shall report immediately to the President and Congress all relevant facts and a statement of actions taken.” 13 U.S.C. § 1351.

Alternatively, to the extent that Nielsen is accepting services from Bingel in her personal capacity, then Nielsen—as a current White House employee—may be in violation of the executive branch gift rules, which prohibit an employee from soliciting or accepting a gift “because of the employee’s official position” or from a prohibited source. 5 C.F.R. § 2635.202(a)-(b); *see also* 5 U.S.C. § 7353.3 The definition of “gift” includes “services.” 5 C.F.R. § 2635.203(b).⁴

Even if a gift exception were to apply, the factors articulated at 5 C.F.R. § 2635.201 weigh against accepting the gift. Section 2635.201 provides that an employee should consider declining a gift “if they believe that a reasonable person with knowledge of the relevant facts would question the employee's integrity or impartiality as a result of accepting the gift.” *Id.*

² The White House is prohibited from augmenting its appropriations by accepting gifts. *See* Honorable Christopher S. Bond, Gov’t Accountability Office, B-300248 (Jan. 15, 2004) (discussing the general prohibition on augmenting appropriations), <http://www.gao.gov/assets/380/370535.pdf>. In addition, DHS’s gift acceptance policy does not permit the acceptance of voluntary personal services prohibited under 31 U.S.C. 1342. *See* DHS, Directive Number 112-02, Gifts to the Department of Homeland Security (Feb. 11, 2008).

³ “Prohibited source” is defined as any person who: “(1) Is seeking official action by the employee’s agency; (2) Does business or seeks to do business with the employee's agency; (3) Conducts activities regulated by the employee's agency; (4) Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties.” 5 C.F.R. § 2635.203(d).

⁴ There is no indication that the exception for gifts based on a personal relationship applies here. *See* 5 C.F.R. § 2635.204(b).

§ 2635.201(b)(1). Factors to take into consideration include whether:

- “The gift has a high market value;”
- “The gift was provided by a person who has interests that may be substantially affected by the performance or nonperformance of the employee's official duties;” and,
- “Acceptance of the gift would provide the donor with significantly disproportionate access.”

Id. § 2635.201(b)(2).

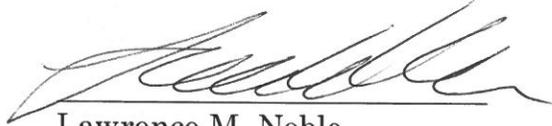
The value of Bingel’s gift is potentially very high, depending on his hourly rate. And Bingel clearly has interests that would be substantially affected by the performance of Nielsen’s official duties: for example, his clients have hundreds in millions in contracts before the same agency Nielsen has been nominated to lead. Moreover, the gratitude that Nielsen will inevitably feel towards Bingel as a result of his valuable gift of personal services will afford him preferential access on behalf of his clients, both now and in the future. Their work together preparing for the Senate confirmation hearing also affords Bingel extensive access to Nielsen, something any lobbyist with interests affected by DHS would desire to have.

More broadly, there is a substantial risk that Bingel’s influence could undermine the integrity of the contracting process. The risk of improper influence over government contracts is particularly concerning when it comes to an agency like DHS, which grants billions in federal contracts every year; in FY 2017, for example, DHS handed out over \$23 billion in taxpayer funds to businesses like Bingel’s clients.⁵

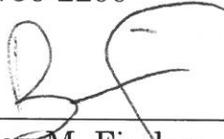
For the above reasons, we request that your offices investigate or make recommendations regarding these potential violations of federal laws and regulations. Thank you for your attention to this matter.

⁵ See Agency Profile: Department of Homeland Security FY2017, USAspending.gov, <https://www.usaspending.gov/Transparency/Pages/AgencySummary.aspx?AgencyCode=7000&FiscalYear=2017> (accessed Nov. 9, 2017).

Respectfully submitted,



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