

Center for Constitutional Rights

Discrimination, Detention, and Deportation: Immigration & Refugees

<https://ccrjustice.org/letter-john-roth-dhs-inspector-general>

Policy Issue Resources

February 6, 2017

Via Email and Overnight Mail

John Roth
DHS Inspector General
Office of Inspector General/MAIL STOP 0305
Department of Homeland Security
245 Murray Lane SW
Washington, DC 20528-0305

Re: Abuses in the Aftermath of the January 27, 2017 Executive Order and Important of Access to Counsel in Airport Detention

Mr. Roth,

The undersigned organizations, the Kathryn O. Greenberg Immigration Justice Clinic and the Center for Constitutional Rights, write to share 26 accounts that document the systemic abuses and violations of the rights of individuals lawfully entering the United States through airports in the days following the issuance of President Trump's January 27, 2017 executive order (Executive Order).^[1] Because many of these abuses and rights violations would have been prevented if those detained at airports had been permitted to communicate with the legions of lawyers who were willing to provide free legal counsel, and in order to prevent similar rights violations from occurring in the future, we recommend that the Office of Inspector General develop mechanisms to ensure that individuals detained in airports can communicate with legal counsel.^[2]

President Trump's January 27, 2017 Executive Order brought chaos to our nation's international airports and the lives of those detained within them. Customs and Border Protection (CBP), which is responsible for facilitating the entry of authorized travelers to the United States, had no guidance on how to implement the directive when it was issued,^[3] but nonetheless began detaining and deporting individuals it believed were covered by the Executive Order, including longtime lawful residents of the United States. Within roughly a day, the Executive Order had been partially enjoined by five courts,^[4] and, a day after that, the White House changed its own interpretation of the Executive Order.^[5]

Even putting aside the serious constitutional questions raised by the Executive Order, the havoc that it wreaked in our admission system and devastating consequences created a context in which the advice of trained legal counsel was essential to vindicate fundamental rights. This letter, which is based on many discussions and 26 declarations from attorneys and people affected, describes: the turmoil after the Executive Order was issued; the fear and confusion among people detained for long periods of time, pressured to waive rights, and in some cases deported in violation of court orders; and CBP's unlawful policy of preventing lawyers from communicating with the detainees at a moment when legal counsel was critical. These accounts and the analysis below leave no doubt that, to prevent widespread rights violations like this in the future, CBP must implement a system for ensuring that individuals detained in airport inspection facilities can communicate with counsel.

I. January 27, 2017 Executive Order & Aftermath

On January 27, 2017, President Donald Trump issued an Executive Order entitled Protecting the Nation from Foreign Terrorist Entry Into the United States which, among other things, suspended the U.S. Refugee Admissions Program (USRAP) and prohibited certain individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen from entering the United States.^[6] The Executive Order thus imposed a policy of detaining and deporting refugees admitted through the USRAP and visa holders from the seven Muslim-majority countries who arrive at U.S. borders and airports, notwithstanding the U.S. government's previous determination that these individuals passed a rigorous vetting process and could enter the United States.

As soon as the order was issued, CBP began denying entry to noncitizens from the seven Muslim-majority countries targeted by the Executive Order, including those who had boarded airplanes with authorization to enter the United States and who, in mid-air, purportedly became inadmissible because of the Executive Order.^[7] When these individuals landed at airports in the United States, CBP prevented them from leaving the airports, detained them in inspection facilities inside the airports, and began deporting them.^[8]

Lawyers representing these individuals rushed to airports around the nation, but were categorically prohibited from communicating with the individuals detained inside, even when they presented proof of preexisting attorney-client relationships.^[9] As word spread that individuals were being detained and deported and needed legal counsel, large numbers of lawyers arrived at the airports to offer pro bono

assistance to the people held inside.^[10] Families of the detained individuals remained in the airports for hours, attempting to understand what was happening and hoping that their loved ones were not being deported.^[11]

To prevent their clients from being deported, a coalition of lawyers filed *Darweesh v. Trump*, a nationwide class action challenging the Executive Order as it relates to refugees admitted through USRAP and visa holders from seven specified countries, and sought a stay of removal pending resolution of the case, in the Eastern District of New York.^[12] Other lawyers around the nation began filing habeas actions to prevent the deportation of various classes of individuals and, in some cases, obtain additional protections such as attorney access to individuals detained in the airports.^[13] The evening of January 28, 2017, the District Court for the Eastern District of New York imposed a nationwide order preventing the government from, on the basis of the Executive Order, denying admission to refugees admitted through USRAP, and visa holders and anyone else from seven specified countries who were legally authorized to enter the United States.^[14] Shortly thereafter, four other district courts issued similar orders.^[15]

Even after those orders were issued, CBP continued to prevent attorneys from accessing clients held in airport inspection facilities, including when prohibiting access violated an order of the District Court for the Eastern District of Virginia.^[16] Individuals remained in detention for many hours after the order was issued, some were deported in violation of court orders,^[17] and others were intimidated into waiving their right to enter the United States without ever having an opportunity to consult with the lawyers who were in the same airport and waiting to advise them.^[18]

II. CBPs Prohibition of Attorney Access & Rights Violations

Although CBP has long had a policy of denying attorneys access to individuals held at airports while screening is completed, the crisis that occurred in the days following the Executive Order shows why there must be some mechanism that allows individuals detained in airports to access counsel.

Both before and after courts enjoined the operation of the Executive Orders entry ban, CBP maintained an impenetrable wall between these detained individuals and lawyers notwithstanding the extenuating circumstances. As the attached declarations and brief summaries below make clear, the absence of counsel meant that detainees were alone and often unable to prevent unlawful deportations, arbitrary and unexplained detention, or serious risks to their health. Ironically, the individuals described in these accounts were the fortunate ones, as they or their families ultimately made contact with attorneys. These declarations do not include the accounts of individuals who were detained and deported and have not managed to tell their stories to counsel, or were afraid to do so. They represent only a very small sample of a wide-scale problem.

Deprivation of Rights

Violation of Court Orders

Length and Conditions of Detention

In sum, these sample accounts reveal circumstances far different than the ordinary inspection process, and far more like executive detention, where people are deprived of critical information, unable to avail themselves of their right to challenge their detention, and coerced into waiving critical rights. Some of these detentions lasted more than thirty hours *fifteen times* the length that CBP has suggested is typical and detainees had no idea if or when or how they could obtain their release.^[37] Even after attorneys brought medical risks, child custody decisions, and court orders to CBP officers attention, the officers prevented attorneys from speaking with their clients and rejected detainees pleas to call their attorneys.^[38] During this time, the very harms that the assistance of counsel should prevent came to pass: individuals were detained and deported without the opportunity to present claims that courts have concluded are likely to succeed on the merits,^[39] and others were coerced into waiving their right to enter the United States because they did not understand their legal options or that they had rights.

III. Prohibiting Individuals Detained in Airport Inspection Facilities Violates the Law

Access to counsel for individuals detained in airport inspection facilities is not just important to prevent the consequences described above, but it is also required to ensure that noncitizens can avail themselves of their constitutional right to challenge unlawful executive detention.

The writ of habeas corpus is essential to insure that miscarriages of justices within its reach are surfaced and corrected,^[40] and that access to the courts is adequate, effective, and meaningful.^[41] As a practical matter, this means that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held or may be removed pursuant to the erroneous application or interpretation of relevant law.^[42] In the immediate wake of the Executive Order, the remedy served its purpose for those who could access its protections: for many, it made the difference between retaining the right to enter the United States and returning to families or much needed safety, and, on the other hand, deportation to a places where some face physical danger. It is for reasons like this that courts have recognized that [a] meaningful opportunity to challenge detention demands that these individuals have access to counsel because, for them, access to the Court means nothing without access to counsel.^[43] Therefore, in circumstances like these, the right to petition for habeas corpus also includes the right of access to counsel.^[44]

* * *

Permitting individuals detained at airports access to legal counsel ensures that their rights will be protected and provides an effective structural check against overzealous and unlawful executive detention. As the events of the past week made clear, situations in which these protections are necessary do arise, and, even in the context of this same Executive Order, could arise again. In light of that and the accounts described above, we urge the OIG to recommend that DHS create a mechanism for individuals detained at airports to

communicate with attorneys.

Such a mechanism can serve the governments interests as well, as CBP and individuals detained in airports have a mutual interest in conducting the process expeditiously. Indeed, detainees ability to communicate with counsel can render the process more efficient by providing clarity on complex questions of fact and law in this notoriously arcane field, and allowing them to understand the existence and ramifications of various options.^[45] Permitting consultation with counsel need not mean adversarial representation at every moment of inspection or open legal clinics in the inspection area. It could simply mean creating a separate space where individuals can seek pro bono legal counsel or call free legal providers. At a minimum, CBP should ensure that individuals are aware of opportunities to consult with pro bono counsel and provide individuals detained in airports for lengthy periods of time or considering withdrawing an application for admission the opportunity to consult with counsel.

The chaos following the issuance of the Executive Order and CBPs refusal to permit attorneys to communicate with clients undoubtedly led to many more coerced waivers and unlawful deportations than we describe here. To prevent another rights violation *en masse*, as we saw last weekend, CBP must end its policy of preventing individuals detained in airports from accessing counsel.

Respectfully,

Baher Azmy Lindsay Nash

Legal Director Kathryn O. Greenberg Immigration

Shayana Kadidal Justice Clinic

Center for Constitutional Rights Benjamin N. Cardozo School of Law

666 Broadway, Floor 7 55 Fifth Avenue, Rm. 1108

New York, NY 10012 New York, NY 10003

bazmy@ccrjustice.org lindsay.nash@yu.edu

(212) 614-6427 (212) 790-0433

[1] These declarations were gathered through a collective effort of the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law, the Immigrants Rights Project of the American Civil Liberties Union (ACLU), a number of ACLU affiliates, and the National Immigration Law Center. Many thanks to all of the individuals listed on page 1 of the Appendix who provided declarations and affidavits while providing critical legal services to individuals affected by the entry ban, and to Immigration Justice Clinic students Javeria Ahmed, Jessica Stertzer, and Elizabeth Wu for their assistance with this submission.

[2] Individuals detained in airports are held in secure inspections facilities within the airport. During that time, they go through secondary inspection, which is process in which CBP questions travelers [i]f there appear to be discrepancies in documents presented or answers given, or if there are any other problems, questions, or suspicions that cannot be resolved within the exceedingly brief period allowed for primary inspection. 62 Fed. Reg. at 10318.

[3] Michael D. Shear and Ron Nixon, *How Trumps Rush to Enact an Immigration Ban Unleashed Global Chaos*, N.Y. Times, Jan. 30, 2017, at A1, available at <https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html> (reporting that CBP, the Department of Defense, and other critical implementing agencies were given little notice or instructions to implement the executive order); Evan Perez, Pamela Broen, and Kevin Liptak, *Inside the confusion of the Trump executive order and travel ban*, CNN, <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/> (Jan. 20, 2017).

[4] See Temporary Restraining Order, *Tootkaboni v. Trump*, No. 17-cv-10154 (D. Mass. Jan. 29, 2017); Order Granting Emergency Motion for Stay of Removal, *Doe v. Trump*, No. 17-cv-126 (W.D. Wash. Jan. 28, 2017); Order, *Vayeghan v. Trump*, No. 17-cv-0702 (C.D. Cal. Jan. 28, 2017); Temporary Restraining Order, *Aziz v. Trump*, No. 17-cv-116 (E.D. Va. Jan. 28, 2017); Decision and Order, *Darweesh v. Trump*, 17-cv-480 (E.D.N.Y. Jan. 28, 2017).

[5] Compare Evan Perez, Pamela Broen, and Kevin Liptak, *Inside the confusion of the Trump executive order and travel ban*, CNN, <http://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/> (Jan. 20, 2017) (reporting that, late on January 27, 2017, the Department of Homeland Security concluded that the Executive Order applied to lawful permanent residents), with *DHS Statement On Compliance With Court Orders And The Presidents Executive Order*, Dept of Homeland Security (Jan. 29, 2017), available at <https://www.dhs.gov/news/2017/01/29/dhs-statement-compliance-court-orders-and-presidents-executive-order> (stating that the Executive Order does not bar the entry of lawful permanent residents).

[6] Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (providing that the suspension of USRAP will last 120 days and the prohibition on admission for individuals from the seven specified countries will last 90 days).

[7] See generally Appx (containing accounts from a sample of the many individuals who left their home counties with authorization to enter the United States and who, upon arrival, were denied entry by CBP solely on account of the Executive Order).

[8] See, e.g., Appx at 7-12 (Abushamma Decl.) (describing her own deportation); Appx at 64-65 (Shebaya Decl.) (describing clients deportation)..

[9] See, e.g., Appx at 52 (Prasad Decl.); Appx at 37 (Kreimer Decl.); Appx at 77-78 (Volko Decl.); see generally Appx.

[10] See generally Appx (containing numerous declarations describing lawyers offering free legal assistance at airports); Elise Viebeck

and Michael Laris, *Hundreds of lawyers descend on airports to offer free help after Trump's executive order*, Wash. Post, Jan. 29, 2017, available at http://wapo.st/2jLJQsX?tid=ss_mail.

[11] See, e.g., Appx at 72-76 (Vafaie Decl.)

[12] Habeas Pet. & Compl., *Darweesh v. Trump*, 17-cv-480 (E.D.N.Y. Jan. 28, 2017).

[13] See, e.g., Habeas Pet., *Tootkaboni v. Trump*, No. 17-cv-10154 (D. Mass. Jan. 29, 2017); Habeas Pet., *Aziz v. Trump*, No. 17-cv-116 (E.D. Va. Jan. 28, 2017).

[14] Order, *Darweesh v. Trump*, 17-cv-480 (E.D.N.Y. Jan. 28, 2017).

[15] See *supra* note 4.

[16] See, e.g., Appx at 14-15 (Calderon Decl.); Appx at 23-30 (Grass Decl.).

[17] See, e.g., Appx at 33-36 (Inlender Decl.).

[18] See, e.g., Appx at 7-12 (Abushamma Decl.); Appx at 79-82 (Vayghan Decl.).

[19] Appx at 7-12 (Abushamma Decl.).

[20] Appx at 79-82 (Vayghan Decl.); see also James Queally & Joel Rubin, *Iranian man barred from entering U.S. lands at LAX; first to return after court order*, L.A. Times, Feb. 2, 2017, <http://www.latimes.com/local/lanow/la-me-ln-iran-return-lax-20170201-story.html>.

[21] Appx at 52-56 (Prasad Decl.).

[22] Appx at 61-63 (Rodriguez Saenz Decl.).

[23] Appx at 14-15 (Calderon Decl.).

[24] Appx at 77-78 (Valko Decl.).

[25] Appx at 83-86 (Dachnisky Decl.).

[26] Appx at 33-35 (Inlender Decl.).

[27] Appx at 23-20 (Grass Decl.).

[28] Appx at 13 (Booker Decl.).

[29] *Id.*; Appx at 48-51 (Masumi Decl.).

[30] Appx at 23-30 (Grass Decl.).

[31] Appx at 66-68 (Tolchin).

[32] Appx at 52 (Prasad Decl.); Appx at 72-76 (Vafaie Decl.).

[33] Appx at 37-41 (Kreimer Decl.).

[34] Appx at 52-56 (Prasad Decl.).

[35] Appx at 69 (Trevio Decl.).

[36] Appx at 57-60 (Pryor Decl.).

[37] In addition to vetting processes that occur prior to entry to the United States, travelers are subject to a primary inspection, which takes approximately 30 seconds to two minutes per air traveler. If a CBP officer has questions about the travelers eligibility to enter the United States, the traveler is referred to secondary inspection, the length of which varies, but CBP estimates can take 15 to 120 minutes per air traveler. U.S. Customs and Border Protection, Preclearance Expansion, Fiscal Year 2015 Guidance for Prospective Applicants, available at https://www.cbp.gov/sites/default/files/documents/Final%20Preclearance%20Guidance_092014.pdf. During this time, individuals are held in group in an inspection area inside the airport and, as a general rule, lawyers are not permitted to enter that area.

[38] See generally Appx.

[39] See *supra* note 4.

[40] *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

[41] *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

[42] *Boumediene*, 553 U.S. at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

[43] *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005); see also *Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004); *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 23 (D.D.C. 2012); *Goodwin v. Oswald*, 462 F.2d 1237,

1241 (2d Cir. 1972) (holding, in case involving communications between prisoners and counsel regarding formation of a prisoners union, a necessary concomitant to the right of access [to the courts] is the right of access to counsel.); *Chandler v. Fretag*, 348 U.S. 3, 10 (1954) (same, in criminal context).

[44] Moreover, the deprivation of the right to counsel creates serious due process concerns and may prevent airport detainees from availing themselves of statutory rights and regulatory rights.

[45] At least as late as 2006, the CBP Inspectors Field Manual recognized that, although 8 C.F.R. 292.5(b) provides that there is no right to representation during the secondary inspection process, [t]his does not preclude . . . [a] inspecting officer, to permit a relative, friend, or representative access to the inspectional area to provide assistance when the situation warrants such action. CBP, Inspectors Field Manual ch. 2.9 (2006). The Inspectors Field Manual has been replaced by the Officers Reference Tool (ORT) but, so far as the undersigned are aware, the ORT is not publicly available.

Get the latest

Join us on the front lines for social justice!

666 Broadway
7th Floor
New York, NY 10012

Main: 212-614-6464
Donations: 212-614-6448
Fax: 212-614-6499

[Contact us](#)

[Privacy Policy](#)

2019 Center for Constitutional Rights

Main: 212-614-6464
Donations: 212-614-6448
Fax: 212-614-6499

[Contact us](#)

[Privacy Policy](#)

2019 Center for Constitutional Rights

Main: 212-614-6464
Donations: 212-614-6448
Fax: 212-614-6499

[Contact us](#)

[Privacy Policy](#)

2019 Center for Constitutional Rights

Get the latest