

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

Statement on Recent Executive Orders

In December 2015, in the wake of a series of horrific terrorist attacks around the world, The Constitution Project’s Liberty and Security Committee issued a statement asking Americans, and particularly their political leadership, to respond in a way that upheld our laws and values. We asked that they consider proposals calmly and deliberately; uphold the right to dissent and the free exercise of religion; resist attempts to target vulnerable groups; and act consistently with the Constitution at all times.¹

An unprecedented series of executive orders recently signed by President Trump, or whose proposed text has been published in the press,² violates all of these core principles, in the name of protecting national security. This occurred almost immediately upon President Trump taking office, rather than in reaction to a known, specific terrorist threat or attack on the United States.

Executive Order 13,769, issued on January 27, 2017,³ bans all nationals of Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen from entering the United States for at least 90 days, forbids the admission of Syrian refugees into the United States indefinitely, and suspends all U.S. refugee admissions for at least 120 days. The order is misleadingly titled “Protecting the Nation from Foreign Terrorist Entry Into the United States”; in fact, it primarily targets on the basis of religion and nationality individuals whom the U.S. government has already determined not to be a threat.

Two other sweeping executive orders regarding immigration were issued on January 25. Executive Order 13,768, “Enhancing Public Safety in the Interior of the United States,”⁴ would overhaul the immigration enforcement system in a way that invites abuse. Instead of prioritizing removal of individuals convicted of serious crimes, the order requires the Secretary of Homeland Security to give equal priority to removing individuals convicted of, charged with, or accused of minor offenses, or deemed a threat by any immigration officer. In effect, this empowers federal and state law enforcement officials to designate any undocumented person as a criminal. The order also instructs the Department of Homeland Security to publish weekly lists of “criminal actions committed by aliens,” and tells agencies to deny non-U.S. persons the

¹ Available at <http://www.constitutionproject.org/wp-content/uploads/2015/12/TCP-Liberty-Security-Committee-Statement-Dec-3-2015.pdf>

² This statement does not address other potential executive orders that are reportedly under discussion, but for which no text is available

³ Available at <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>

⁴ Available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>

protections of the Privacy Act. These steps are particularly disturbing given recent reports of increasing hate crimes and threats against minorities.

Executive Order 13,767, “Border Security and Immigration Enforcement,”⁵ directs the construction of a physical wall along the United States’ border with Mexico. Moreover, it requires the Secretary of Homeland Security to construct detention facilities and detain all individuals facing removal proceedings. At a time when 40,000 people are already detained and immigration courts are facing backlogs so severe that hearings can be postponed for years,⁶ this carries a steep fiscal cost and an even higher humanitarian cost on the men, women, and children subjected to it. It would seriously impede individuals’ ability to obtain legal representation or meaningful court review of any claim for relief from removal.

The press has published several versions of another draft executive order issued in the name of national security. The first version would have withdrawn the prohibition on the CIA operating overseas prisons, expanded military commissions, and instructed the Secretary of Defense to end all transfers from Guantanamo and prepare to send newly captured detainees there.⁷ The second version removes all reference to interrogation policies and military commissions, but maintains the requirement that the Defense Secretary continue to use Guantanamo, including for new captures.⁸

It is unclear what, if any, legal and policy review these orders received before they were signed. It is clear that they threaten to harm fundamental constitutional rights, American values, and innocent people, without any evidence that they will benefit national security.

We call upon President Trump to withdraw the executive orders entirely, or suspend them pending a thorough legal and policy review by all relevant departments and agencies to address these concerns. We also call upon him to respect any court decisions limiting or overturning his executive orders, and refrain from attacks upon judges’ integrity or independence. We call upon him to act with more deliberation and care before taking future executive action, and avoid actions that target minorities, chill dissent, or threaten other core constitutional guarantees.

We ask Congress to use its lawmaking, appropriations, oversight, and advice-and-consent powers on a bipartisan basis to enforce our constitutional safeguards and protect individuals’ fundamental rights.

We ask the courts to defend their independent constitutional role and act as a check on the executive, as they have begun to do in the context of the seven-country travel ban.

⁵ Available at <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>

⁶ E.g. <http://www.humanrightsfirst.org/press-release/immigration-detention-hits-all-time-high>; https://www.nytimes.com/2016/12/01/us/deluged-immigration-courts-where-cases-stall-for-years-begin-to-buckle.html?_r=0

⁷ Available at <https://www.nytimes.com/interactive/2017/01/25/us/politics/document-Trump-draft-executive-order-on-detention-and.html>

⁸ Available at <https://assets.documentcloud.org/documents/3455640/Revised-draft-Trump-EO-on-detainees-and-Gitmo.pdf>

Finally, we call on individuals employed by executive agencies to uphold their responsibility faithfully to execute our laws at all times, and comply fully and promptly with all court orders.

David Cole, National Legal Director, American Civil Liberties Union; Hon. George J. Mitchell Professor in Law and Public Policy, Georgetown University Law Center

Phillip Cooper, Professor of Public Administration, Mark O. Hatfield School of Government, Portland State University

Talbot “Sandy” D’Alemberte, Partner, D’Alemberte & Palmer; Professor, Florida State University; President, Florida State University, 1993-2003; President, American Bar Association, 1991-92; Member, Florida House of Representatives, 1966-1972

John W. Dean, Counsel to President Richard Nixon; former Goldwater Chair of American Institutions at Arizona State University

Mickey Edwards, Vice President, Aspen Institute; Lecturer at the Woodrow Wilson School of Public and International Affairs, Princeton University; former Member of Congress (R-OK) and Chairman of the House Republican Policy Committee

Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress (Ret.)

Michael German, former F.B.I. Agent (1988-2004)

Dr. David P. Gushee, Distinguished University Professor of Christian Ethics; Director, Center for Theology and Public Life, Mercer University

Azizah al-Hibri, Professor Emerita, The T.C. Williams School of Law, University of Richmond; Founder, KARAMAH: Muslim Women Lawyers for Human Rights

David Irvine, Brigadier General (Ret.), U.S. Army; former strategic intelligence officer, U.S. Army Reserve; taught prisoner-of-war interrogation for 18 years at the Sixth U.S. Army Intelligence School; former Republican state legislator (Utah)

James R. Jones, former U.S. Ambassador to Mexico; former Member of Congress (D-OK)

Christopher Kelley, Lecturer in Political Science, Miami University (OH)

Claudia J. Kennedy, Lieutenant General (Ret.) U.S. Army; former Deputy Chief of Staff for Intelligence at Headquarters, Department of the Military

Alberto Mora, Senior Fellow, Carr Center for Human Rights Policy, Harvard Kennedy School; Former General Counsel, Department of the Navy.

Joe Onek, Principal, The Raben Group; Senior Counsel, Speaker of the House Nancy Pelosi, 2007-2011; Senior Coordinator for rule of law, State Department, 1999-2001; Principle Deputy Associate Attorney General, Department of Justice, 1997-1999; Deputy Counsel, President Jimmy Carter, 1979-1981

Mary O. McCarthy, Consultant, Freedom of Information and Privacy Act; Associate Deputy Inspector General, Investigations, Central Intelligence Agency, 2005-2006; Visiting Fellow,

Center for Strategic and International Studies, 2002-2004; Senior Policy Planner, Directorate of Science and Technology, Central Intelligence Agency, 2001-2002; Senior Director, Special Assistant to the President, National Security Council, 1998-2001; Director for Intelligence Programs, National Security Council, 1996-1998; National Intelligence Officer for Warning (Deputy 1991-1994), 1994-1996

Thomas R. Pickering, former Under Secretary of State for Political Affairs, 1997-2000; United States Ambassador and Representative to the United Nations, 1989-1992; former Ambassador to the Russian Federation, India, Israel, El Salvador, Nigeria, and Jordan

Paul R. Pillar, Nonresident Senior Fellow, Center for Security Studies, Georgetown University; Intelligence Officer (positions included Deputy Chief of DCI Counterterrorist Center, National Intelligence Officer for the Near East and South Asia, and Executive Assistant to the Director of Central Intelligence), Central Intelligence Agency and National Intelligence Council, 1977-2005

Deborah N. Pearlstein, Associate Professor of Law, Cardozo Law School, Yeshiva University

Jack N. Rakove, W. R. Coe Professor of History and American Studies and Professor of Political Science, Stanford University

Peter Raven-Hansen, Glen Earl Weston Research Professor of law, George Washington University Law School

Louis Michael Seidman, Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center

David Skaggs, Adjunct Professor of Law, University of Colorado Law School; former Member of Congress (D-CO) and Member of the Appropriations Committee and Permanent Select Committee on Intelligence

Nancy Soderberg, President and CEO, Soderberg Global Solutions; Distinguished Visiting Scholar, University of North Florida; President, U.S. Connect Fund, 2009-2013; Vice President, International

Neal R. Sonnett, Member, ABA Board of Governors, 2009-2012; Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism; former United States Attorney and Chief of Criminal Division for the Southern District of Florida; former President, National Association of Criminal Defense Lawyers

Gerald E. Thomson, MD, Professor of Medicine Emeritus, Columbia University; former President, American College of Physicians

Don Wallace, Chairman, International Law Institute, Georgetown University Law Center

John W. Whitehead, President, The Rutherford Institute

Lawrence B. Wilkerson, Col. (Ret.) U.S. Army; Distinguished Visiting Professor of Government at the College of William and Mary; Former Chief of Staff to Secretary of State Colin Powell

Affiliations are for identification purposes only