

An Analysis and Brief History of Foreigners' Rights under the US Constitution:
An Examination of US Border Policies with Regard to Personal Devices

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In the first weeks of the Donald J. Trump Administration, he has issued a large number of executive orders. The object of inquiry in the instant case is Executive Order (EO) 13769 and how it affects visiting foreign nationals with previously approved travel visas, students and educators in particular.¹ It has been the subject of a great deal of criticism and, at the time of this writing, is enjoined and restrained via a temporary restraining order (TRO) issued from the District Court for the Western District of Washington. The TRO was issued amid the EO's resulting chaos in part because it included persons already airborne on their way to the United States. Upon review, the 9th Circuit Court has upheld the TRO, effectively making the enforcement of the offending EO illegal while it lasts.² While the order was still in effect, the Trump Administration insisted that just over 100 people were affected but in truth the subject population was closer to 90,000.³ The Administration number includes only those who had been barred from boarding planes while the order was in effect. One of them was Kjell Magne Bondevik, former prime minister of Norway, because his passport indicated that he had once

¹ Donald J. Trump, Executive Order 13769, "Protecting the Nation from Foreign Terrorist Entry into the United States," (27 January 2017), 82 Fed. Reg. 8977. <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>

N. B.: The versions of Executive Order 13769 and four others posted on the White House website contain errors, including erroneous references to nonexistent or irrelevant laws. The version posted by the Federal Register is, by law, the official and controlling text. As such, when they differ, the Federal Register text is used herein. See: Gregory Korte, "White House Posts Wrong Versions of Trump's Orders on Its Website," *USA Today* (14 February 2017). <http://www.usatoday.com/story/news/politics/2017/02/14/white-house-posts-wrong-versions-trumps-orders-its-website/97845888/>; Fed. R. Civ. Pro. 65(b).

² *State of Washington and State of Minnesota v. Donald J. Trump, Rex W. Tillerson, and John F. Kelly*, 17-cv-00141 (9th Cir.) (9 February 2017); *State of Washington v. Trump*, C-17-0141-JLR, 2017 WL 462020 (WDWA) (3 February 2017).

³ Kevin Drum, "Chart of the Day: 90,000 People Are Affected by Trump's Travel Ban. About 80,000 Are Muslim," *Mother Jones* (31 January 2017). <http://www.motherjones.com/kevin-drum/2017/01/chart-day-90000-people-are-affected-trumps-travel-ban-about-87000-are-muslim>

visited Iran.⁴ Another such case involves the forced split in the family of one Shamis Fallah, a naturalized citizen born in Syria but now a lieutenant in the US Navy.⁵ The larger number includes those detained, contrary to their Fourth, Fifth, and Fourteenth Amendment rights, and those already within the United States who would be unable to return to the country should they leave for any reason. The majority of that 90,000 are students, educators, and specialized workers.⁶

The legal and judicial consensus as of this writing is that the Trump Administration will fail in its defense of Executive Order 13769.⁷ This may, of course, change should there be further EOs on this topic or if Pres. Trump's Supreme Court nominee, Neil Gorsuch, is confirmed by the Senate, giving the Court a conservative majority, 5-to-4.⁸ Though not always a perfect guide, the political makeup of the Court is not to be ignored. Though Gorsuch emphasized the impartiality and independence of the federal judiciary in accepting his nomination, his judicial history has toed quite closely with the more extreme conservative political and social positions while serving on the 10th Circuit.⁹ According to Rudy Giuliani, former mayor of New York City, Executive Order 13769 was intended to be a Muslim Ban, as had been called for during the Trump campaign, but suitably altered so as to pass judicial review.¹⁰ Given the responses by multiple state and federal courts, it can be said that they failed in this effort.

⁴ Henrik Pryser Libell, "Norwegian Ex-Premier Is Stopped at Dulles Airport over Iran Visit," *New York Times* (3 February 2017). <https://www.nytimes.com/2017/02/03/world/europe/kjell-magne-bondevik-norway-dulles.html>

⁵ Shamis Fallah, "I'm a Refugee and a Naval Officer. The Immigration Ban Hurts My Family," *Military Times* (12 February 2017). <http://www.militarytimes.com/articles/im-a-refugee-and-a-naval-officer-the-immigration-ban-hurts-my-family>

⁶ Drum.

⁷ *Washington and Minnesota*, 3.

⁸ Julie Hirschfeld Davis and Mark Landler, "Trump Nominates Neil Gorsuch to the Supreme Court," *New York Times* (31 January 2017). <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html>

⁹ Steve Vladek, "Hobby Lobby and Executive Power: Gorsuch's Key Rulings," *CNN* (1 February 2017). <http://www.cnn.com/2017/01/31/politics/hobby-lobby-executive-power-gorsuch-key-rulings/>

¹⁰ Amy B. Wang, "Trump Asked for a 'Muslim Ban,' Giuliani Says – and Ordered a Commission to do it 'Legally,'" *Washington Post* (29 January 2017) <https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/>; Donald

Though targeted at seven named nations (Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen) because of their putative terrorist threat to the United States, when Section 5(b) is taken into consideration, it gives preference to minority religious groups discriminated against within their own nations.¹¹ That is, should any member of a minority religion claim persecution by their home government, regardless of which nation they call home, they can apply for and be granted automatic refugee visa status. This, in theory, includes Aum Shinrikyo, or, more specifically, its two daughter or sectarian successor organizations, Aleph and Hikari no Wa, should any members still be at large and active.¹² So there are distinct concerns for citizens, nationals, and residents of Japan traveling to the United States in any event. This all, of course, ignores the fact that such religious preferences, as have been made explicit by the president in interviews if not in the EO text itself, are unconstitutional.¹³

In the midst of all these facts and events, it is often forgotten that all persons, not just citizens, have rights under the US Constitution. In fact, at several points the text of the main document and early amendments make this distinction clear. The rights of non-citizens are somewhat more circumscribed than those of citizens, but they do exist and are legally enforceable. Further, the claims of various presidential representatives that the executive's decisions and actions are not reviewable are grossly inaccurate. The president does have wide

J. Trump, Interview by David Brody, "Supreme Court Dream Team: All the Buzz about These Three Trump Picks," *CBN* (30 January 2017) <http://www1.cbn.com/cbnnews/politics/2017/january/judge-gorsuch-a-dream-pick-for-supreme-court>; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 US 252 (1977), at 266-268; *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah* 508 US 520 (1993), at 534. It should be noted that on 8 May 2017, after the original writing of this item and the confirmation of Gorsuch to the Supreme Court, the Trump website deleted the original press release in which he called for a "total and complete shutdown" of Muslim immigration to the United States minutes before the question was to be taken up in the 4th Circuit.

¹¹ Trump, Executive Order 13769.

¹² United States, Department of State, Bureau of Counterterrorism, "Foreign Terrorist Organizations," (2016). <https://www.state.gov/j/ct/rls/other/des/123085.htm>

N. B.: Though Aum Shinrikyo is still listed by the State Department, the two successor groups are not.

¹³ US Const., Amend. I., *Lemon v. Kurtzman*, 403 US 602 (1971), at 612-613; *De la Cruz v. Towney*, 582 F. 2d 45 (9th Cir.) (1978), at 50; *Larson v. Valente*, 456 US 228 (1982), at 244 and 254-255; *Santa Fe ISD v. Doe*, 530 US 290 (2000), 310.

discretion in these matters, but it is neither unlimited nor beyond review.¹⁴ Such is “an absurdity too gross to be insisted on.”¹⁵ Further, the case upon which Trump’s argument lies in truth holds the polar opposite of the view advanced and requires vigorous proof-texting and omission to be used to arrive at the conclusion his lawyers allege.¹⁶

In this case, the states intervened on behalf of their universities who asked for relief on behalf of their international students and educators and as such standing was recognized.¹⁷ Identical arguments have been accepted from foreign governments and institutions of learning in similar cases when advocating on behalf of their students and educators, provided they are thorough in their standing presentations.¹⁸ States and foreign nations may act on behalf of public universities, and thus of their students and educators, as they are arms of the government.¹⁹ In the instant case, the harm is that the nationals of the named countries cannot travel to conduct research, which thus interferes with the universities’ mission statements, which are matters of law in their respective states.²⁰ Analogous arguments made by foreign governments or institutions are similarly regarded.

¹⁴ *Marbury v. Madison*, 5 US (1 Cranch) 137 (1803), at 177; *Ex parte Milligan*, 71 US 2 (1866), at 120-121; *Chae Chan Ping v. United States*, 130 US 581 (1889), at 604; *Yamataya v. Fisher*, 189 US 86 (1903), at 100-101; *Ex parte Quirin*, 317 US 1 (1942), at 19; *Ex parte Endo*, 323 US 283 (1944); *Galvan v. Press*, 347 US 522 (1954), at 530; *Zemel v. Rusk*, 381 US 1 (1965), at 17; *United States v. Robel*, 389 US 258 (1967), at 264; *Fiallo v. Bell*, 430 US 787 (1977), at 787; *INS v. Chadha*, 462 US 919 (1983), at 943; *American-Arab Anti-Discrimination Commission v. Reno*, 70 F. 3d 1045 (9th Cir.) (1995), at 1056; *Zadvydas v. Davis*, 533 US 678 (2001), at 695; *Hamdi v. Rumsfeld*, 542 US 507 (2004), at 536; *Alperin v. Vatican Bank*, 410 F. 3d 532 (9th Cir.) (2005), at 559 and n. 17; *Boumediene v. Bush*, 553 US 723 (2008), at 765; *Arizona v. United States*, 567 US ____ (2012); *Cardenas v. United States*, 826 F. 3d 1164 (9th Cir.) (2016), at 1169; *Washington and Minnesota; Washington*; 28 CFR § 17.17(c) and § 17.46(c).

¹⁵ *Marbury*, 177.

¹⁶ *Kleindienst v. Mandel*, 408 US 753 (1972).

¹⁷ *Pierce v. Society of Sisters*, 268 US 510 (1925), at 536; *Baker v. Carr*, 369 US 186 (1962), at 204; *Singleton v. Wulff*, 428 US 106 (1976), at 114-116; *Runyon v. McCrary*, 427 US 160 (1967), at 175 and n. 13; *Lujan v. Defs. Of Wildlife*, 504 US 555 (1992), at 560; *Ohio Assoc. of Indep. Schools v. Goff*, 92 F. 3d 419 (6th Cir.) (1996), at 422.

¹⁸ *Townley v. Miller*, 722 F. 3d 1128 (9th Cir.) (2013), at 1133.

¹⁹ *Hontz v. State*, 714 P. 2d 1176 (Washington Supreme Court) (1986), at 1180; *Uni. of Minnesota v. Raygor*, 620 NW 2d 680 (Minnesota Supreme Court) (2001), at 683.

²⁰ *Washington and Minnesota; Washington*.

Regarding what the rights guaranteed are, one must consult the Fourteenth, Fourth, and Fifth Amendments. The Fourteenth Amendment holds that neither the United States, nor any of the states, may “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”²¹ The parts of the section preceding this one make it clear that the author of the amendment distinguished between citizens and all persons and accorded them various rights accordingly. As such, non-citizens, of whatever origin or manner of entry into the United States, do in fact have rights. The rights in question are spelled out in the Fourth and Fifth Amendments. The Fourth deserves for the present purposes to be quoted in full, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”²² Because the Fourteenth explicitly recognizes all persons, including non-citizens, as having rights, since its addition to the Constitution, the Fourth has been read as including non-citizens under its protection. That is, no government agent, employee, contractor, or other person acting under color of law may search the papers, possessions, effects, or person of any individual without prior issuance of a warrant or ample evidence of exigent circumstances, operating under the principle of probable cause, that would lead to the harm of another person. If a person is merely in motion from one point to another, by whatever means, there is no automatic assumption of probable cause to search them or their effects or to demand identification. The Supreme Court, in a rare unanimous decision, has ruled that cell phones and other electronic devices may not be

²¹ US Const., Amend. XIV, sec. 1, cl. 3.

²² US Const., Amend. IV.

searched absent a warrant and are protected by the Fourth Amendment.²³ Notwithstanding that, such searches do still occur at airports and other points of entry, contrary to the Court's ruling, amounting to 0.0012% of all air travelers landing or arriving at a US airport in 2015.²⁴ However, it is an accepted truism of American law that the deprivation of right to one person is too much, and for even a moment is too long.

Regarding the Fifth Amendment, the relevant text is the Due Process Clause, which holds that "no person ... shall be deprived of life, liberty, or property, without due process of law."²⁵ That is, barring a warrant, court order, or trial determination, no one may be held nor may their effects be searched. Excepting a warrant delivered by electronic transmission, none of these is possible in the context of a port of entry anywhere in the United States. Though the courts are wise to give the executive wide discretion, that discretion must be tempered with the ability to respond. In other words, if a person cannot formulate a legal response in the time between notification of a regulation and its enforcement, or if the regulation is thrust upon them *de novo*, they are not to be held accountable to it.²⁶ Anyone unlawfully detained, searched, or otherwise interfered with in their lawful business when entering or moving about the country has a binding claim of violation of their rights under procedural due process and this applies to all persons.²⁷ Further, American persons and organizations may claim right to bring suit on behalf of foreign nationals thus affected if there is an established relationship, whether familial, economic, or educational.²⁸ The EO threatens and actually commits serious deprivations of rights, and "it is well established that the deprivation of constitutional rights unquestionably constitutes

²³ *Riley v. California*, 573 US ____ (2014).

²⁴ Daniel Victor, "What Are Your Rights if Border Agents Want to Search Your Phone?" *New York Times* (14 February 2017) <https://www.nytimes.com/2017/02/14/business/border-enforcement-airport-phones.html>

²⁵ US Const., Amend. V, sec. 1, cl. 4.

²⁶ *Cleveland Board of Education v. Loudermill*, 470 US 532 (1985), at 542.

²⁷ *Aptheker v. Secretary of State*, 378 US 500 (1964), at 516; *Landon v. Plasencia*, 459 US 21 (1982), at 33-34; *Zadvydas*, 693; *Nken v. Holder*, 556 US 418 (2009), at 426.

²⁸ *Kerry v. Din*, 576 US ____ (2015).

irreparable injury” regardless of the nature of the relationship between the person and the United States government.²⁹

To prepare for possible infringements of rights when foreigners are visiting the United States, regardless of whence they hail or citizenship, the first step is preemptive: Secure representation with an American attorney or firm that specializes in immigration law. Many such have been providing *pro bono* services in recent days and there is a national organization to coordinate their efforts.³⁰

Border Patrol and other customs agents do still search phones and laptops, particularly as one enters or leaves the secure area of an airport.³¹ By a strict or broad reading of established law and precedent, this is unconstitutional. Unfortunately, the question has never been directly tested because extant case law refers only to state, county, municipal, and similar police forces. There is no law or executive order specifically giving federal agents the authority they claim for such actions, but neither is there any such thing, or a court decision, specifically prohibiting it. The surest guide here, the Fourth Amendment, has never been directly applied. Agencies have been known to keep phones and other devices for weeks at a time and to copy and destroy the data on them. Further, those who are detained are not reimbursed or compensated for missed flights or destroyed property.

Agents cannot force a person to divulge the passwords to their devices. For those who do agree to this, that is interpreted in a regulatory fashion as consent to search the device. The DHS is currently reviewing and accepting public commentary on a proposed rule that would require

²⁹ *Elrod v. Burns*, 427 US 347 (1976), at 373.

³⁰ Elise Viebeck and Michael Laris, “Hundreds of Lawyers Descend on Airports to Offer Free Help after Trump’s Executive Order,” *Washington Post* (29 January 2017) https://www.washingtonpost.com/politics/hundreds-of-lawyers-descend-on-airports-to-offer-free-help/2017/01/29/55ef11b2-e64b-11e6-bf6f-301b6b443624_story.html; American Immigration Lawyers Association, “Pro Bono” (2017) <http://www.aila.org/practice/pro-bono>

³¹ Victor.

agents to request such information from all non-citizens entering the country.³² The best advice is to keep information on such devices to the absolutely necessary minimum. This includes any stored passwords to online networks that may then be accessed by agents. There are online guides for how this may best be done, but they should be read in a “use at own risk” mentality.³³

Under no circumstances should anyone ever volunteer their phones and other devices for what will become an unrestricted search by the government. If the agents insist, respond in turn by insisting on contacting the lawyer previously noted. The only possible response is sane, civilized resistance to what is clearly an overreach and a breach of right under the Constitution and established judicial decisions on the matter.

In summary, the recent EO is unconstitutional, as are searches of phones and other devices. The former is currently under review but there is neither established law nor precedent on the latter beyond executive regulations. Prepare a lawyer in advance and be ready to insist upon your rights, regardless of citizenship, when entering or exiting the United States.

³² Ron Nixon, “Visitors to the US May Be Asked for Social Media Information,” *New York Times* (28 June 2016) <https://www.nytimes.com/2016/06/29/us/homeland-security-social-media-border-protection.html>

³³ Andy Greenberg, “A Guide to Getting Past Customs with Your Digital Privacy Intact,” *Wired* (12 February 2017) <https://www.wired.com/2017/02/guide-getting-past-customs-digital-privacy-intact/>