



**Written Testimony of American Civil Liberties Union**

**Hugh Handeyside  
Staff Attorney, National Security Project**

**U.S. House of Representatives Democratic Forum,  
“Ali v. Trump: The Fight for American Values”**

**March 9, 2017**

## ***Introduction***

I would like to thank the members of the Judiciary Committee for inviting the American Civil Liberties Union (ACLU) to testify at today’s Democratic forum, “Ali v. Trump: The Fight for American Values.” The ACLU is a nationwide, non-partisan organization with more than 2.5 million members, activists, and supporters, and 53 affiliates dedicated to the principles of liberty and equality embodied in our Constitution and civil rights laws.

Today’s forum raises issues of urgent concern. The ACLU is aware of numerous indications that U.S. Customs and Border Protection (CBP) officers and agents are exceeding their authority and potentially infringing on travelers’ constitutional rights. Misconduct by CBP officers is not new, unfortunately, but recent accounts suggest that officers have been emboldened to engage in improper or even unlawful conduct by official policy changes and by rhetoric from the highest levels of the Trump Administration.<sup>1</sup> Reports of lengthy border detentions, questioning about religious or political beliefs, searches and seizures of smartphones or other electronic devices, and other invasive or abusive conduct have increased in recent weeks, raising serious questions about whether CBP officials are treating border crossings and ports of entry as rights-free zones.

Longstanding, systemic problems within CBP and the Department of Homeland Security (DHS) have set the stage for such conduct. First, officers wield significant discretion in carrying out immigration and border enforcement duties. Without meaningful limits on officers’ conduct and effective accountability mechanisms to address misconduct, citizens and non-citizens alike—particularly members of Muslim, Arab, Middle Eastern, South Asian, and other minority communities—are vulnerable to abusive searches and detention. That vulnerability was on glaring display during the implementation of the Administration’s Muslim Ban executive order, and none of the alleged abuses from that period have been subject to redress or accountability.<sup>2</sup> Second, the lack of binding guidance prohibiting discriminatory profiling in DHS operations means federal agents are targeting travelers for searches and interrogations based on their race, religion, or other protected characteristics.<sup>3</sup> Third, information from credible sources suggests that CBP construes the border as a justification for gathering intelligence on travelers without

---

<sup>1</sup> See Executive Order: Enhancing Public Safety in the Interior of the United States, Jan. 25, 2017, <http://bit.ly/2jybzNG>; Executive Order: Border Security and Immigration Enforcement Improvements, Jan. 25, 2017, <http://bit.ly/2jqES77>; Memorandum from John Kelly on Implementing the President’s Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), <http://bit.ly/2lrcCRg>; Memorandum from John Kelly on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), <http://bit.ly/2miirQd>. See also Nicholas Kulish, Caitlin Dickerson & Ron Nixon, *Immigration Agents Discover New Freedom to Depart Under Trump*, N.Y. Times, Feb. 25, 2017, <http://nyti.ms/2IEyGLg> (quoting White House Press Secretary Sean Spicer as stating that the President wanted to “take the shackles off” border and immigration enforcement officers); Philip Rucker, *Trump touts recent immigration raids, calls them a ‘military operation’*, Wash. Post, Feb. 23, <http://wapo.st/2mGIgxc>.

<sup>2</sup> See Press Release, Ctr. for Constitutional Rights, Abuses by Border Patrol Related to Muslim Ban Order: Complaint Submitted to DHS Inspector (Feb. 7, 2017), <http://bit.ly/2mkqDRf>.

<sup>3</sup> *What Does a Secure Border Look Like?: Hearing Before the Subcomm. on Border and Maritime Sec. of the H. Comm. on Homeland Sec.*, 113th Cong. 11-12 (2013) (written statement of Am. Civil Liberties Union), <http://bit.ly/2m3lxaP>.

any basis for suspecting wrongdoing.<sup>4</sup> That flies in the face of CBP's own authority, which is limited, and fosters an environment in which innocent travelers are subjected to intrusive and unnecessary searches.

Recent indications of CBP misconduct are doubly alarming in light of the administration's planned border enforcement hiring spree.<sup>5</sup> Prior experience has shown that such a dramatic increase in personnel—and the looser hiring standards that the increase will require—will prompt a spike in human and civil rights violations, racial and religious profiling, and corruption within the CBP workforce.<sup>6</sup>

These issues warrant congressional action. The ACLU urges Congress to enact legislation that includes reasonable restrictions on CBP conduct and that requires systemic, robust, and permanent oversight and accountability mechanisms in the border security context, designed to ensure that CBP officers operate within the Constitution and adhere to the highest professional law enforcement standards. We further urge Congress to take such action in advance of considering Administration requests to fund an increase in CBP personnel.

### ***Reported Abuse and Misconduct***

Lengthy border detention and use of force. Recent news reports recount instances in which citizens, lawful permanent residents, and visitors to the United States have undergone lengthy detention and at times aggressive physical treatment when transiting the border. For example, Akram Shibly, a 23-year-old U.S. citizen from Buffalo, New York, described being pinned down and choked by a CBP officer after stating that he was not comfortable handing over his smartphone for inspection.<sup>7</sup> CBP officers handcuffed and detained Haisam Elsharkawi, a U.S. citizen from Anaheim, California, after he requested access to a lawyer during exit screening.<sup>8</sup> French historian Henry Rousso underwent a ten-hour detention, reportedly because of a CBP officer's misplaced suspicion about an honorarium for a speech Mr. Rousso was scheduled to give at Texas A&M University.<sup>9</sup>

Prolonged detention and unwarranted use of force can violate the Fourth Amendment's guarantee against unreasonable searches and seizures. While CBP has the authority to stop and search travelers at the border for the purpose of determining admissibility and locating

---

<sup>4</sup> See, e.g., Cora Currier, *Revealed: the FBI's Secret Methods for Recruiting Informants at the Border*, The Intercept, Oct. 5, 2016, <http://bit.ly/2dsyufc>.

<sup>5</sup> See Kelly memoranda, *supra* note 1 (describing plans for the hiring of 10,000 ICE agents and officers, 5,000 Border Patrol agents, and 500 Air & Marine agents/officers).

<sup>6</sup> See *What Does a Secure Border Look Like?*, *supra* note 2, at 11. See also Tal Kopan, *Best CBP estimates say hiring could take decade*, CNN.com, Mar. 8, 2017, <http://cnn.it/2mjD8fS>; *White House Orders The Hiring Of 15,000 New Immigration Agents*, NPR, Feb. 22, 2017, <http://n.pr/2lwBYgg> (including comments of former head of CBP internal affairs regarding past CBP hiring problems); Molly O'Toole, *Trump Administration Seeks to Loosen Hiring Requirements to Beef Up Border Patrol*, ForeignPolicy.com, Feb. 25, 2017, <http://atfp.co/2midNpg>;

<sup>7</sup> Murtaza Hussain, *Complaints Describe Border Agents Interrogating Muslim Americans, Asking for Social Media Accounts*, The Intercept, Jan. 14, 2017, <http://bit.ly/2jJ5FJe>.

<sup>8</sup> Daniel Victor, *What Are Your Rights if Border Agents Want to Search Your Phone?*, N.Y. Times, Feb. 14, 2017, <http://nyti.ms/2lj2AE9>.

<sup>9</sup> Erin McCann, *French Historian Says He Was Threatened With Deportation at Houston Airport*, N.Y. Times, Feb. 26, 2017, <http://nyti.ms/2mkyssU>.

contraband, that authority is limited by statute and by the Constitution. It is not a license to abuse, harass, or detain travelers unreasonably. Reports of lengthy detention and excessive or unnecessary use of force raise troubling questions about whether CBP officers are violating travelers' Fourth Amendment rights.

Questioning regarding religious and political beliefs. In joining this forum and speaking publicly about their recent treatment at the border, Muhammad Ali Jr. and Khalilah Camacho-Ali have highlighted the ways in which CBP questioning about religious and political beliefs can threaten Americans' privacy and expressive interests.<sup>10</sup> Others arriving in the United States this year—primarily Muslims or those who could be perceived to be Muslim—have been asked similar questions about their religious or political beliefs.<sup>11</sup>

Such questioning is not unprecedented. Numerous American Muslims have reported being questioned in a similar way about their protected religious beliefs, associations, and practices in recent years. The ACLU has long worked to challenge invasive religious questioning at the border—work that prompted DHS to undertake an investigation into the practice in 2011.<sup>12</sup> DHS also released hundreds of pages of records related to religious questioning in response to the ACLU's request under the Freedom of Information Act.<sup>13</sup> The records showed that DHS had received numerous complaints of religious questioning of Muslim travelers, and that the questioning appeared to followed a pattern across various border crossings and ports of entry. The recent experiences of the Ali family and others suggest that DHS and CBP have failed to take adequate steps to end such questioning.

It is fundamentally un-American for government officers to question people seeking to enter the United States about their religious or political beliefs, associations, and religious practices. Such questioning undermines core American values, including religious freedom and equal protection, and it can chill the exercise of rights protected under the First Amendment. It is also deeply stigmatizing because it signals that particular personal beliefs are reason for government suspicion, interrogation, and investigation. Questioning people about their constitutionally protected beliefs serves no valid government purpose unless there is credible evidence supporting a reasonable suspicion of involvement in specific criminal activity that would warrant questioning—a very narrow, exceptional circumstance. The kind of religious and political questioning we have seen instead undermines national security by wasting scarce government resources, generating false leads, and eroding trust in law enforcement and government among members of targeted communities.

---

<sup>10</sup> See, e.g., Sedria Renee, *Muhammad Ali Jr. on Airport Detainment: 'I'm Not American?'*, NBCNews.com, Feb. 27, 2017, <http://nbcnews.to/2mOZetq>.

<sup>11</sup> See, e.g., Hussain, *supra* note 6; Jillian D'Amours, *US border guards deny entry to Canada Muslim mother*, Middle East Eye, Feb. 10, 2017, <http://bit.ly/2kxp9Bb> (religious and political questioning of Moroccan-born Canadian citizen); Comm. to Protect Journalists, *BBC journalist questioned by US border agents, devices searched*, cpj.org, Feb. 1, 2017, <http://bit.ly/2mGWs9t> (questioning of journalist regarding political views); Caroline Mortimer, *Donald Trump Muslim immigration ban: US border patrol 'checking people's Facebook for political views'*, Independent, Jan. 28, 2017, <http://ind.pn/2jCL0Js>.

<sup>12</sup> See Memorandum from Margo Schlanger, DHS Officer for Civil Rights and Civil Liberties, to Alan Bersin and Alfonso Robles (May 3, 2011), <http://bit.ly/2mH00Z8>.

<sup>13</sup> Am. Civil Liberties Union, *Border Questioning – Produced Documents*, <http://bit.ly/2mGUQMB>.

Searches and seizures of smartphones and electronic devices. Numerous travelers—citizens and non-citizens alike—have reported in recent weeks that CBP officers have searched or seized their smartphones or other electronic devices during border inspections.<sup>14</sup> To effect such searches, officers have demanded that individuals unlock their devices or disclose their device passwords. The officers have conducted the device searches over travelers' objections and have sometimes held the devices for hours, accessing cloud-based data, personal photographs, emails and texts, and a range of other private information.

As with religious questioning, searches of digital devices at the border are not new. The ACLU has challenged device searches through direct litigation and by submitting *amicus* briefs in relevant cases, and the lawfulness of such searches remains a contested issue.<sup>15</sup> It is clear, however, that the overall number of device searches increased sharply in 2016, and anecdotal evidence suggests that the searches are continuing unabated in 2017.<sup>16</sup>

Digital device searches at the border raise serious constitutional and privacy concerns. Smartphones and other digital devices have become blueprints for our entire lives. They contain staggering amounts of sensitive and personal information, including much of our written communications, our associations with others, financial and medical information, and photos and videos portraying the most intimate aspects of our relationships. They differ fundamentally from the containers and items CBP has the authority to search at the border, but CBP's policy is that digital devices can be searched without any reason to believe that they contain evidence of wrongdoing. That policy, and the suspicionless device searches CBP conducts at the border, are at odds with the Fourth Amendment.

Requests for social media identifiers and passwords. Secretary Kelly testified at a House Homeland Security Committee hearing on February 7, 2017 that DHS would consider requiring visa applicants to provide log-in information, including passwords or other credentials, for their social media accounts.<sup>17</sup> That testimony came among other reports that CBP officers have been demanding social media information from travelers, including U.S. citizens and lawful permanent residents.<sup>18</sup>

The collection and scrutiny of social media information by border officials would threaten constitutional and human rights while jeopardizing national security. Such a social

---

<sup>14</sup> See, e.g., Hussain, *supra* note 6; Victor, *supra* note 7; D'Amours, *supra* note 10; Comm. to Protect Journalists, *supra* note 10; Emanuella Grinberg, *American NASA scientist says his work phone was seized at airport*, CNN.com, Feb. 15, 2017, <http://cnn.it/2IHxceO>; Rob Salerno, *US Customs block Canadian man after reading his Scruff profile*, Daily Xtra, Feb. 20, 2017, <http://bit.ly/2kHwcv>; Shelby Webb, *Feds detain Katy High School student from Jordan following President Trump's immigration ban*, Houston Chronicle, Feb. 2, 2017, <http://bit.ly/2kPKwBA>.

<sup>15</sup> See, e.g., *Abidor v. Napolitano*, Case No. 1:10-cv-04059 (E.D.N.Y.) (challenging DHS policies authorizing suspicionless searches of cell phones, laptops, and other electronic devices); Brief of Am. Civil Liberties Union, et al. in Supp. of Pet'r, *Riley v. California*, No. 13-132 (2014), <http://bit.ly/2mkazyO>; Brief of Amici Curiae Am. Civil Liberties Union et al. in Supp. of Def.-Appellant, *United States v. Saboonchi*, No. 15-4111 (4th Cir. 2015), <http://bit.ly/2IEJOIg>.

<sup>16</sup> See Victor, *supra* note 7.

<sup>17</sup> See *Ending the Crisis: America's Borders and the Path to Security: Hearing Before the H. Homeland Sec. Comm.*, 115th Cong. (Feb. 7, 2017) (testimony of Homeland Security Secretary John Kelly), <http://bit.ly/2jVe94n>.

<sup>18</sup> See, e.g., Hussain, *supra* note 6; *Sudanese Stanford Ph.D. Student Speaks Out After Being Detained at JFK Under Trump Muslim Ban*, Democracy Now, Jan. 30, 2017, <http://bit.ly/2kLMeUu>.

media dragnet would ensnare countless U.S. citizens who are in contact with visa applicants and generate troves of information that is completely irrelevant to border security. It would chill freedom of expression, association, and religion; intrude upon confidential professional relationships; and pose grave cybersecurity risks for individuals. It also would encourage other governments to adopt similar measures, exposing U.S. citizens to further scrutiny and surveillance when they travel abroad. And as with other border security measures discussed here, it would disproportionately affect members of Muslim, Arab, Middle Eastern, and South Asian communities.

Exclusion of travelers on ideological grounds. Multiple news reports indicate that visitors with valid visas or entry documents have been turned away at the U.S. border based on their perceived opinions or planned participation in lawful protests, including Canadian citizens who were planning to attend the women’s marches in various U.S. cities in January.<sup>19</sup>

Barring visitors from entry based on their views or criticism of the U.S. government constitutes impermissible ideological exclusion. Such ideological screening—used as a political tool during the Cold War but possibly experiencing a comeback—is at odds with our founding principles, including freedom of belief, and it sets the stage for abusive inspections and interrogations. Congress has rejected ideological exclusion because it impoverishes public discourse and denies Americans access to diverse ideas and perspectives from abroad.<sup>20</sup> Any move by CBP to resurrect this practice or function as thought police at our nation’s borders would be dangerous and potentially unlawful. Our country has a long history of admitting people with a wide range of views and opinions, including those who criticize the U.S. government.

Document checks following a domestic flight. On February 22, 2017, CBP officers demanded that passengers disembarking a domestic flight from San Francisco to New York’s John F. Kennedy International Airport produce identification documents before they could leave the airplane.<sup>21</sup> A CBP spokesperson issued a statement asserting that CBP was assisting another agency in locating an individual who was possibly on the aircraft and who had been ordered removed from the United States.<sup>22</sup> According to the statement, CBP sought “consensual assistance from passengers aboard the flight” and “did not compel any of these domestic passengers to show identification.”<sup>23</sup>

---

<sup>19</sup> See, e.g., Kayla Rogers, Faith Robinson & Madison Park, *Canadians say they were turned away at US border on way to Women’s March*, CNN.com, Jan. 21, 2017, <http://cnn.it/2j99YzM>; *Protesters from Canada, UK, ‘turned away at US border’*, BBC News, Jan. 21, 2017, <http://bbc.in/2IEYpDq>.

<sup>20</sup> See Moynihan-Frank Amendment, Foreign Relations Authorization Act, Pub. L. No. 100-204, § 901, 101 Stat. 1331, 1400 (1987), amended by Foreign Relations Authorization Act, Fiscal Years 1990 and 1991; H.R. Conf. Rep. No. 343, § 128(b) 101st Cong., 1st Sess. (1989).

<sup>21</sup> See Wesley Lowery, *Federal agents ask domestic flight passengers to show IDs in search for immigrant ordered deported*, Wash. Post, Feb. 24, 2017, <https://goo.gl/9YZrYR>; Erica Byfield, *Passengers Demand Answers Following Intense Customs Scrutiny at JFK Airport*, NBC 4 New York, Feb. 23, 2017, <https://goo.gl/Lx0oxu>; Tim Dickinson, *Border Patrol Agents Stop Domestic Travelers at New York Airport*, Rolling Stone, Feb. 23, 2017, <https://goo.gl/99EcBK>; Keegan Hamilton, *Your Papers, Please*, Vice News, Feb. 23, 2017, <https://goo.gl/AyNdg7>.

<sup>22</sup> Dickinson, *supra* note 20.

<sup>23</sup> *Id.*

CBP's conduct requires a full explanation. The statement CBP issued in response to widespread outrage did not identify a basis in CBP's authority for stopping and requesting documentation from passengers arriving on domestic flights, nor did it explain why CBP elected to stop and request identification from each arriving passenger, as opposed to using less intrusive means of locating the individual in question or determining that he or she was not on board the airplane. Passengers' accounts of the incident, moreover, suggest that the officers prevented passengers from leaving the airplane until they produced identity documents, casting doubt on CBP's assertion that the stops of those passengers were consensual.

It is unclear whether this incident heralds a trend, but any change or expansion in CBP's role in immigration enforcement could have far-reaching consequences for non-citizens and citizens alike. CBP officers already have significant latitude in carrying out their duties; extending that latitude further would invite abuses, racial and religious profiling, and other misconduct without improving security.

Derisive and humiliating treatment of travelers. A theme unites many of the recent reports of misconduct: CBP officers' treatment of travelers with suspicion, derision, and disrespect. Australian children's author Mem Fox's account of her detention at Los Angeles International Airport echoes those of other visitors, lawful residents, and U.S. citizens.<sup>24</sup> Ms. Fox describes officers yelling at travelers who did not speak English, assuming the travelers were acting with deception, and approaching them with belligerence and disrespect. As has been the case in the past, members of Muslim, Arab, Middle Eastern, and South Asian communities have borne the brunt of such treatment. Accounts from members of these communities suggest that many CBP officers lack the basic cultural and geographic awareness that should be a prerequisite for serving in that capacity.

It is difficult to overstate the damage that CBP officers do when they treat travelers with derision and undue suspicion. Ms. Fox wrote simply: "In that moment I loathed America. I loathed the entire country," despite knowing that most Americans are generous and warm-hearted.<sup>25</sup> CBP officers are often the first Americans that tens of millions of visitors encounter upon arriving here, and they represent the U.S. government in those interactions. They can and must exercise their duties with respect for the dignity and humanity of all travelers.

## **Recommendations**

The ACLU urges Congress to enact reasonable restrictions on CBP conduct, clarify the limits to CBP's authority at the border, and incorporate meaningful, robust, and permanent accountability and oversight mechanisms into border security measures, including:

- Measures designed to reduce the incidence of prolonged detention and the unreasonable use of force;<sup>26</sup>

---

<sup>24</sup> See Mem Fox, *Mem Fox on being detained by US immigration: 'In that moment I loathed America'*, Guardian, Feb. 27, 2017, <http://bit.ly/2liwX9x>.

<sup>25</sup> *Id.*

<sup>26</sup> See ACLU Recommendations Regarding Use of Force by U.S. Customs and Border Protection Officers, <http://bit.ly/2m3FILt>.

- A prohibition on questioning regarding protected religious or political beliefs, associations, or practices that are unrelated to the nature or purpose of an individual's travel;
- A prohibition on searches or seizures of smartphones and other digital devices absent adequate cause to believe that the devices contain evidence of wrongdoing, and adoption of limits on the length of time CBP may keep seized devices in order to search them;
- Reaffirmation of travelers' right to refuse to disclose device and account passwords;
- A bar on the collection of social media identifiers or passwords from visitors as a matter of CBP policy, and adoption of an appropriate standard for accessing and assessing social media content;
- Adoption of appropriate standards governing social media data and data obtained from digital devices, including standards for the suppression of data wrongly obtained, limitations on the retention of such data, and restrictions on the sharing or use of such data for purposes other than determining admissibility; and
- Mandatory cultural awareness training and the adoption of rigorous standards of professional conduct for CBP officers, along with meaningful accountability mechanisms designed to ensure humane treatment of all travelers.

### *Conclusion*

CBP's mission of ensuring border security and enforcing immigration laws is an important and challenging one. In carrying out that mission, CBP must not exceed its authority or trample on the rights of travelers and members of border communities. Recent reports of CBP abuse, misconduct, or harassment of travelers reinforce the ACLU's longstanding concerns about the lack of effective oversight of CBP operations. We urge Congress to adopt the above recommendations in order to ensure that CBP acts within its statutory authority and the Constitution, and to do so before consideration of increased funds for CBP personnel, which would likely exacerbate the problems we have seen in the absence of the above reforms.