



WRITTEN STATEMENT SUBMITTED TO THE
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Regarding
the Commission's Emergency Hearing
On the Impact of Recent Executive Orders

Submitted by:

American Civil Liberties Union

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The American Civil Liberties Union (ACLU) appreciates the opportunity to provide the Commission with a submission on the human rights impact of three Executive Orders issued by President Trump: “Border Security and Immigration Enforcement Improvements;”¹ “Protecting the Nation from Foreign Terrorist Entry into the United States;”² and “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects.”³ Each of these orders has severe human rights implications for those affected and may violate U.S. obligations under international human rights law. As demonstrated by the related agency memoranda and the implementation of these orders to date, these three orders embody a dangerous disregard for the rights of indigenous peoples and vulnerable communities including migrants, refugees as well as racial, ethnic, and religious minority groups.

The executive orders and their implementation raise serious concerns

¹ The White House, Executive Order: Executive Order: Border Security and Immigration Enforcement Improvements, Jan. 25, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>.

² The White House, Executive Order: Protecting the Nation from Foreign Terrorist entry into the United States, Jan. 27, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/27/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

³ The White House, Executive Order: Executive Order Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects, Jan. 24, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/24/executive-order-expediting-environmental-reviews-and-approvals-high>.

regarding their compatibility with the United States' regional human rights commitments. As a Member State of the Organization of American States (OAS), the United States has an obligation to respect and to ensure the human rights of every person within its jurisdiction, pursuant to the OAS Charter and the American Declaration of the Rights and Duties of Man. This obligation extends to all individuals regardless of nationality, migratory status, or other social condition, and includes the rights to, inter alia: equality and nondiscrimination, due process of law and judicial protection, seek asylum (including the rights not to be subjected to refoulement or collective expulsion), liberty, freedom from torture and cruel or degrading treatment, special protection for children, and respect for family life.

Further, the United States has ratified, among other instruments, the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the 1967 Protocol to the 1951 Convention Relating to the Status of Refugees (Refugee Convention), and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Collectively, these instruments require the United States to respect and ensure the rights to, inter alia: equal protection and non-discrimination, due process in immigration proceedings, liberty, family life, judicial protection, nonrefoulement, and to seek asylum. These rights are implicated, and may already have been violated, by the issuance of these executive orders and their impending implementation.

I. Executive Order No. 13767 “Border Security and Immigration Enforcement Improvements”

On January 27, 2017, President Trump issued two immigration enforcement orders, “Border Security and Immigration Enforcement Improvements” and “Enhancing Public Safety in the Interior of the United States,” which, along with an implementing memorandum from the Department of Homeland Security,⁴ have already sent shockwaves through the immigrant and border communities. Although the second immigration order (no. 13768) was not addressed as the subject of this Commission hearing, we include it in our discussion as the two orders operate in tandem, and the second order has significant implications for the human rights of refugees, asylum seekers and other noncitizens living or arriving in the United States.

The Border Security order (no. 13767) calls for, among other things: a physical border wall between the United States and Mexico; the construction of additional detention facilities near the southern U.S. border and continuous detention of non-citizens apprehended for suspected violations of U.S. immigration law (which may and will include asylum

⁴ John Kelly, Secretary, U.S. Department of Homeland Security, Memorandum, “Implementing the President’s Border Security and Immigration Improvement Policies,” Feb 20, 2017, *available at* https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf

seekers); prioritizing border entry prosecutions, which the Vatican had previously called upon the United States to suspend;⁵ and expansion of the number of border patrol agents. It further suggests that asylum seekers waiting for a court date—even if they are thought to have a credible fear and a bona fide claim—could be sent to Mexico to await the final outcome of their asylum determination.⁶ Section 11 of the Order, on asylum, states its purpose is to “end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens,” a disturbing perspective on the asylum system in light of its well-documented failure to allow asylum seekers entry and a meaningful opportunity to present their claims to asylum.⁷

Added to this, the interior enforcement order (no. 13768) made clear that nearly all of the 11 million undocumented immigrants are now targets for arrest, detention, and deportation. It does not matter if the individual has lived in the U.S. for one day or decades. It does not matter if the individual has a violent criminal record or no record whatsoever. And it does not matter if the individual has U.S. citizen children, extensive family ties, military service, academic achievements, or community contributions. Without any supporting information, this order claimed that enhanced enforcement (i.e., arrest, detention, and removal) is necessary because: “Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety.”⁸ This language and the conduct it authorizes further stereotypes immigrants and noncitizens and furthers xenophobia in a manner that is dangerous for citizens and noncitizens alike.

The border and interior enforcement executive orders also call for a massive expansion of state and local immigration enforcement, which is problematic not only because of the impact on immigrant families living

⁵ United Nations General Assembly, Draft Report of the Working Group on the Universal Periodic Review: United States of America, A/HRC/WG.6/9/L.9, paragraph 68, p. 10 (Nov. 10, 2010), available at

http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/A_HRC_WG.6_9_L.9_USA.pdf.

⁶ Tal Kopan, CNN, “Trump asylum policy could upend US-Mexico relations,” Feb. 3, 2017, available at <http://www.cnn.com/2017/02/03/politics/donald-trump-border-security-order-mexico/>

⁷ UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM (USCIRF), BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL (2016), available at <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>; Sarah Mehta, Human Rights Program, American Civil Liberties Union, *American Exile, Rapid Deportations That Bypass the Courtroom* (2014), available at https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf; UNHCR, “Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S. Mexico Border,” (June 2014); see also Betsy Cavendish and Maru Cortazar, “Children at the Border: The Screening, Processing and Repatriation of Mexican Minors,” (2011), available at: <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>; Human Rights Watch, *You Have No Rights Here*, (2014), available at <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk>,

⁸ The White House, Executive Order: Enhancing Public Safety in the Interior of the United States, Jan. 27, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

in the United States but also because of the danger of heightened racial profiling in this joint policing. Multiple international bodies have repeatedly raised concerns about the persistence of racial and ethnic profiling by law enforcement in the U.S., including in the immigration arena. In 2008, the Committee on the Elimination of Racial Discrimination (which monitors implementation of ICERD), in its concluding observations to the United States, “note[d] with concern that despite the measures adopted at the federal and state levels to combat racial profiling...such practice continues to be widespread.”⁹ In 2014, the CERD called upon the United States to end programs like the 287(g) program, which deputizes local law enforcement as federal immigration officers, albeit ones with minimal training and virtually no oversight or accountability.¹⁰ Empowering local police officers to look for immigration violators undermines public trust in law enforcement and has already resulted in racial profiling, as a federal court found in an ACLU case in Arizona, for example.¹¹

Through the controversial 287(g) program, the Department of Homeland Security (DHS) is inviting states and localities to assume federal immigration enforcement powers even though the DHS Inspector General had previously concluded that the program lacks adequate civil rights safeguards.¹² The much-criticized 287(g) program rose to infamy under Joe Arpaio, the former Maricopa County (Arizona) Sheriff and Alamance County (North Carolina) sheriff Terry Johnson.¹³ In both cases, DOJ concluded that the sheriff’s departments engaged in a pattern and practice of constitutional violations including racial profiling and unlawful detention of Latinos. In expanding this program despite the well-documented civil rights abuses it encourages, the Trump administration is openly promoting this kind of discriminatory law enforcement and unconstitutional policing.

Moreover, as made explicit in a DHS factsheet, the border and interior enforcement Executive Orders will expand (numerically and geographically) the immigrants subject to expedited removal¹⁴ – a deportation shortcut that allows a DHS agent, rather than an impartial judge, to determine an immigrant’s permanent fate with – according to the

⁹ Committee on the Elimination of Racial Disparities, “Concluding observations of the Committee on the Elimination of Racial Discrimination: United States,” CERD/C/USA/CO/6 (8 May 2008).

¹⁰ Committee on the Elimination of Racial Disparities, “Concluding observations on the combined seventh to ninth periodic reports of the United States of America,” CERD/C/USA/CO/7-9, 25 Sept. 2014.

¹¹ *Ortega Melendres et al. v. Arpaio*, D.C. No. 2:07-cv-02513-GMS (9th Cir. Apr. 15, 2015).

¹² Department of Homeland Security Office of Inspector General, THE PERFORMANCE OF 287(G) AGREEMENTS, March 2010, available at https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.

¹³ U.S. Department of Justice, Re: United States’ Investigation of Maricopa County, Dec. 15, 2011, available at https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf; U.S. Department of Justice, Re: United States’ Investigation of the Alamance County Sheriff’s Office, Sept. 18, 2012, available at

<https://www.justice.gov/iso/opa/resources/171201291812462488198.pdf>

¹⁴ Department of Homeland Security, “Fact Sheet: Executive Order: Border Security and Immigration Enforcement Improvements,” Feb. 21, 2017, available at <https://www.dhs.gov/news/2017/02/21/fact-sheet-executive-order-border-security-and-immigration-enforcement-improvements>.

U.S. government’s legal position – virtually no judicial review. The February 20th memorandum for the implementation of the immigration executive orders further suggested that unaccompanied minors traveling to the United States might be treated as accompanied children (making them subject to deportation and removing them from some of the legal protections under the Trafficking Victims Protection Reauthorization Act), and their parents could even be prosecuted for smuggling them into the country. As laid out in greater detail in our submission to this Commission for this session regarding access to asylum, the protections for unaccompanied minors have already been eroded in practice, and to further weaken those legal safeguards, criminalize parents for bringing their children to join them, and subject children to deportation without a hearing would threaten not only their human rights but their basic safety¹⁵.

The executive orders also establish a mass mandatory detention system, allowing DHS to lock up children, families, and asylum seekers without individualized consideration of flight risk and danger (discussed at greater length in our submission on access to asylum). These executive orders shred due process while creating a boondoggle for the private prison companies that will profit through new detention contracts.¹⁶

II. Executive Order 13780 “Protecting the Nation from Foreign Terrorist Entry into the United States”

Since it was introduced in late January 2017, the internationally condemned Muslim and refugee ban has occupied center stage at the airports, in the media, the courts, on the streets, and in town halls. The original ban was put on hold after being blocked by multiple federal courts, with nearly every court rejecting the Trump administration’s arguments at every turn.¹⁷ Federal judges reviewing the ban, including judges appointed by Republican presidents and Democratic presidents, have made clear that there are constitutional limits to presidential power, with one judge stating, “Maximum power does not mean absolute power. Every presidential action must still comply with the limits set by Congress’ delegation of power and the constraints of the Constitution, including the Bill of Rights.”¹⁸ That judge further laid out in detail how the ban probably violates the First Amendment of the U.S. constitution.

After the courts blocked the original refugee and Muslim ban, the administration was forced to rewrite and narrow the original ban.¹⁹ The

¹⁵ American Civil Liberties Union, “Written Statement Submitted to the Inter-American Commission on Human Rights, Hearing on Policies that Prevent Access to Asylum in the United States”, March 21, 2017, available at <https://www.aclu.org/hearing-statement/written-statement-submitted-inter-american-commission-human-rights>

¹⁶ Carl Takei, American Civil Liberties Union, “Trump and Sessions: Great for the Private Prison Industry, Terrible for Civil Rights,” Jan. 5, 2017 available at <https://www.aclu.org/blog/speak-freely/trump-and-sessions-great-private-prison-industry-terrible-civil-rights>

¹⁷ See *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017); *Darweesh et al. v. Trump et al.*, No. 1:17-cv-480 (E.D.N.Y. filed Jan. 28, 2017); *Aziz et al. v. Trump*, No. 1:17-cv-116 (E.D.Va. Feb. 13, 2017).

¹⁸ *Aziz et al. v. Trump*, No. 1:17-cv-116 (E.D.Va. Feb. 13, 2017).

¹⁹ For more on the first Muslim and refugee ban, see our letter to the Commission: American Civil

revised refugee and Muslim ban, was set to go into effect on March 16, 2017, was challenged by the states of Hawai'i, Washington, Maryland, Minnesota, Massachusetts, New York, and Oregon, as well as advocacy groups including the ACLU. On March 15, 2017, a federal court in Hawai'i issued a nationwide temporary restraining order, preventing the revised Executive Order's refugee and six-country ban from going into effect for now.²⁰ Early on March 16, 2017, in a case brought by advocates including the ACLU, a federal court in Maryland issued a nationwide preliminary injunction, preventing the Section 2(c) of the Executive Order—the six country ban—from going into effect.²¹ A hearing on the refugee resettlement claims in the Maryland case is scheduled for March 28, 2017. (The government is appealing the rulings in both cases.) Although the revised ban is narrower than the original ban, it still bans all refugees for at least 120 days and bans visa issuance, for at least 90 days, to nationals of six Muslim-majority countries (Iran, Sudan, Syria, Libya, Somalia, and Yemen). The revised ban, like the original ban, attempts to deliver on Donald Trump's promise "for a total and complete shutdown of Muslims entering the United States" – a statement that the President has never repudiated.

Both the original and the revised ban raise multiple constitutional issues, including violations of the First Amendment establishment clause, which forbids the government from singling out any particular religion for favor or disfavor. The revised order, like the original, further violates U.S. obligations under human rights law, including the Refugee Convention, which requires that the US provide protection and safe haven to those facing persecution.²² By shutting the door to refugee admissions, whether temporarily or indefinitely, Trump's order flagrantly violates that core obligation.

The UN High Commissioner for Refugees and International Migration Organization noted this proud tradition in a joint statement in reaction to the executive order. "The long-standing US policy of welcoming refugees has created a win-win situation: it has saved the lives of some of the most vulnerable people in the world who have in turn enriched and strengthened their new societies," the statement read. "The contribution of refugees and migrants to their new homes worldwide has been overwhelmingly

Liberties Union, "Re: Convening an Emergency Hearing on U.S. Executive Order 'Protecting the Nation from Foreign Terrorist Entry into the United States' at March 2017 Period of Sessions", Feb. 6, 2017, available at https://www.aclu.org/sites/default/files/field_document/iachr_muslim_ban_coalition_letter_feb_6_2017.pdf

²⁰ *State of Hawai'i & Ismail Elshikh v. Trump et al.*, No. 17-00050 DKW-KSC, Order Granting Motion for Temporary Restraining Order (D. Ha. March 15, 2017).

²¹ *IRAP v. Trump*, No. TDC-17-0361, Memorandum Opinion (D. Md. March 16, 2017).

²² Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954); Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967); see also Jamil Dakwar, "All international laws Trump's Muslim ban is breaking," *Al Jazeera*, Feb. 2, 2017 available at <http://www.aljazeera.com/indepth/opinion/2017/02/international-laws-trump-muslim-ban-breaking-170202135132664.html>

positive."²³

The ban on nationals from six designated countries furthermore discriminates on the basis of national origin. Article 26 of the ICCPR requires equal treatment before the law of all persons, without discrimination on any ground, including race, religion, or national or social origin.²⁴ The Executive Order's treatment of nationals of these countries violates the prohibition against discrimination and equal protection before the law. The order is clearly discriminatory, requiring separate and unfair treatment of entire groups of (predominately Muslim) people based on their national origin. Although the new order suggests a case-by-case waiver may be available for some nationals (§ 3(c)), the waiver is subject to individual Customs and Border Protection ("CBP") officers' unfettered discretion. Moreover, the possibility of discretionary waivers for some cannot cure the Order's discriminatory purpose and effect.

The UN's CERD has already concluded that "xenophobia against non-nationals, particularly migrants, refugees, and asylum seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices."²⁵ This executive order, which stigmatizes and raises unjustified suspicion on whole groups of people because of their national origin, threatens to impact not only individuals who want to come to the U.S. but citizens and noncitizens in the United States who are nationals of these countries.

Beyond the numerous constitutional issues implicated by the Muslim ban, there are many critical questions that the Trump administration has declined to answer or has answered with inaccurate information. At least 756 individuals were wrongfully detained for long periods of time by DHS CBP agents at airports and other ports of entry, during the weekend after the original Muslim ban went into effect.²⁶ An unknown number of individuals, including lawful permanent residents, were handcuffed, detained, and illegally removed from the U.S., after having landed at U.S. airports with proper documentation. Families have been torn apart, and many remain separated across oceans. The revised order continues to endanger the rights of citizens and noncitizens alike, leaving refugees in

²³ United Nations Human Rights Committee, Joint IOM-UNHCR Statement on President Trump's Refugee Order, Jan. 28, 2017, available at <http://www.unhcr.org/news/press/2017/1/588bc4e34/joint-iom-unhcr-statement-president-trumps-refugee-order.html>.

²⁴ ICCPR, adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, art. 26, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

²⁵ Committee on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination against Non-citizens (Sixty-fourth session, 2004), U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004).

²⁶ Liz Robbins, N.Y. Times, "U.S. List of Those Detained for Trump's Travel Ban Is Called Incomplete," Feb. 24, 2017, available at https://www.nytimes.com/2017/02/24/nyregion/travel-ban-trump-detained.html?_r=1

potentially life-threatening situations and harming and stigmatizing noncitizens who want to come to the United States to join their families, work, or study.

III. Executive Order 13755 “Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects.”

On January 24, President Trump signed an executive order titled “Expediting Environmental Reviews and Approvals for High-Priority Infrastructure Projects.”²⁷ On the same day, the President also signed a Presidential Memorandum “Regarding Construction of the Dakota Access Pipeline”²⁸ with the ultimate goal of expediting the construction of the Dakota Access Pipeline (“DAPL”), an 1,100-mile pipeline to be constructed to carry over half a million barrels of fracked crude oil from the state of North Dakota to the state of Illinois each day.

While the President emphasized in his memorandum that the construction of the pipeline would “serve the national interest”, his executive actions seriously threaten the rights of Indigenous Peoples and violate treaties with Indian tribes and federal laws, including the National Environmental Policy Act (NEPA), which requires that an environmental assessment be completed prior to undertaking a project on federal land that might substantially impact the environment. President Trump’s memorandum specifically placed pressure on the U.S. Army Corps of Engineers to issue a permit allowing the pipeline to be constructed underneath the Missouri River, just north of the Standing Rock Sioux Reservation in North Dakota. It is worth noting that the route of the pipeline was originally planned to traverse land further north and would have crossed the Missouri River at a point where it is only 200-300 feet wide instead of nearly a mile wide at the Lake Oahe crossing; however, white landowners objected citing environmental concerns, and DAPL altered the route in response to their objections.

The planned construction of DAPL has been met with unprecedented waves of protest by and in support of the Standing Rock Sioux Tribe. The Tribe has launched a legal challenge against the company constructing the pipeline and subsequently against the U.S. Army Corps of Engineers, and, with allies from around the country, the Tribe has actively engaged in nonviolent protest against its construction²⁹. While the pipeline is

²⁷ The White House, Executive Order: Executive Order Expediting Environmental Reviews and Approvals For High Priority Infrastructure Projects, Jan. 24, 2017, available at <https://www.whitehouse.gov/the-press-office/2017/01/24/executive-order-expediting-environmental-reviews-and-approvals-high>

²⁸ The White House, Memorandum: Presidential Memorandum Regarding Construction of the Dakota Access Pipeline, Jan. 24, 2017 available at <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-dakota-access-pipeline>

²⁹ *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-01534 (D.D.C. filed Jul. 27, 2016), See Complaint at: <http://earthjustice.org/features/faq-standing-rock-litigation#documents>

currently planned to run through federal land under the Missouri River one-half mile north of the current boundary of the Tribe's reservation, the Standing Rock Sioux believe they still own that land under an 1851 treaty. In any event, the Standing Rock Sioux and other Indian tribes are directly threatened by any future oil spill, which would contaminate the Missouri River and present grave downstream consequences for the Tribes that use the Missouri River and Lake Oahe as a water source. Construction of the pipeline under the Missouri River would not only threaten the federally-protected water rights of the Standing Rock Sioux, but a significant rupture would likely pollute the water used by some 18 million persons in the region. The Standing Rock Sioux has also made the case that the completion of DAPL would destroy sacred sites of the tribe.³⁰

The Trump administration's policy, coming just days after the President took office, was an abrupt break in policy. The previous administration recognized that the pipeline has the potential to cause catastrophic misery and loss should it rupture. Consequently, the Army Corps of Engineers announced on December 4, 2016 that it was requiring a comprehensive study be conducted into the project's potential environmental impact before a permit would be issued. The Obama administration refused to give Energy Transfer Partners – the main corporation building DAPL - permission to build a portion of the pipeline under Lake Oahe in North Dakota. The Obama administration also confirmed that under federal law, DAPL cannot be approved until proper consultation with the Standing Rock Sioux Tribe is completed.³¹

The Standing Rock Sioux Tribe strenuously argues that construction of the pipeline would violate its rights under federal treaties and statutes, including NEPA as well as the federal government's responsibility to protect the Tribe's rights and sovereignty under the 1851 Treaty of Fort Laramie and the 1868 Treaty of Fort Laramie. The Tribe argues that a full environmental impact statement ("EIS") must be completed before any permit for construction could be issued.³²

President Trump's executive order and subsequent memorandum, however, had an immediate impact and on February 7, the Army Corps of Engineers reversed its decision and announced its intention to provide the easement without conducting a careful and proper assessment of environmental impact. The reversal was a blatant display of disrespect to

³⁰ Chad Harrison, Councilman At-Large, Standing Rock Sioux Tribe, "Testimony Before the House Committee on Energy and Commerce" (Feb. 15, 2017) available at <https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/Testimony-Harrison-EP-Hrg-Energy-Infrastructure-2017-02-15.pdf>

³¹ See e.g., Victoria Tauli-Corpuz, United Nations Special Rapporteur on the rights of indigenous people, "End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples", *Office of the United Nations High Commissioner for Human Rights*, 3 Mar. 2017, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21274&LangID=E>

³² *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 1:16-cv-01534 (D.D.C. filed Jul. 27, 2016), See Complaint at: <http://earthjustice.org/features/faq-standing-rock-litigation#documents>

the Tribe, a stark violation of its treaty rights with the United States, and an apparent violation of federal law, including NEPA. Shortly thereafter, the Cheyenne River Sioux Tribe (“CRST”) which is located 73 miles south of Lake Oahe, asked federal court to intervene and temporarily halt construction of the pipeline. CRST asked the court to intervene to protect its members’ free exercise of religion, which would be compromised by the presence of crude oil in the Dakota Access pipeline under Lake Oahe in violation of the Religious Freedom Restoration Act. However, on March 7, 2017, a federal judge declined to issue a preliminary injunction, and on March 18, 2017, the United States Court of Appeals for the District of Columbia Circuit declined to intervene, claiming that the Tribe “has not satisfied the stringent requirements” for such injunction.³³ Barring any last-minute judicial intervention, the construction of the last controversial portion of DAPL is expected to be completed and “...oil may be introduced in this part of the line between Monday, March 20, 2017 and Wednesday, March 22, 2017...”³⁴ leaving the water rights and sacred sites of Standing Rock Sioux and other tribes under attack.³⁵

The ACLU joined a friend-of-the-court brief with 34 Indian tribes and other organizations in support of the case filed by the Standing Rock Sioux Tribe in federal court. We have argued that construction of the pipeline should be halted immediately to respect the Standing Rock Sioux’s treaty rights, and that an environmental assessment must be completed under NEPA to determine whether the project presents unnecessary and unreasonable danger to the environment and to the Tribe’s land and water.

We have provided compelling response to the claims that the Standing Rock Sioux Tribe is unlikely to be harmed by the construction of the pipeline and that the chance of a rupture is very low. First, the chance of a rupture is not low. In July 2015, the Michigan Petroleum Pipeline Task Force issued a comprehensive report of pipeline failures. The study found that “hundreds” of pipeline ruptures “have occurred throughout the U.S. pipeline system.”³⁶ The report cites many examples of ruptures over the last few years, including a pipeline off the coast of California that failed in May of 2015 and released 105,000 gallons of oil into the Pacific Ocean; another pipeline beneath the Yellowstone River that, a few months earlier,

³³ Zoe Tillman, “A Federal Appeals Court Won’t Block The Dakota Access Pipeline As It Nears Completion”, *Buzzfeed News*, Mar. 18, 2017 available at https://www.buzzfeed.com/zoetillman/a-federal-appeals-court-wont-block-the-dapl?utm_term=.viYVKyJP#.chRqwYXdy.

³⁴ *Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers and Dakota Access LLC.*, No. 1:16-cv-01534-JEB, Status Report of Dakota Access, LLC. (D.D.C. filed 13 Mar., 2017).

³⁵ *Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe v. U.S. Army Corps of Engineers and Dakota Access, LLC.*, No. 1:16-cv-01534 (JEB), Memorandum Opinion (D.D.C. filed Mar. 7, 2017) available at <https://assets.documentcloud.org/documents/3509171/170307-DenyInjunction.pdf>.

³⁶ Michigan Department of Attorney General and Department of Environmental Quality, Report: “Michigan Petroleum Pipeline Task Force Report,” July 2015 available at http://www.michigan.gov/documents/deq/M_Petroleum_Pipeline_Report_2015-10_reducedsize_494297_7.pdf.

released 42,000 gallons of oil; a pipeline in Mayflower, Arkansas that two years earlier ruptured and released 134,000 gallons, and a pipeline that in July of 2010 released 840,000 gallons of oil and contaminated 38 miles of the Kalamazoo River in Michigan. Second, even if the possibility of a rupture were low—which it is demonstrably not—the consequences would be grave. Even a “moderate” release of oil into the Missouri River would have profound and devastating consequences.

Lastly, it is worth asking *who* would bear the consequences of a rupture. Now that the route of the pipeline has been moved to the Standing Rock Sioux Tribe’s watershed, it would be the members of the Standing Rock Sioux Tribe who would suffer the most irreparable harm. But the Standing Rock Sioux are not the only ones who rely on that source of water: the degradation of the water would further impact some 18 million people downstream who depend on the water from the Missouri River.

Under treaties made by the Standing Rock Sioux and the U.S. government, as well as under federal statutes, the tribe has the right to protect its land, its heritage, and its water from contamination by a possible pipeline rupture.³⁷ The treatment of the Standing Rock Sioux by Energy Transfer Partners and all levels of the U.S. government raises the question: whose “priority” is really being served by expediting “high priority infrastructure projects”?

We request that the United States government be urged to rescind or modify the Executive Order and related presidential memorandums, their implementation, and future guidance on implementation as necessary to comply with its obligations to respect, protect, and fulfill the human and treaty rights of individuals, communities, and Indigenous Peoples affected by major infrastructure projects.³⁸ The United States must meaningfully consult and directly engage with sovereign tribal governments and representatives of Indigenous Peoples impacted by infrastructure projects such as the Dakota Access Pipeline, including for the purpose of assessing the impacts of those projects on human rights—rights recognized in treaties concluded with indigenous nations—and, respect for the right to free, prior, and informed consent especially prior to undertaking a project on federal land that threatens their health and welfare.

The United States has endorsed the U.N. Declaration of the Rights of Indigenous Peoples,³⁹ and it must protect the rights of Indigenous Peoples

³⁷ See Stephen Pevar, *The Rights of Indians and Tribes* (Fourth Edition) (Oxford University Press 2012), pp. 45-54.

³⁸ As the Commission has noted, economic development of countries cannot be undertaken in disregard of their ineluctable obligations to respect and guarantee human rights. IACHR, “Indigenous Peoples, Afro-Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities”, OEA/Ser.L/V/II. Doc. 47/15 (31 Dec. 2015) available at http://www.oas.org/en/iachr/media_center/PReleases/2016/048.asp

³⁹ United Nations Declaration on the Rights of Indigenous Peoples (March 2008) available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

especially under Articles 3, 16, 19, 24, 29, and 31. We urge the Commission to engage in ongoing monitoring of environmental and cultural impact reviews, and the process for obtaining free, prior, and informed consent for the construction of major infrastructure projects in the United States, with particular focus on the Dakota Access Pipeline. Finally, we ask the Commission to follow up on implementation of its recommendations in previous hearings, cases, and thematic reports related to Indigenous Peoples' rights and the environment in the United States, especially the report on Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities.⁴⁰

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We thank this Honorable Commission for convening this hearing on the on the human rights impact of three Executive Orders issued by President Trump: "Border Security and Immigration Enforcement Improvements;" "Protecting the Nation from Foreign Terrorist Entry into the United States;" and "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects." Should you have further questions regarding the information in this submission, please contact Sarah Mehta (smehta@aclu.org) or Jamil Dakwar (jdakwar@aclu.org).

Sincerely yours,



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⁴⁰ IACHR, "Indigenous Peoples, Afro-Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities", OEA/Ser.L/V/II. Doc. 47/15 (31 Dec. 2015) *available at* http://www.oas.org/en/iachr/media_center/PReleases/2016/048.asp