

QMUL Reflection Group on Terrorism and Human Rights

The Great Data Extortion Exercise: investigating the Trump Travel Bans

5th Workshop 14 December 2017 (by invitation)

Lincolns Inn Fields QMUL room LG2

14:30 – 18:30

The US Government, for a third time this year on 24 September 2017, issued an order banning nationals from some countries from entering the USA. The first two bans – Executive Orders of 27 January 2017 and 6 March 2017 – focused on nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen – with Iraq taken off the list in March. The first two Executive Orders have been partially stopped by various Circuit Courts (mainly the Hawaii Circuit, the 9th Circuit and the Supreme Court) and the matter has gone to the Supreme Court for a full hearing (eventually). The three travel bans have the same vocation: to require all states to provide information regarding their citizens (and those foreigners about whom they hold information) to the US authorities in return for being left off the banned list. The method used by the US Government to seek to extract from other states information which they hold on their citizens sits uneasily with constitutional and human rights obligations of those states to protect the privacy and data of their citizens (and those foreigners about whom they hold information).

The most recent Travel Ban sets out the information which states must provide about their citizens with a three fold objective – (a) to confirm the identity of people seeking to enter the USA; (b) identification of persons applying for any other benefit under US immigration laws and (c) assessment of security or public safety threats. The baseline contains three categories of information:

- (a) identity-management information;
- (b) national security and public safety information;
- (c) national security and public safety risk assessment.

Further specificity is provided in the Travel Ban as follows:

Identity management information: states must provide to the US authorities information needed by the US to determine whether individuals seeking to go or stay in the USA are who they claim to be. This focuses on integrity of documents. The criteria are whether the country issues electronic passports embedded with data to enable confirmation of identity; reports lost or stolen passports to appropriate entities (unspecified); and makes available on (US) request identity-

related information not included in its passports. This extra information is not defined or limited.

National security and public safety information: the US Government expects foreign governments to provide information about whether persons (seeking to go to the US) pose a national security or public-safety risk (not limited to the USA). The criteria are whether the country makes available known or suspected terrorist and criminal history information upon request; whether the country provides passport and national identity document exemplars; whether the country impedes the US Government's receipt of information about passengers and crew traveling to the USA (this is a reference to Passenger Name Records held by airlines). This category might catch new Regulation 2017/458 on databases and EU external frontiers to catch EU national 'foreign' fighters.

National security and public safety risk assessment: this category focuses on national security risk indicators. The criteria are: whether the country is a known or potential terrorist safe haven; whether it is a participant in the Visa Waiver Program; whether it regularly fails to receive its nationals subject to final orders of removal from the USA.

From the perspective of EU, ECHR and European national constitutional law, this obligation to provide information about citizens to a foreign state presents problems. As has been seen in the sags around the Passenger Name Record Agreements (the EU Canada proposed agreement was struck down by the Court of Justice in July 2017) the Safe Harbour Agreement EU-US which was struck down by the Court of Justice in 2015 (*Schrems*) all regarding the transmission of personal data outside the EU without adequate data protection guarantees in place in order to protect the privacy of people whose data is held by EU states.

This seminar is designed to interrogate the objective of the three travel bans from a European perspective with attention on rights of privacy and data protection. This is an exploratory seminar. Participants will not be expected to have developed papers or powerpoints but rather to come ready to make 10 minute presentations directed specifically to the Travel Bans and to examine the issues regarding EU and European privacy entitlements.

Travel Ban 3:

<https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry>

Travel Ban 2:

<https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>

Travel Ban 1:

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

Introduction

14:30 – 14:45: Welcome by Head of School, Valsamis Mitsilegas and introduction to the subject by Elspeth Guild

Panel 1: The three travel bans and the developing demands of data

14:45 – 16:15:

In this first panel we will examine the evolution of the travel bans and how they have been perceived both in the US and Europe. We will interrogate the challenges to the bans before the US courts which have revolved specifically around the deference of the judiciary to the executive regarding claims to legitimate action on the basis of national security and the powers of the President under the Immigration and Nationality Act but not about privacy.

Chair: Didier Bigo

Panelists: Elspeth Guild, Elif Kuskonmaz, Eva Nanopoulos, Davor Jancic, Mario Mendez

16:15 – 16:45 tea break

Panel 2: Privacy, Data Protection, Fair Trial and the Trump Data Demands

16:45 – 18:30:

In this second panel the issue of European privacy norms are under the spotlight. We will look at what the US data demands are from the perspective of EU norms and the judgments of the CJEU and ECtHR in particular. This panel will not repeat simply what the state or EU (and ECHR) law is but apply it in particular to each category of information which the Trump Travel Bans demands of states to stay off the list.

Chair: Rudi Fortson

Panelists: Dan Squires, Valsamis Mitsilegas, Niovi Vavoula, Crofton Black.

Assistant: Alvina Hoffmann (PHD student KCL)

Participants:

Caroline Morgan, European Commission

Susie Alegre, consultant, OHCHR Human Rights and Borders

Tobias Blanke, KCL

Panelists, Chairs and Participants

Didier Bigo

Professor of International Relations at Sciences-Po, Paris and researcher at the Center for International Studies and Research/National Foundation of Political Science (CERI/FNSP). I was scientific coordinator of the CHALLENGE project on the Changing Landscape of Liberty and Security in Europe, supported by 4.5m euro under FP6, and with 23 academic partners, running from 2005-10. I was also CI on the INEX project (2011-14), focussing on critical infrastructure, mobility and traceability at the borders and beyond, with 1.25m funding under FP7 and 7 academic partners. In addition, I led the King's contribution to the FP7 funded SAPIENT Consortium, which has explored the human consequences of new surveillance technologies. This too produced a number of interdisciplinary outputs, including, Bigo, 'Sorting out smart surveillance,' Computer Law & Security Review 26 (2010).

Crofton Black

Crofton Black is a researcher, journalist and writer with extensive experience of complex investigations in the field of human rights abuses and counter-terrorism. He is a leading expert on the CIA's rendition, detention and interrogation programme and a specialist in military and intelligence corporate contracting. He has a PhD in the history of philosophy from the University of London and is co-author of the award-winning *Negative Publicity: Artefacts of Extraordinary Rendition*.

Rudi Fortson QC

Rudi Fortson QC is a Visiting Professor of Law at Queen Mary University of London, and he has been a barrister in independent practice for some 30 years at 25 Bedford Row, London, and he "took silk" in 2010. As well as an in-court practitioner, Rudi Fortson has written and lectured extensively on many criminal-law issues. He has attended several experts' meetings at the European Commission on behalf of the 'Bar Council of England and Wales', and the 'Criminal Bar Association'. He was a member of the 'Police Foundation Independent Inquiry into the Misuse of Drugs Act 1971' (Chair: Viscountess Runciman DBE), and a member of the 'Criminal Justice Forum' for the Institute of Public Policy Research [IPPR]. More recently he was a member of the Independent Working Group on Drug Consumption Rooms for the Joseph Rowntree Foundation.

Elsbeth Guild

Elspeth Guild is Jean Monnet Professor ad personam at Queen Mary, University of London as well as at the Radboud University Nijmegen, Netherlands. She is also a partner at the London law firm, Kingsley Napley and an associate senior research fellow at the Centre for European Policy Studies, Brussels. She is also a visiting Professor at the College of Europe, Bruges. She was special advisor to the House of Lords European Union Committee's Inquiry into Economic Migration in 2005.

Davor Jancic

Dr Davor Jancic is a Lecturer at the Department of Law, Queen Mary University of London and teaches EU Law, Public Law and Elements of Contract Law. He was previously Senior Researcher in EU Law at the T.M.C. Asser Institute in The Hague and a British Academy Newton Fellow at the Law Department of the London School of Economics and Political Science (LSE). Prior to this, he was Assistant Professor at Utrecht University, where he taught courses in constitutional, European and human rights law. Dr Jancic holds a PhD in European constitutional law from Utrecht University and his doctorate analysed the role of national parliaments in EU decision making. He obtained his LL.M in International and European Law *cum laude* from the University of Amsterdam and his LL.B *summa cum laude* from the University of Novi Sad.

Elif Kuskonmaz

PHD candidate QMUL, expert in Passenger Name Record Agreements, privacy and data protection in the context of national security.

Mario Mendez

Mario Mendez graduated with a first class degree in Law and Politics from QMUL and was awarded the Drapers' Scholarship to study at the College of William and Mary in Virginia where he completed an LL.M in American Legal Studies. He was awarded a distinction on the BCL at the University of Oxford and the *Vinerian Scholarship Proxime Accessit* (second place). He completed his PhD at the European University Institute (EUI). He completed the Post-Graduate Certificate in Academic Practice at QMUL (awarded with distinction) and is a fellow of the Higher Education Academy.

Valsamis Mitsilegas

Valsamis Mitsilegas is Professor of European Criminal Law, Dean for Research (Humanities and Social Sciences) and, since 2012, Head of the Department of Law at Queen Mary University of London (QMUL). He is currently also serving as Academic Lead for Internationalisation for the University. He is the Inaugural Director of the [Queen Mary Institute for the Humanities and Social Sciences \(IHSS\)](#) and has been the Director of the [Queen Mary Criminal Justice Centre](#) since

2011. From 2001 to 2005 he served as legal adviser to the House of Lords European Union Committee. His research interests and expertise lie in the fields of European criminal law; migration, asylum and borders; security and human rights, including the impact of mass surveillance on privacy; and legal responses to transnational crime, including organised crime and money laundering. He is the author of six monographs and over 100 articles and chapters in academic volumes. His latest books are [The Criminalisation of Migration in Europe](#) (Springer, 2015) and [EU Criminal Law After Lisbon](#) (Hart, 2016). He is a regular adviser to think-tanks, parliaments, governments and EU institutions including the European Commission, the European Parliament and the EU Fundamental Rights Agency. He is currently serving for a second term as a member of the European Commission's Expert Group on Criminal Policy and is an inaugural member of the CEPS High level Group on Justice and Home Affairs.

Eva Nanopoulos

Dr Eva Nanopoulos joined Queen Mary in September 2016 as a Lecturer in Law. She teaches Public Law, Administrative Law and International Human Rights Law and is the Academic Coordinator of the BA/LLB in Law and Politics. Her research interests span across EU law, international law and critical legal theory with a focus on counter-terrorism, human rights and foreign policy and security issues. She is particularly interested in the interaction between the legal and the political, how this relationship manifests itself in different and at different times (formal emergencies, 'crises', or 'normal' times) and what this tells us about the role and function of the law. Her PhD looked at the judicial review of counter-terrorism measures in the EU. She is in the course of completing a monograph exploring the politics that underpin the juridification of individual/targeted sanctions in the EU, to be published by Hart Publishing in 2017. She is also working on an edited collection exploring the systemic causes of the Euro-crisis from a critical perspective based on a conference co-organised in Cambridge in the Spring of 2016.

Dan Squires QC

Dan has a wide-ranging practice and has appeared in many of the leading public law and human rights cases of the past decade. He became a QC in 2016. Dan represents individuals, corporations, and public authorities as well as non-governmental organizations. He is on the A panel of the Equality and Human Rights Commission and before taking silk was a member of the Treasury A Panel. Chambers & Partners and the Legal 500 recommend Dan as a leading barrister in Administrative and Public Law, Civil Liberties and Education. He is a Visiting Professor in the Law Department at Queen Mary University of London.

Niovi Vavoula

Dr Niovi Vavoula is Post-doctoral Research Assistant at Queen Mary, University of London (QMUL). She is also part-time Teacher at the [London School of Economics and Political Science](#), Editorial Assistant to the peer-reviewed journal [New Journal of European Criminal Law \(NJECL\)](#) and Coordination Assistant to the [European Criminal Law Academic Network \(ECLAN\)](#). She regularly collaborates with the [ODYSSEUS Academic Network for Legal Studies on Immigration and Asylum in Europe](#). She has given guest lectures at the Aristotle University of Thessaloniki (2016), City University London (2014) and was a visiting researcher at ULB - Université libre de Bruxelles (2014). Before commencing her doctoral studies in 2012, she qualified as lawyer (Athens Bar Association, 2011), served as a volunteer at the Legal Department of the [Greek Council for Refugees](#) (2011-12) and did an internship for the Greek Desk at [Eurojust](#) (2012). She publishes in the areas of EU immigration and criminal law and has acted as an expert consultant for the Commission, the Parliament and the Fundamental Rights Agency. Her doctoral thesis examined the privacy challenges stemming from the establishment of pan-European immigration databases and will be published by Brill Nijhoff in early 2018.