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June 13, 2017

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## Re: Policies and Practices Effecting Journalists at the Border

Dear Inspector General Roth:

The Reporters Committee for Freedom of the Press writes this letter to express our concern about United States Customs and Border Protection (CBP) policies and practices that affect journalists at the border.

In recent years, we have become alarmed by the number of reported stops involving journalists at the U.S. border as well as the intrusive nature of the searches involving journalists' electronic devices. Within the past year, several of the organizations joining this letter have individually filed Freedom of Information Act requests with the Department of Homeland Security (DHS) for information pertaining to border stops of journalists.

Because the U.S. Department of Justice Office of Inspector General is conducting an investigation of CBP and its activities at the border,<sup>1</sup> we write today to express our concern about the stops and searches involving journalists. In addition, we write to obtain clarification about CBP's policies involving journalists and to notify the agency about the unique constitutional, common law, and statutory rights that are implicated.

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<sup>1</sup> See Letter from Inspector General Roth to Hon. Yvette D. Clark, March 20, 2017, *available at* <http://bit.ly/2s1g8qv>; *see also* Administrative complaint of ACLU regarding border searches, May 4, 2017, *available at* <http://bit.ly/2rRcNIJ>

***Border searches of journalists have become more invasive because of technological advances.***

Each year journalists pass through the U.S. border to cover important stories all over the country and the globe. Often, journalists experience serious risks to their lives and their sources while traveling abroad, including being subject to invasive searches and seizures of their electronic devices by despotic regimes. In fact, the Department of State has cautioned journalists traveling outside the United States to “[e]rase any sensitive photos, comments, or other materials from your social media pages, cameras, laptops, and other electronic devices that could be considered controversial or provocative by local groups.” See United States Department of State, *For Journalist Travelers* (June 10, 2017), <http://bit.ly/2qIcuxy>.

Recently, reporters have begun to feel a similar threat at home from U.S. border officials. Since 2015, multiple reporters have been singled out at the border for their journalistic work, stopped, searched, and interrogated. Many of these events have been well documented by the media. The following list includes some of the most invasive and troubling instances from the past two years:

- Kim Badawi, French-American photojournalist, who has worked for *The New Yorker*, *The Wall Street Journal*, and *Le Monde* was stopped at the U.S. border when flying to America in November 2016. Officers detained Badawi for 10 hours while they searched his phone, rifled through private photos, encrypted WhatsApp messages with a source, and other contacts and conversations from the past 10 years.<sup>2</sup>
- Isma’il Kushkush, a freelance journalist and former acting East Africa bureau chief of the *New York Times*, reported that he has been stopped five times since 2013, with questioning lasting two to three hours. In January 2016 Kushkush was stopped and officers conducted unduly intrusive searches of his electronic devices. They also interrogated Mr. Kushkush about his reporting on refugees.<sup>3</sup>
- Ed Ou, a Canadian photojournalist, was en route to cover protests at the North Dakota pipelines in November 2016 when he was stopped by CBP agents at the Vancouver airport and subjected to an extended interrogation and search that lasted six hours.<sup>4</sup> According to Ou, officers had prior knowledge about him which they used in their four rounds of questioning.<sup>5</sup> CBP officers also conducted unduly intrusive searches

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<sup>2</sup> Tasneem Nashrulla, *This U.S. Journalist Said He Was Detained At Miami Airport For Working in the Middle East*, BUZZFEED, Nov. 24, 2015, <http://bzfd.it/2rJ0TDC>.

<sup>3</sup> Alexandra Ellerbeck, *Security Risk for Sources as U.S. Border Agents Stop and Search Journalists*, COMM. TO PROTECT JOURNALISTS, Dec. 9, 2016, <http://bit.ly/2rYxR2i>.

<sup>4</sup> Andrea Peterson, *U.S. Border Agents Stopped Journalist from Entry and Took His Phones*, THE WASH. POST, Nov. 30, 2016, [http://wpo.st/fi\\_J2](http://wpo.st/fi_J2).

<sup>5</sup> Trevor Timm, *Attention All Journalists: US Border Agents Can Search Your Phones*, COMM. TO PROTECT JOURNALISTS, Nov. 30, 2016, [http://www.cjr.org/first\\_person/ed\\_ou\\_border\\_standing\\_rock.php](http://www.cjr.org/first_person/ed_ou_border_standing_rock.php) (stating the first question officers asked him was “When was the last time you were in Iraq?”).

of his belongings, which included his personal diary and mobile phones, and ultimately did not allow him to enter the country.

- Maria Abi-Habib, a Lebanese-American and *Wall St. Journal* reporter, was taken by DHS agents to “a special section of LAX airport” when arriving from Beirut for a work trip in July 2016.<sup>6</sup> According to the Abi-Habib, the agent “independently knew who I worked for and my Twitter account, countries I’d reported from (like Iraq) and even recent articles I’d written.”<sup>7</sup> Abi-Habib was subject to questioning for over an hour when officers asked to search her cellphone to “collect information.”<sup>8</sup>
- Ali Hamedani, a BBC journalist, was detained at Chicago O’Hare airport in January 2017. The journalist was traveling on a Media (“I”) Visa to interview a Persian singer. CBP officers ordered him to unlock his phone, after which they searched it, as well as his computer and Twitter feed. Hamedani told the BBC that U.S. agents read his Twitter account for his political views.<sup>9</sup>
- Mohammed Tawfeeq, a CNN editor, was subjected to secondary screening when entering the Atlanta airport in January 2017.<sup>10</sup> Tawfeeq, who travels regularly as part of his job, is a permanent legal resident of the United States since 2013.

The occurrence of border stops of journalists is nothing new, however. Reports of unduly intrusive searches of journalists at the border have been reported for years, with a notable increase since the September 11 attacks.<sup>11</sup> But lately, these stops seem to have become more commonplace, and even more likely to infringe on protections of journalists.

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<sup>6</sup> Mazin Sidahmed, *Department of Homeland Security Detains Journalist Returning from Beirut*, THE GUARDIAN, July 21, 2016, <http://bit.ly/29Z7PPl>.

<sup>7</sup> Maria Abi-Habib, Facebook Post, July 21, 2016, <http://bit.ly/2abls0R>.

<sup>8</sup> Frank Pollatta and Jose Pagliery, *Feds Try To Forcefully Search Wall Street Journal Reporter’s Phone*, CNN.COM, July 21, 2016, <http://cnmmon.ie/2qF6Wce>.

<sup>9</sup> Comm. to Protect Journalists, Alerts, *BBC journalist questioned by US border agents, devices searched*, Feb. 1, 2017, <https://www.cpj.org/2017/02/bbc-journalist-questioned-by-us-border-agents-devi.php>.

<sup>10</sup> Ellen Elridge, *CNN producer detained in Atlanta files lawsuit against immigration order*, ATLANTA JOURNAL-CONSTITUTION, Feb. 1, 2017, <http://on-ajc.com/2jXh4rN>.

<sup>11</sup> See e.g., Michael Sniffen, *Feds Rate Travelers for Terrorism*, THE WASH. POST, Nov. 30, 2006, <http://wapo.st/2qzCKKC>; Susan Stellin, *Security Check Now Starts Long Before You Fly*, N.Y. TIMES, Oct. 21, 2013, <http://nyti.ms/2rdLjwv>; Mike Masnick, *DHS Interrogates NY Times Reporters At Border, Then Denies Having Any Records About Them*, TECH DIRT, Dec. 10, 2013, <http://bit.ly/2qsDJkJ>. See also Rachel Bunn, *Oscar-nominated filmmaker detained at U.S. border sparks debate over searches of electronic devices*, RCFP.ORG, Apr. 10, 2012, <http://rcfp.org/x?1yfL>; Geoff King, *For journalists coming into US, policies border on the absurd*, CPJ.ORG, Oct. 28, 2014, <http://bit.ly/1tDxF2l>, (quoting journalist Ahmed Shihab-Eldin who was stopped by CBP many times and says agents “seemed familiar with his work”); Tasneem Nashrulla, *This U.S. Journalist Said He Was Detained At Miami Airport For Working In the Middle East*, BUZZFEED, Nov. 24, 2015, <http://bzfd.it/2qsW8Of>.

Border searches of journalist's mobile phones and other electronic devices have become uniquely problematic in the past few years as cellphones have become necessary tools of the journalistic trade. To equip reporters for the twenty-four hour news cycle and minute-to-minute deadlines, newsrooms provide training to their journalists on how to do "mobile newsgathering." Journalists who travel have become especially dependent on these devices in order to report on breaking news stories from afar.

Mobile devices also contain an unprecedented amount of data from the variety of applications geared towards newsgathering. Today, journalists are required to use a plethora of tools on their devices, including audio and video recording functions, cameras, notetaking apps, calendars, and encrypted messaging programs. After gathering data, they can then distribute their work directly through social media right on their devices. These devices thus are sometimes a modern-day newsroom for journalists, and contain a great deal of confidential or proprietary information. As the U.S. Supreme Court noted in *Riley v. California*, 134 S. Ct. 2473, 2489 (2014), the typical phone can contain "millions of pages of text, thousands of pictures, or hundreds of videos." Indeed, journalists have been turning to special courses and advisors to learn how to secure this private information.

At the same time, searches at the border are now often conducted with electronic tools exceptionally adroit at combing through vast amounts of data from electronic devices very quickly, adding a new level of intrusiveness into border searches. In one border search case, *United States v. Kolsuz*, 185 F. Supp. 3d 843, 849 (E.D. Va. 2016), the court noted that officers "connected the iPhone to a Cellebrite Physical Analyzer, a tool that extracts data from electronic devices, and conducted an advanced logical file system extraction" at the scene of the detention.

***Constitutional concerns.*** According to CBP's own guidelines, border searches are "subject to the requirements and limitations provided herein *and applicable law*." U.S. CBP, Border Search of Electronic Devices Containing Information, Directive No. 3340-049, § 5.1.2 (Aug. 20, 2009) (emphasis added) (hereinafter "Directive"). *See also* § 5.2.2 (stating "sensitive information, such as . . . work-related information carried by journalists, shall be handled in accordance with *any applicable federal law* and CBP policy") (emphasis added).

The U.S. Supreme Court has repeatedly underscored the need for heightened protections in Fourth Amendment cases involving First Amendment concerns, especially in cases involving the press. In *Marcus v. Search Warrant*, the Court noted that "[h]istorically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." 367 U.S. 717, 724 (1961). The Court added that "[t]he Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Id.* at 729.

Consistent with the historic relationship between the First and Fourth Amendments, the Court has made clear that "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1979), *quoting Stanford v. Texas*, 379 U.S. 476, 485 (1965).

While the Supreme Court has recognized an exception that permits the government to employ broad search power at the border, see *United States v. Ramsey*, 431 U.S. 606 (1977), “reasonableness” is still an essential element of a search beyond a routine customs inspection. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985) (“We hold that the detention of a traveler at the border ... is justified at its inception if customs agents ... *reasonably suspect* that the traveler is smuggling contraband”) (emphasis added).

While CBP’s policies are not clear on what, if any, standard border agents apply, we write to underscore that a meaningful standard is necessary because searches of electronic devices create heightened constitutional concerns. See *Riley*, 134 S. Ct. at 2489 (finding warrantless searches of an electronic device unreasonable because they reveal the “sum of an individual’s private life”). Such a portable catalog of one’s life did not exist at the time *Ramsey* and *Montoya de Hernandez* were decided. Based on the experiences of journalists like Kim Badawi and Ali Hamedani, it is clear that CBP’s application of its own policies does not account for these concerns, and are not “reasonable” even by the lesser standard for a border search.

***Applicability of the Privacy Protection Act.*** CBP’s searches and seizures of a journalist’s cellphone or other electronic devices also implicate the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (“PPA”). The PPA prohibits searches and seizures of work product and documentary materials held by a person with “a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication,” with a few expressly enumerated, and very narrow, exceptions.<sup>12</sup> Under the statute, the government is generally prohibited from searching or seizing such materials without probable cause that the person has committed a crime.

After the Supreme Court found in *Zurcher* that Fourth Amendment protections, applied with “scrupulous exactitude,” were sufficient to protect newsrooms from invasive searches, Congress chose to create additional safeguards under the PPA to protect a newspaper’s First Amendment activity.<sup>13</sup> Thus, the PPA “affords the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment.” S. Rep. No. 96–874, at 4 (1980). In practice, the statute protects journalists who may possess evidence of a crime, but who are not themselves suspected of criminal activity.

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<sup>12</sup> While the statute specifically says it does not interfere with the ability “to enforce the customs laws of the United States,” 42 U.S.C. 2000aa-5, reading of *content* on an electronic device is not part of the customs function, and the distinction between examining a device as contraband that violates customs rules and the personal correspondence on that device is the same as the distinction in federal law between opening mail “which appears to contain matter in addition to, or other than, correspondence” and that “which appears to contain only correspondence,” the latter of which requires a search warrant or consent. See 19 C.F.R. § 145.3 (2017).

<sup>13</sup> 42 U.S.C. § 2000aa(a) (protecting materials “possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper . . . or other similar form of public communication”). The PPA, therefore, prohibits government searches and seizures of a journalist’s work product materials without probable cause that the journalist has committed a crime. *Id.*

CBP's current practices contravene the PPA insofar as its policies would permit agents to search and seize work product or documentary materials held on a journalist's electronic device. Routine searches of a journalist's electronic devices at the border thus interfere with the protections Congress thought were important for the free flow of information to the public.

***The need for confidentiality.*** Searches of journalists threaten to disclose reporters' confidential documents and disturb the essential reporter-source privilege. While the U.S. Supreme Court, in its only ruling on the issue, has said that journalists cannot refuse to testify before grand juries investigating crimes, Justice Powell noted in a concurrence in that case that they are not "without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring). Since then, most federal circuits have found at least some degree of a reporters' privilege in at least some contexts,<sup>14</sup> 40 states have adopted shield laws, and almost every state has recognized some degree of privilege in its case law.<sup>15</sup>

Confidentiality between a reporter and source is necessary for the news media. Without the ability to promise confidentiality, journalists would not be able to fulfill their role as public watchdogs. Journalists who travel internationally often seek and obtain information that may be privileged. *See Zemel v. Rusk*, 381 U.S. 1, 28 (1965) (Goldberg, J., dissenting) (stating that journalists often obtain through travel "information necessary to the making of informed decisions" by the public). Many significant pieces of American journalism would not have been written without anonymous sources and the ability to promise confidentiality, and much of the public interest reporting undertaken regularly relies on confidential sources.<sup>16</sup>

CBP's Directive acknowledges the importance of taking special precautions for a reporter's privileged materials. Section 5 of the Directive, titled "Review and Handling of Privileged or Other Sensitive Material," mentions that privileged material should be subject to special handling. In the list of various types of privileged materials, CBP includes legal documents, medical records, and "*work-related information carried by journalists.*" § 5.2.2 (emphasis added). The Directive requires this information to be handled in accordance with "any applicable federal law and CBP policy" and that any questions "regarding the review of these materials shall be directed to the CBP Associate/Assistant Chief Counsel, and this consultation

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<sup>14</sup> *See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595–96 & n.13 (1st Cir. 1980); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988); *United States v. Burke*, 700 F.2d 70, 76–77 (2nd Cir. 1983); *United States v. Treacy*, 639 F.3d 32, 42 (2nd Cir. 2011); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, *modified*, 628 F.2d 932 (5th Cir. 1980); *United States v. Smith*, 135 F.3d 963, 972 (5th Cir. 1998); *In re Grand Jury Proceedings*, 810 F.2d 580, 583–84 (6th Cir. 1987); *Shoen v. Shoen*, 48 F.3d 412, 418 (9th Cir. 1995); *United States v. Capers*, 708 F.3d 1286, 1303 (11th Cir. 2013); *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000).

<sup>15</sup> For the various sources of legal protections in each state and federal circuit, *see* The Reporters Comm. for Freedom of the Press, *The Reporter's Privilege*, RCFP.ORG, available at <http://www.rcfp.org/reporters-privilege>.

<sup>16</sup> *See* Society of Professional Journalists, *Anonymous Sources*, SPJ.ORG, available at <https://www.spj.org/ethics-papers-anonymity.asp> ("Anonymous sources are sometimes the only key to unlocking that big story, throwing back the curtain on corruption, fulfilling the journalistic missions of watchdog on the government and informant to the citizens").

shall be noted in appropriate CBP systems of records.” *Id.* While the agency may have special internal rules to protect these privileged materials, they have not been made public.

Thus, CBP’s procedures place journalists’ common law, statutory, and constitutional rights at risk by sanctioning the search and seizure of electronic devices and destabilizing the important relationship between journalists and their sources. CBP’s procedures must ensure that such searches will not compromise the work product and communications of journalists who may use various tools in connection with their newsgathering, including tools that protect the identities of and their communications with confidential sources.

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The undersigned organizations are deeply committed to seeing journalists’ rights protected at the border. For this reason, we urge the Office of Inspector General to conduct a comprehensive review of CBP’s policies and practices to determine whether CBP is complying with federal law, obligations under the U.S. Constitution, and its own agency guidelines. As part of this review, we also ask that any policies the agency may have that specifically involve the stop and search of journalists or seizure of their privileged records be made public. This transparency is necessary to ensure that border agents conduct their important work while respecting the rights of journalists.

Sincerely,

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The Reporters Committee for Freedom of the Press