



August 14, 2018

John V. Kelly  
Acting Inspector General  
Office of Inspector General/Mail Stop 0305  
Department of Homeland Security  
245 Murray Lane SW  
Washington, DC 20528-0305

U.S. Department of Homeland Security  
Office for Civil Rights and Civil Liberties  
Building 410, Mail Stop 0190  
Washington, D.C. 20528

Transportation Security Administration  
701 South 12th Street  
Arlington, VA 20598

CBP INFO Center  
1300 Pennsylvania Avenue N.W., MS: 1345  
Washington, DC 20229

U.S. Customs and Border Protection  
Attn: Gaetano Cordone, Port Director  
Orlando International Airport  
9043 Tradeport Drive  
Orlando, FL 32827

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
NATIONAL OFFICE  
125 BROAD STREET, 18TH FL.  
NEW YORK, NY 10004-2400  
T/212.549.2500  
WWW.ACLU.ORG

OFFICERS AND DIRECTORS  
SUSAN N. HERMAN  
PRESIDENT

ANTHONY D. ROMERO  
EXECUTIVE DIRECTOR

ROBERT B. REMAR  
TREASURER

**VIA CERTIFIED U.S. MAIL, RETURN RECEIPT REQUESTED**

**RE: Repeated Detention, Search, and Intrusive Questioning of U.S. Citizen at Multiple U.S. Airports and Ports of Entry**

Mr. Kelly:

I write on behalf of Zainab Merchant, a U.S. citizen and the founder and editor of *Zrights Studios*, formerly *Zainab Rights*, a multimedia site posting content on current affairs, politics, and culture. She is also a graduate student in international security and journalism at Harvard University and the mother of three young children. Ms. Merchant has been subjected to invasive searches, questioning, and detention by Transportation Security Administration (TSA) or U.S. Customs and Border Protection (CBP) officers every time she has traveled by air or reentered the United States since September 2016.

Ms. Merchant has done nothing to warrant such treatment. The pattern of prolonged, humiliating searches to which she has been subjected raises serious constitutional concerns and suggests that Ms. Merchant, who is Muslim, has been targeted for additional scrutiny because of her religion and/or her work as a writer. We urge that you review whether the agencies' practices comply with applicable policy, federal law, and the U.S. Constitution and implement measures necessary to ensure that Ms. Merchant can travel free from unlawful harassment and abuse.

### **Detention, Search, and Questioning of Ms. Merchant**

Since September 2016, TSA and CBP have subjected Ms. Merchant to intrusive, humiliating searches—often in ways that appear duplicative and unnecessary—every time she has sought to board an airplane or reenter the United States.<sup>1</sup>

September 2016. On September 1, 2016, Ms. Merchant and her husband traveled with their baby daughter from their home in Orlando to a wedding in Vancouver, British Columbia. At both the Orlando and Los Angeles airports, they were unable to print their boarding passes from a self-service machine and underwent rigorous additional screening, including pat-down searches, at TSA checkpoints. They were then subjected to additional pat-down searches and explosive residue tests at the boarding gates—in full view of other passengers with whom they were about to fly—despite having cleared secondary screening only minutes earlier. The additional search at the gate in Los Angeles caused Ms. Merchant and her family to miss their flight. They were rebooked on another flight to Portland that left five hours later, but when they arrived, the luggage pick-up area was closed, and they had to wait two additional hours for their bags. They drove overnight to Vancouver and had no problems entering Canada.

Three days later, on September 4, 2016, the family returned to the United States. When they arrived at the U.S.-Canada border in Blaine, Washington, a CBP officer scanned their passports, prompting an audible alert. The officer directed them to the border station, where they spent approximately six hours in a cold room without access to food or their phones. Their six-month-old baby cried for much of the night. At about 2:00 a.m., CBP officers took Ms. Merchant's husband to a separate room and questioned him for approximately 45 minutes. At 4:30 a.m., the officers stated that they had received the call they had been waiting for from Washington, D.C., and permitted the family to leave. The family then drove to Portland, having had no sleep, only to undergo the same additional screening and duplicative at-gate searches at the Portland airport and when boarding their connecting flight in Atlanta.

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<sup>1</sup> Ms. Merchant sets forth the details of the incidents described here in a renewed petition for redress submitted to the Department of Homeland Security Traveler Redress Inquiry Program.

December 2016. On December 13, 2016, Ms. Merchant, her husband, and their three young children traveled from Orlando to Toronto for a wedding. Ms. Merchant and her husband had “SSSS” notations on their boarding passes—signifying that they were “Secondary Security Screening Selectees”—and were subjected to the same additional screening they had experienced during the September 2016 trip. Ms. Merchant had recently been injured in a car accident, and at one point during the screening process, officers manually probed under the cast on her leg and touched areas of bruising, causing pain. The family had no difficulty entering Canada.

On their return trip on December 19, 2016, they were again referred to secondary inspection at U.S. customs, where they spent approximately four-and-a-half hours, and Ms. Merchant’s husband was questioned separately again before the family was permitted to reenter the United States. During a layover at New York’s JFK International Airport, they underwent TSA’s secondary screening procedures yet again, despite never having left the secure area of the airport.

March 2017. On March 1, 2017, Ms. Merchant traveled to Toronto to visit her uncle. Another uncle, who has health problems, accompanied her on the trip. They were unable to check in online or at the airport kiosks, and when they received their boarding passes, each had an “SSSS” notation. Both Ms. Merchant and her uncle were subjected to secondary screening at the TSA checkpoint, and TSA officers took Ms. Merchant to a private room for another pat-down search. At the gate, other TSA officers subjected them to further at-gate checks and pat-down searches in front of the other passengers. During a layover in Chicago, they were again subjected to pat-down searches before boarding their flight, despite never having left the secure area of the airport. They had no difficulty entering Canada.

On March 5, 2017, Ms. Merchant traveled alone from Toronto to Orlando. During preclearance at the Toronto airport, U.S. customs redirected Ms. Merchant for additional inspection. In a deeply humiliating process, CBP officers removed all of the contents of her bag, including her undergarments, and examined them closely in a public area. They also read the contents of her graduate school notebooks. The officers then questioned Ms. Merchant about topics wholly unrelated to the trip from which she was returning. They asked her about an article she had written for *Zainab Rights* that described her experience at the border in September 2016 and was critical of CBP’s actions. A CBP officer said the article made the CBP officers sound “evil,” but that they were just doing their jobs. The officers also asked Ms. Merchant about her religion and opinions, including: “You’re from Tanzania originally? Are you Ismaili?” “Do you support ISIS?” “Do you know anyone who is an ISIS supporter?” Ms. Merchant responded that she did not support ISIS, and that if she knew anyone who did, she would report it to the police. She pleaded with the officers to allow her to return home to her children.

Ms. Merchant spent approximately two hours in the inspection area. When she was permitted to leave and arrived at the boarding gate, she was forced to undergo another pat-down search before boarding her flight. She had a layover in Newark, New Jersey, and when she arrived at the gate—without having left the secure area of the airport—officers were already there waiting for her and asked to check her boarding pass. During the boarding process, TSA officers stood in the jet way checking each passenger's boarding pass and ID. The officer who checked Ms. Merchant's boarding pass said that she would have to go through security again and led her to a checkpoint. The screening process took an hour, causing her to miss her flight.

July 2017. In July 2017, Ms. Merchant traveled from Orlando to Washington D.C., and from there to Chicago and back to Orlando. Again, for each flight, she was subject to duplicative additional screening both at the security checkpoints and at the gates, in full view of other passengers. On July 1, 2017, while she was at the gate at the Orlando airport, TSA officers questioned her. On July 3, at Reagan National Airport in Washington D.C., TSA officers took Ms. Merchant's laptop out of her sight for approximately thirty minutes. On July 8, TSA officers in Chicago pulled her into a separate security line and questioned her about where she was traveling, why she had come to Chicago, who she had stayed with, and whether she was arriving from another country.

September 2017. On September 16, 2017, while returning to Orlando from a trip to Morocco for a friend's destination wedding, Ms. Merchant and her husband were again redirected to secondary inspection. While sitting in the waiting area, Ms. Merchant spoke with another woman about their repeated experiences with additional inspection and screening. A CBP officer who overheard them said something like, "When you fly, you sign off all your rights. Do what you want, get a lawyer, get the courts involved, and do the redress, but you'll never be able to get off." Another officer questioned Ms. Merchant about her writing and asked her what she sought to achieve from it. He said, "Please don't write anything bad about us." Ms. Merchant and her husband spent approximately three hours in the secondary inspection area.

December 2017. In December 2017, Ms. Merchant received a voicemail from a DHS officer who identified himself as Agent Newcomb. He referred to her travel-related issues and said that he "would like to come up with a solution that could make everyone happy." During a subsequent meeting, Agent Newcomb and another officer who identified himself as Agent Jerome questioned Ms. Merchant about whether she knew of anyone who had been "radicalized" and again indicated that they would like to come up with a mutually beneficial solution to her travel issues. Ms. Merchant declined to meet with the officers again.

The officers' statements suggested to Ms. Merchant that her travel problems are unrelated to any valid security concern, and are instead a means of pressuring her to provide information or serve as an informant.

February-March 2018. On February 28, 2018, Ms. Merchant traveled from Orlando to Boston to attend class at Harvard University. As usual, she was subjected to secondary screening at the airport in Orlando.

On March 3, 2018, she traveled from Boston to Washington, D.C. for a speaking engagement. At Boston Logan airport, she underwent an extraordinarily intrusive and humiliating search. While a female TSA officer named McNeill was patting her down, another female officer asked the officer, "Is this the selectee we were waiting for?" Ms. Merchant had recently undergone surgery related to a tailbone injury, and the officers removed the surgery brace from her abdomen. Officer McNeill then told the second officer that she wanted to take a "deeper look" at Ms. Merchant's groin area. The officers told Ms. Merchant that they would need to conduct a private screening. Because of her repeated, disturbing experiences with intrusive searches, Ms. Merchant responded that she was fearful of a private screening, and that they could conduct the search in public. The officers notified a supervisor named Zamosa, who threatened to call in state troopers if Ms. Merchant did not cooperate. Ms. Merchant asked if she could use her phone to call her attorney. Officer Zamosa responded that "technically" she had no choice but to cooperate, as her phone and any other devices were unavailable to her during the search. As other travelers in the screening area watched, Officer Zamosa called two state troopers to the area and told them that Ms. Merchant was "resisting a private screening"—an obvious distortion of the situation that appeared intended to pressure her. Ms. Merchant stated that she was not resisting, but simply wanted to know why a private screening was necessary. Officer Zamosa cut her off and talked to the two state troopers privately. The state troopers approached her and said that she could not leave the premises or use her phone, and that it would be better if she complied calmly. Because Ms. Merchant felt that she had no choice, she proceeded to the private screening.

Once inside the room, the second female officer patted Ms. Merchant down, lifted her shirt to see the sutures in her abdomen, and felt in her groin area. The officer then asked Ms. Merchant to open her pants. Horrified, she did so, revealing a menstrual pad. The officers then ended the private screening. As she was leaving, Ms. Merchant approached Officer Zamosa to get his name, but he placed his hand over his badge. One of the state troopers did the same, but Ms. Merchant could see that the other trooper's name was Walsh. She learned Officer Zamosa's name from another TSA officer as she was leaving.

Ms. Merchant traveled from Washington, D.C. to Orlando on March 4, 2018. She underwent the usual secondary screening protocol in Washington, D.C. During the boarding process, TSA officers conducted checks inside the gate

itself immediately before she boarded the aircraft. The officers directed her to take off her shoes and turn on her devices, and they opened up everything in her wallet and backpack and patted her down thoroughly—almost immediately after she had undergone secondary screening at the checkpoint. The officers acknowledged to Ms. Merchant that she was the reason they were conducting the additional searches at the gate.

June 2018. On June 10, 2018, Ms. Merchant traveled from Orlando to Washington, D.C. to speak at a conference. As usual, in Orlando her boarding pass displayed “SSSS,” and she underwent duplicative screening at the security checkpoint and at the gate for her flight. TSA officers at the gate questioned her about whether she lives in Orlando, how long she would be staying in Washington, D.C., and the purpose of her travel. The officers did not question any of the other passengers at the gate. It took more than an hour and 15 minutes for Ms. Merchant to obtain a boarding pass during return travel to Orlando on June 12. When she finally received her boarding pass, it displayed “SSSS” as usual, prompting the additional screening to which she is continually subjected.

Ms. Merchant has engaged in no illegal activity or conduct that could reasonably be interpreted as threatening to the security of the United States, and she has repeatedly requested an explanation for why TSA and CBP continually subject her to additional scrutiny and harassment. She submitted a petition for redress through the DHS Traveler Redress Inquiry Program (TRIP), but the response she received was wholly uninformative, and her travel difficulties did not improve. She has appealed to senators and congressional representatives, who have been unable to obtain results on her behalf. Individual TSA and CBP officers have responded to her questions dismissively or maintained, incorrectly, that she lacks legal rights at checkpoints or in inspection areas.

The cumulative effect of this treatment on Ms. Merchant has been severe. She avoids flying if possible and experiences extreme frustration, anxiety, and humiliation when she does fly. She and her husband also avoid flying with their children, not only because of the added burdens of such scrutiny but also to spare them the ordeal of watching their parents demeaned and stigmatized during the screening or inspection process. Faced with the prospect of undergoing the same Kafkaesque screening protocol every time she flies, Ms. Merchant decided not to enroll in courses for her graduate program at Harvard University during the fall of 2017, because of the travel that attending classes would have entailed.

### **The Agencies’ Treatment of Ms. Merchant Raises Serious Concerns Under the Constitution, Federal Law, and Applicable Policy.**

Ms. Merchant’s experiences—individually and in the aggregate—raise questions about the lawfulness of TSA’s and CBP’s actions.

First, the agencies' conduct potentially violates Ms. Merchant's due process rights. By continually subjecting Ms. Merchant to intrusive searches and screening requirements far beyond those required of other travelers, TSA and CBP are interfering with her right to travel.<sup>2</sup> And by forcing her to undergo these onerous procedures in full view of the traveling public—including passengers in boarding areas preparing to travel with her on the same flight—the agencies are threatening her right to be free from government-imposed stigma.<sup>3</sup> They are doing so, moreover, without having provided Ms. Merchant with bedrock due process protections: notice of the reasons for the deprivation of these rights and an opportunity to contest those reasons.<sup>4</sup> The DHS TRIP process does not include such protections, and courts that have evaluated it in similar contexts have concluded that it violates both the Fifth Amendment's Due Process Clause and the Administrative Procedure Act.<sup>5</sup> TSA and CBP cannot continue to stigmatize Ms. Merchant and interfere with her right to travel without, at the very least, informing her of the basis for their actions and providing her with a meaningful opportunity to contest that basis and clear her name.

Additionally, CBP's treatment of Ms. Merchant raises grave First Amendment concerns. Her activities as the founder of, and a contributor to, *Zainab Rights*—including her writings criticizing TSA and CBP policies and conduct—are fully protected by the First Amendment.<sup>6</sup> Nonetheless, during border inspections in March and September 2017, CBP officers questioned Ms. Merchant about an article she had written for *Zainab Rights* that was critical of CBP's actions. They complained that the article portrayed CBP in a negative light and advised that she should refrain from criticizing CBP in the future. Such conduct suggests that the officers subjected Ms. Merchant to secondary inspection and/or prolonged detention in retaliation for her First Amendment-protected speech, and in a manner that was intended or likely to deter her from exercising her First

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<sup>2</sup> See *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (government action implicates the right to travel “when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right”) (citations and quotations omitted); *Kent v. Dulles*, 357 U.S. 116, 127 (1958) (freedom to travel internationally is “an important aspect of the citizen’s liberty”); *Elhady v. Piehota*, 303 F.Supp.3d 453 (E.D. Va. 2017) (citizens subjected to invasive additional screening, hours-long detention and questioning, and other liberty-constraining measures when flying or reentering the country stated procedural due process claims).

<sup>3</sup> See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (due process protects against unfair government stigma); *Elhady*, *supra* note 2 at \*6 (citizens subjected to additional scrutiny at airports and border posts stated valid claims for reputational injuries).

<sup>4</sup> See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”)

<sup>5</sup> See *Latif v. Holder*, 28 F. Supp. 3d 1134, 1161-64 (D. Or. 2014); *Mohamed v. Holder*, 995 F. Supp. 2d 520 (E.D. Va. 2014).

<sup>6</sup> *Akins v. Fulton County, Ga.*, 420 F.3d 1293, 1300 (11th Cir. 2005) (speech regarding governmental misconduct “lies near the core of the First Amendment”) (quoting *Butterworth v. Smith*, 494 U.S. 624, 632 (1990)).

Amendment rights.<sup>7</sup> Plainly, criticism of CBP is an inappropriate basis for subjecting a traveler to additional inspection or detention.

The CBP officers' questioning of Ms. Merchant about her religious beliefs in Toronto in March 2017 violated other constitutional guarantees. That questioning was unrelated to any valid security rationale and served no legitimate government interest. It burdened Ms. Merchant's rights to freedom of expressive association and free exercise of religion, as well as her rights under the Religious Freedom Restoration Act (RFRA).<sup>8</sup> The First Amendment also protects against compelled disclosure of religious beliefs and political opinions.<sup>9</sup> The ACLU has previously called on the DHS Inspector General to investigate CBP's troubling practice of questioning U.S. citizens and lawful permanent residents who are Muslim, or who are perceived to be Muslim, about their religious beliefs, associations, or practices.<sup>10</sup> In 2011, DHS produced documents in response to a Freedom of Information Act request indicating that DHS had received numerous complaints of religious questioning of Muslim travelers, and that the questioning followed a pattern across various border crossings and ports of entry.<sup>11</sup> CBP's questioning of Ms. Merchant about her religious beliefs is a disturbing indication that it has not ended this unlawful practice, and we again call for a review of CBP policy regarding religious questioning and the adoption of adequate measures to ensure that questioning at the border complies with federal law and the Constitution.

Ms. Merchant's experiences with CBP and TSA also threaten her rights under the Fourth Amendment.<sup>12</sup> The duration of Ms. Merchant's detentions at the border—in particular the seven-hour detention at the U.S.-Canada border in September 2016—appear to have exceeded what was reasonable under the

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<sup>7</sup> See *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005) (plaintiff suffers adverse action if the defendant's retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights).

<sup>8</sup> See *Tabbaa v. Chertoff*, 509 F.3d 89, 102 (2d Cir. 2007) (conduct by CBP officers at the border can burden the association rights of citizens seeking to reenter the United States, triggering First Amendment protections); *id.* at 105-06 (noting that both the Free Exercise Clause of the First Amendment and RFRA circumscribe government questioning and searches of individuals at the border).

<sup>9</sup> *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982) (“[C]ompelled disclosure of political associations and beliefs . . . ‘can seriously infringe on privacy of association and belief guaranteed by the First Amendment.’”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (“[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”).

<sup>10</sup> Letter from ACLU and Muslim Advocates to Richard L. Skinner, DHS Inspector General (Dec. 16, 2010), available at <https://goo.gl/5GFqkc>.

<sup>11</sup> See ACLU, Border Questioning – Produced Documents, <https://goo.gl/NFyu5G>.

<sup>12</sup> See *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (“The Fourth Amendment applies to all seizures of the person.”).



circumstances.<sup>13</sup> Absent any particularized basis for believing that Ms. Merchant was carrying any illegal items or otherwise violating the law when seeking to reenter the United States, CBP had no valid basis for prolonging her detentions at the border.<sup>14</sup>

TSA's treatment of Ms. Merchant is similarly at odds with the Fourth Amendment. Although all travelers must submit to screening procedures before being permitted to enter the secure areas of airports, TSA has repeatedly singled Ms. Merchant out for searches that are far more intrusive and lengthy than those applied to other travelers. The scope and duration of these repeated searches of Ms. Merchant, at TSA checkpoints and elsewhere in airports, may violate the Fourth Amendment's reasonableness requirement—particularly when considered in the aggregate.<sup>15</sup> The TSA officers' questioning of Ms. Merchant in July 2017 and June 2018 also exceeds the permissible scope of the administrative searches that TSA is permitted to conduct for aviation screening purposes, as such questioning went beyond what was necessary to determine that Ms. Merchant was not carrying weapons or dangerous items.<sup>16</sup>

Finally, the pattern of baseless, intrusive searches and detentions of Ms. Merchant raises concerns about discrimination and unlawful profiling. Again, Ms. Merchant has engaged in no illegal activity or conduct that could legitimately be viewed as threatening to aviation or national security. That being the case, the CBP officers' questions in March 2017 about her religious affiliation and views on ISIS, and the DHS officers' questions in December 2017 about whether she knew of anyone who had been "radicalized," suggest that she has been targeted for additional scrutiny because of her religion.<sup>17</sup> The DHS officers' offer to resolve Ms. Merchant's travel problems if she agreed to provide information or serve as an informant renders these concerns all the more acute and underscores that the agencies lack a valid reason for their treatment of Ms. Merchant.

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<sup>13</sup> See *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (border detention must be "reasonably related in scope to the circumstances which justified it initially").

<sup>14</sup> See *id.* at 541-52 (requiring a "particularized and objective basis" for believing that a traveler is engaged in specific illegal activity in order to prolong a border detention); *United States v. Sharpe*, 470 U.S. 675 (1985) (Fourth Amendment requires that any detention be reasonable in scope and duration).

<sup>15</sup> See *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) ("A particular airport security screening search is constitutionally reasonable provided that it is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives and that it is confined in good faith to that purpose.") (citation omitted). Courts, moreover, have concluded that where the same basis serves as justification for successive detentions, the duration and scope of those detentions "must be both individually *and* collectively reasonable." *United States v. Foreste*, 780 F.3d 518, 525 (2d Cir. 2015) (analyzing the reasonableness of successive police stops collectively and identifying similar cases in other circuits) (emphasis added).

<sup>16</sup> See *Aukai*, *supra* note 15 at 962.

<sup>17</sup> See *Cherri v. Mueller*, 951 F. Supp. 2d 918, 929 (E.D. Mich. 2013) (Muslims questioned about their religion during border detentions stated valid claims for equal protection violations).

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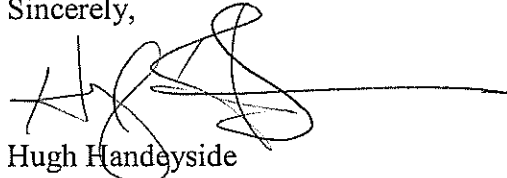
On behalf of Ms. Merchant, we ask for:

1. An investigation into whether the conduct set forth herein is consistent with TSA and CBP policies, federal law, and the Constitution;
2. Implementation of measures sufficient to ensure that Ms. Merchant may travel free from unlawful and unjustified detention, searches, or interrogation; and
3. A review of TSA and CBP policies and practices to determine whether those agencies are singling out persons for additional scrutiny, searches, or prolonged detention based on First Amendment-protected expression or association, including religious affiliation.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

Thank you for your time and careful attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. Handeyside', with a long horizontal line extending to the right.

Hugh Handeyside  
Senior Staff Attorney, National Security Project  
American Civil Liberties Union Foundation