

Press Freedom

Under Threat

International Press Freedom
Mission to the **United States**
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Thank you to all of the media organizations and journalists who took the time to meet with us and share their views.

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Executive Summary

In recent years, press freedom organizations have become increasingly concerned by the challenges faced by the media in the United States (US). These challenges include: record numbers of prosecutions against whistleblowers; the restriction of public information, on the grounds of national security; the direct stigmatization of media workers by politicians; and physical attacks and arbitrary arrests of journalists by law enforcement officials.

These concerns inspired an unprecedented press freedom mission to the US in January 2018. Through interviews with journalists in Texas, Missouri, Wisconsin, Illinois and Washington DC, the mission gained a deeper understanding of the challenges media workers face locally and nationally. This short mission only scratched the surface of the complex issues at stake, however, our findings still paint a perturbing picture for press freedom in the US. Despite this, we also found that in some sectors the press was bolstered and further emboldened by the challenges they face.

This report outlines five intersecting areas of concern, which are fundamental to the protection of media freedom.

1 Protests and public events

The physical safety of journalists covering protests or major events is essential for press freedom. We received reports of journalists being arrested and even assaulted by law enforcement officials at a local and state level. Law enforcement officials have also refused to recognize the rights of journalists to report freely on events of public interest. This lack of understanding of journalists' rights and examples of open hostility towards the media are particular issues of concern. While, this does not reflect a federal policy, it is paramount that state and local authorities ensure the safety of journalists and the freedom to report on matters of public interest.

2 Crossing the border

Reports from journalists indicate an increase in border stop and searches of media workers. We heard about 18 journalists who have been subject to a total of 95 more detailed secondary stop and searches since 2008. Of these, ten were forced to hand over their cellphones. Journalists have little legal protection when it comes to electronic device searches. Press freedom groups have also been monitoring cases in which journalists have been denied entry into the US. Submitting journalists to searches or denying them entry not only makes their work increasingly difficult but sends a negative message about press freedom globally.

3 Source protection

Investigative journalism relies on sources and whistleblowers to uncover major stories and issues of public interest. Over recent years, the protection of sources had been weakened by a number of prosecutions, particularly the increasing use of the Espionage Act 1917. These prosecutions rocketed under the Obama administration. Other troubling developments include: the Department of Justice seeking to review its media subpoena guidelines; Attorney General Jeff Sessions, failing to promise that he will follow the current guidelines; and assertions that the Department will seek to imprison whistleblowers. The mission considers that this shift reflects forthright rhetoric by President Trump who has likened those who leak information to Nazis.¹ Targeting journalists' sources and a crackdown on whistleblowers could restrict the reporting of public interest issues and prevent important information being made public.

4 Free flow of information

The US has a freedom of information law that should, in principle, make it easier for journalists to uncover information that is of interest to the public. However, the mission found that the system is lethargic and frequently unresponsive. We received reports of untimely and obstructive responses

from official bodies and the inconsistent application of the law and its guidelines, particularly concerning the fee-waiver for journalists and the rejection of requests on grounds of national security under overly broad and arbitrary guidelines.

5 Deteriorating rhetoric

There has been a change in the political landscape in which media workers have found themselves, particularly over the past two years. The rhetoric that Trump and his administration have used to disparage and discredit the media, before and after the 2016 election, is of grave concern. Political leaders' words have ramifications beyond the immediate news cycle. It appears that members of the public and other local authority or political figures have felt emboldened by the media strategy of the current administration and journalists have found themselves subject to increasing abuse, harassment, and threats, particularly online.

Press freedom relies on the safety of journalists and their sources. In order for media freedom to thrive, journalists need the freedom to report and access information in the public interest and we need political representatives who facilitate this freedom, even when they receive criticism. By openly and aggressively targeting journalists and media outlets, the current US administration

¹ <https://www.independent.co.uk/news/donald-trump-russia-claims-dossier-report-tweet-unverified-kremlin-fabrication-a7521456.html>

risks undermining media freedom and creates a culture where journalists find themselves unprotected.

Self-censorship

Journalists do not operate in a vacuum and the press is subject to economic, political, and social pressures that have an impact on its freedom to report openly. The mission received reports, particularly from local media, where economic or political pressures had led to questions of self-censorship. If the issues identified in this report are not addressed, self-censorship could become a greater challenge for the US media. What happens to media freedom in the US also has implications beyond its borders

The mission found inspiration in the many professional, brave and determined journalists whom we met. While our findings are a serious cause for concern in the US and beyond, they are by no means a terminal diagnosis for press freedom in the US. The recommendations gathered in this report if followed, would pave the way for strengthened media freedom in the US.

1. Introduction

Independent journalism holds the powerful to account and shines light on the most pressing issues of our day. It seeks to inform, to ignite, to inspire and to spark debate. However, despite strong protection of press freedom through the First Amendment, press freedom organizations have found themselves increasingly concerned about a roll-back of media freedom in the US.

In January 2018, a delegation of global press freedom organizations undertook an unprecedented mission to the US, in response to concerns about threats to journalists and heightened anti-press rhetoric in the year since Trump took office.

The mission, organized by the Committee to Protect Journalists (CPJ) and International Freedom of Expression Exchange (IFEX), also included ARTICLE 19, Index on Censorship, International Press Institute (IPI) and Reporters Without Borders (RSF - Reporters Sans Frontières).

Between January 15 and 17, the mission carried out fact-finding visits to Columbia and St. Louis in Missouri, and Houston in Texas to gather examples of the challenges faced by local media. Remote interviews were conducted with journalists in Wisconsin and Illinois. Meetings with senior policymakers

and national media took place in Washington between January 18 and 19.

Our aims were to provide global press freedom groups with an on-the-ground understanding of the situation in the US; to bring attention to the deterioration of press freedom to a national and global audience; and to show solidarity with our US colleagues.

This report provides an overview of our findings, including recommendations to federal and state authorities and other stakeholders. The report does not provide an exhaustive list of issues or cases across the US, nor does it necessarily reflect the official positions of all the participating organizations.

Despite these threats, the US media is still one of the most free, thanks to the protections of the First Amendment. But press freedom organizations worldwide have an interest in what happens to media freedom in the US because of the implications beyond its borders. Venezuelan leader Nicolás Maduro turned to Trump's 'fake news' defense to brush aside criticism of constitutional changes amid an ongoing crisis.² Syrian President Bashar al-Assad dismissed an Amnesty International report on the torture and execution of thousands of detainees as

² <https://www.theguardian.com/us-news/2018/jan/25/how-trumps-fake-news-gave-authoritarian-leaders-a-new-weapon>

“forged” in the “fake news era”³. Aung San Suu Kyi’s government in Myanmar has sought to deflect accusations of ethnic cleansing of the Rohingya people with the claim of ‘fake news’ while conducting a broader crackdown on press freedom.⁴ The China state news agency Xinhua also called the *New York Times* report on torture of Chinese lawyer Xie Yang “fake news”.⁵

What happens in the US affects all of us. Our freedom to know, to criticize and to question those who hold power over us is reliant on the free flow of pluralistic and independent information. In our ever-smaller global world, some domestic policy is felt as keenly abroad as at home.

³ https://www.yahoo.com/news/exclusive-defiant-assad-tells-yahoo-news-torture-report-is-fake-news-100042667.html?soc_src=social-sh&soc_trk=tw

⁴ <https://www.facebook.com/state.counsellor/photos/pcb.1113877308746484/1113876728746542/?-type=3&theater>

⁵ http://www.china.org.cn/china/Off_the_Wire/2017-03/02/content_40387499.htm

2. Context

The fabric of press freedom in the US has been frayed and weakened by the political stigmatization of journalists over the past year. But media freedom also faces the prospect of more tangible damage through state and local authority policies and practices that have seen an escalation in harassment, denial of access, and the criminalization of journalists covering protests. These threats come against a background of political, social, and technological change that is affecting journalism in the US and beyond.

Citizen journalism

The definition of what it is to be a journalist has radically changed in recent years as technology allows anyone with a phone or computer to create and share content. The rise in ‘citizen journalism’ has been a positive force for freedom of expression, exposing news stories that might otherwise not have come to light and holding the powerful to account. However, it has created challenges when it comes to protecting the rights of those who do not fall into traditional definitions of journalism.

This is highlighted by the treatment of journalists at protests, which as this report shows, is of particular concern for press freedom. In recent years, the US has seen a number of large scale protests, including opposition to the Dakota Access Pipeline and Black Lives Matters protests about the deaths of African-Americans at the hands of

the police. As this report shows, journalists covering these events have been abused, detained, and even arrested and charged with crimes. Those who are not working for established news outlets could be more vulnerable to having their rights denied. For example, the majority of the ten journalists arrested at protests in St. Louis over a police shooting, were freelancers and citizen journalists. In an age when journalism is changing, it’s important that the rights of all journalists to report freely are maintained.

Changing media landscape

The challenges described in this report take place against the backdrop of a resource constrained time for the media industry as a whole. Falling advertising revenues, particularly for local news outlets, are forcing staff cutbacks and placing increased pressure on the diminishing workforce, which reduces the capacity for journalists to seek out information and report the events that are crucial to enable the public to make informed decisions. In addition, journalists report increasing difficulty in accessing public information, despite the 2016 FOIA reform bill.

“ *I think it is a steady erosion of access to info. There are fewer of us than there have ever been. Our news organizations have less money to fight this battle* ”

Protection of sources

Technology that allows journalists to create and share content more easily also creates a digital footprint that can affect their ability to protect their sources, a fundamental tenet of press freedom. As noted in this report, there are anecdotal reports of an increased frequency of journalists being stopped for secondary screenings at borders and having their devices seized and passwords demanded. These devices can potentially reveal the names of sources, how and when they have been contacted, and information they have shared. With little legal protection, journalists may not be able to guarantee the protection of sources who have chosen to share sensitive information or information that those in power may be keen to suppress.

Social media

Social media has transformed how news is consumed. A Pew Research Center Survey showed that 67% of American got some of their news via social media channels.⁶ This shift is not only affecting the business model of journalism but changing the way that the public engage with journalists. While some of these interactions are positive, many journalists, particularly women and people of colour, face personal abuse in response to news stories they have written. This is

a global phenomenon not just limited to the US. However, in the US, it could be exacerbated by the President's direct attacks on individuals and news outlets.

Terrorism

In recent years, there have been several terrorist attacks in the US and abroad, a global refugee crisis and a rise in political extremism.

These events may have contributed to the use of 'national security' as a rationale for restricting public information, increased border searches and the condemnation of whistleblowers who have leaked public information. During times of political upheaval, it is vital to ensure that freedom of expression is protected not undermined.

⁶ <https://uk.reuters.com/article/us-usa-internet-socialmedia/two-thirds-of-american-adults-get-news-from-social-media-survey-idUKKCN1BJ2A8>

3. Areas of Concern

3.1 Protests and public events

Protest and freedom of the press are closely linked and are both protected through the First Amendment: “the right of the people to peacefully assemble, and to petition the Government for redress of grievances”. Protests are an essential part of democratic expression and it is vital that journalists are able to report on them without fear of harassment from either the police or the public.

One of the most persistent areas of concern over recent years is the treatment of journalists covering protests, where journalists have found themselves kettled,⁷ removed from protests, detained, and even charged with offenses. Previously, journalists may have been charged with misdemeanors⁸ – the most serious of which might carry penalties of a large fine or up to a year in prison. However, recent cases have seen journalists charged with felonies,⁹ which can carry penalties of decades in jail.

The US Press Freedom Tracker documented 34 arrests of journalists in 2017; at the time of the mission, eight journalists faced criminal charges.¹⁰ In the fall of 2017 at least ten journalists were arrested in St. Louis, while covering protests over a police shooting. Journalists told us that at public

demonstrations in Missouri, reporters are increasingly caught between aggressive police and sometimes hostile protesters. In St. Louis and Ferguson, the police have adopted increasingly militarized tactics. New protest laws under consideration in Missouri and a number of other states, will restrict the right to protest and would raise the stakes further for journalists who are arrested. These restrictions include laws that increases the penalties for protests near “critical infrastructure” or for engaging in “rioting”, as well as wearing masks or disguises, or blocking traffic.¹¹

We heard how journalists often feel caught between the police and protesters. Sometimes journalists have avoided arrest because they are local reporters and known to local police officers. However, some reporters told us that they are uneasy with being seen as overfriendly with the police. The majority of journalists arrested in St. Louis have been freelancers and citizen journalists, often resulting in law enforcement claiming they are not journalists or meaning that they do not have the institutional reinforcement afforded by a media outlet.

⁷ <https://dictionary.cambridge.org/us/dictionary/english/kettling>

⁸ <https://www.law.cornell.edu/uscode/text/18/3559>

⁹ Ibid.

¹⁰ <https://pressfreedomtracker.us/arrest-criminal-charge>

¹¹ <http://www.icnl.org/usprotestlawtracker/>

“ *The police have become more militaristic in their response. There is a use of overwhelming force instead of de-escalation to solve things.* ”

Reporter, St. Louis on arrests of reporters during protests

Many incidents suggest law enforcement officers require further training and directives to protect journalists' rights to cover events.

“ *St. Louis police have to read the rights of press during roll call. It's shocking that has to be read. But in my experience working on the streets it should almost be read daily. They will push you back from the scene, even when general public is on the scene [if they see you with a camera.]* ”

Reporter, St. Louis on police behavior towards the press

Journalists arrested while covering protests

Below are examples of journalists who have been detained, arrested, or even assaulted, while reporting on public events and protests, even when they have clearly identified themselves as members of the press. These include journalists reporting on protests organised by the Black Lives Matter movement and demonstrations against the Dakota Access Pipeline. These incidents follow a pattern that has been growing for some time.

Chris Hayes



Chris Hayes, a Fox 2 St. Louis-based journalist, was handcuffed and shackled to a bench in Kinloch, Missouri, on June 30 2016.¹² He was detained after objecting to being barred from a public meeting on uninsured and unregistered police cars, a story that Fox 2 had originally investigated. Hayes was issued a court summons for failure to comply and disorderly conduct.

¹² <https://www.riverfronttimes.com/newsblog/2016/07/01/fox-2-investigative-reporter-chris-hayes-arrested-in-kinloch-for-doing-his-job>



Aminah Ali

Aminah Ali, a St. Louis-based independent journalist who founded local news site *Real STL News*, was arrested on October 3 2017. She was reporting on a demonstration against the acquittal of former St. Louis police officer, Jason Stockley, who fatally shot Anthony Lamar Smith, an African-American man, in 2011. Protesters marched on the interstate and blocked traffic, shutting down Highway 40. After they exited the highway, lines of police officers enclosed them in a kettle and ordered them to sit on the ground, then began to arrest them. Ali, who was covering the march for *Real STL News*, was also arrested. Ali is one of ten journalists documented in the Press Freedom Tracker as arrested during protests in St. Louis.¹³

Mike Faulk

St. Louis Post-Dispatch reporter, Mike Faulk was arrested by police on September 17 2017, while covering a protest in response to the Stockley acquittal. Faulk was caught in a kettle in which police lines moved forward, trapping dozens of people indiscriminately, including protesters, journalists, residents, and observers. A report by Faulk's lawyer describes how Faulk was knocked down by several officers, his limbs pinned to the ground and his head forcefully pushed to the ground by a foot. It is understood that once he was incapacitated, an officer squirted pepper spray in his face. Police put Faulk into a van holding approximately eight others and took him to the city jail. Faulk was charged with failure to disperse, a municipal charge.

¹³ <https://pressfreedomtracker.us>

“ *There was no investigation of who was breaking flowerpots and windows it was just who is hanging out in this spot. That’s what was legally problematic. Downtown residents walking by [...] police say that they saw people wearing goggles and gas masks to evade. People wearing goggles are trying to not be accidentally pepper sprayed.* ”

Reporter, St. Louis on the tactic of kettling



Mike Stark

On October 28 2017, Mike Stark, a reporter for liberal news site Shareblue Media, was arrested in Fairfax County, Virginia while covering the campaign of Republican gubernatorial candidate, Ed Gillespie. According to a report on Shareblue, Stark was filming Gillespie’s campaign vehicle at the Annandale Parade when a police officer approached him and ordered him to move out of the street. Stark told the Freedom of the Press Foundation that he complied with the order to move onto the sidewalk and informed the officer that he was a reporter. Stark said that the officer subsequently told him to stay away from the Gillespie campaign bus, which he refused to do since he was covering Gillespie’s political campaign.

Stark reported that following an argument, a police officer lifted his right ankle off the ground, sending him face-first into the sidewalk. Five officers then pinned Stark to the ground with their knees on the back of his head and his body. Stark told the Freedom of the Press Foundation that officers punched him repeatedly in the legs during the physical takedown and that his phone was broken during the incident.



Amy Goodman

Amy Goodman is host of the news program, *Democracy Now!*¹⁴ She was taken into custody on September 3 2016, after she filmed private security guards employed by Dakota Access LLC using dogs and pepper spray to disperse the protests against construction work. Her video has been viewed over 14 million times on Facebook.¹⁵ At first, Goodman was charged with a misdemeanor offense of criminal trespass, but that was escalated by the State Attorney to a rioting felony. A district judge finally dismissed the charges, in October 2016.¹⁶

Goodman is one of several journalists and documentary filmmakers covering protests against the controversial Dakota Access Pipeline project, who have been arrested and charged with felonies.

Jenni Monet

As noted above, freelance journalists can be particularly vulnerable when covering protests. Jenni Monet, a freelancer who contributes to outlets including Al Jazeera and PBS NewsHour, had been reporting on the Dakota pipeline protests for the Center for Investigative Reporting for several months when she was arrested on February 1 2017, while covering the dismantling of an encampment known as Last Child Camp.

Despite showing police her media pass and walking away when instructed to do so, Monet says that she was arrested, strip searched, detained for 40 hours and held in jail for 25 hours before being charged with criminal trespass and engaging in a riot. She commented: “[I was] clearly removed from the arrests [...] I was walking away, I was halfway down the hill, and they still arrested me.” She reported that she was not read her Miranda rights and after spending seven hours on a school bus with other arrestees, she was transferred and then held in a metal cage in the jail parking lot.¹⁷ Monet has since plead not guilty to all charges and awaits the next hearing of her case.¹⁸

¹⁴ https://www.democracynow.org/2016/9/12/headlines/north_dakota_vs_amy_goodman_arrest_warrant_issued_after_pipeline_coverage

¹⁵ <https://www.facebook.com/democracynow/videos/10154446432358279/>

¹⁶ https://www.democracynow.org/2016/10/17/breaking_riot_charges_against_amy_goodman

¹⁷ <http://www.latimes.com/nation/la-na-standing-rock-journalist-arrest-20170205-story.html>

¹⁸ <http://www.mediafiledc.com/jenni-monet-arrested-dapl-journalist-speaks/>



Ryan Kailath

Ryan Kailath was arrested on July 9 2016, when while covering the New Black Panthers protests in Baton Rouge, Louisiana for National Public Radio.¹⁹ The protests took place following the killing of Alton Sterling, a 37-year-old African-American man, by Baton Rouge police officers. Kailath was standing on a grass verge covering the protests; as things got violent he retreated into another line of police officers who arrested him. Kailath said he repeatedly identified himself as a journalist but was ignored. He tweeted on July 11 that a police officer said to him: “I’m tired of y’all saying you’re journalists.” When he was arrested, the police identified Kailath as an African-American man although he identifies as Indian-American.²⁰

Kailath said: “I was transferred between six locations, searched naked, given an orange jumpsuit and a medical and mental health screening, and finally checked in to the East Baton Rouge Parish Prison. In the morning, we were given the local paper, The Advocate. It was only when an inmate paging through it looked up at me and said: ‘Hey, you’re in here!’ that I learned I was being charged with simple obstruction of a highway.”²¹ Within the week all charges against him were dropped.²²

¹⁹ https://www.cjr.org/q_and_a/ryan_kailath.php

²⁰ <https://twitter.com/ryankailath/status/752541299694186497?lang=en>

²¹ <https://www.pri.org/stories/2016-07-15/i-was-arrested-while-obeying-law-baton-rouge-protest-heres-what-happened>

²² <https://twitter.com/ryankailath/status/754105111140442112>

3.2. Crossing the border

Journalists have faced prolonged detentions, denial of entry, and invasive searches at US borders over the past few years. They have also reported an increase in stops and secondary searches of journalists after the Visa Waiver Program Improvement and Terrorist Travel Prevention Act was passed in 2015. In some cases, border agents have searched journalists' electronic devices; in others, journalists have been denied entry into the US. Submitting journalists to searches or denying them entry not only makes their work increasingly difficult but sends a negative message about press freedom globally.

Searching digital devices

Journalists have little legal protection when it comes to electronic device searches at the border. A 2009 internal resolution from the US Customs and Border Protection (CBP) requires agents to consult legal counsel, if a person objects to a search on the grounds of protecting privileged legal material that could implicate someone in a crime. However, the directive does not provide the same protection for journalists, leaving reporters, their unpublished work, and their sources vulnerable. A new directive released by Customs and Border Protection in January 2018 provides little additional security for journalists concerned about their privacy at the border.

Since 2008 at least 18 journalists, many of whom are US citizens, have been stopped a total of 95 times at the border for secondary screening and questioning.²³ Many have been stopped on multiple occasions for prolonged periods, to the extent that traveling for work has become difficult. Officers requested at least ten of these journalists turn over their cell phones, raising concerns about the protection of sources.

The US Customs and Border Protection and Immigration and Customs Enforcement agencies state that they have the authority to search the electronic devices of anyone entering the country. The Supreme Court has not ruled on such searches, but it has upheld the so-called 'border search exception' to the Fourth Amendment's requirement that authorities obtain a warrant to search items coming into the US. Privacy advocates argue that there is a significant difference between searching a suitcase to ensure that it doesn't contain weapons or contraband and searching through someone's private messages on their cell phone or laptop. These devices carry vast amounts of personal data. For journalists, being compelled to hand over their cell phones raises concerns about whether they can adequately protect their sources.

²³ <https://pressfreedomtracker.us/>

The American Civil Liberties Union (ACLU) has documented thousands of cases where border officials have asked individuals to hand over, unlock, or decrypt their electronic devices.²⁴ CPJ and the Reporters Committee for Freedom of the Press have filed freedom of information requests to find out how many journalists have been subject to secondary screenings at the border as there is little official data available. Information that is publicly available shows that the overall number of electronic device searches has risen by around 60% during the Trump administration.²⁵

In 2013, the 9th Circuit appeals court, in a divided decision (*US v. Cotterman*), ruled that border agents cannot engage in a deep forensic search of electronic devices, for example using software to unlock password protected files, without reasonable suspicion.

A recent US CPB directive gestured towards the Cotterman decision by creating a distinction between ‘basic’ and ‘advanced’ searches. According to the directive, a basic search is a cursory examination of a device that can be conducted without suspicion; an advanced search is a forensic examination

that requires the use of other devices or software. To carry out an advanced search, border agents must have, “reasonable suspicion of activity in violation of the laws enforced or administered by CBP”.²⁶ The directive falls short of the Cotterman decision because it leaves a significant loophole to this rule: the requirement is waived when, “there is a national security concern”.²⁷ This can be interpreted in very broad terms and there are few standards for agents to follow. Furthermore, even a basic search is invasive and can compromise personal data, risking the confidentiality of journalists’ sources.

According to a recent report from the Knight Institute, the new CBP directive does little to address growing concerns over border searches and in fact encodes some deeply disturbing provisions.²⁸ The directive states that travelers are “obligated” to turn over their unlocked and unencrypted devices, and that CBP may request passcodes and detain devices it cannot access.²⁹

Legal experts question whether electronic device searches are constitutional, pointing to *U.S. v. Riley*, a 2014 case in which the Supreme Court stated that the warrantless

²⁴ <https://www.aclu.org/issues/privacy-technology/privacy-borders-and-checkpoints/electronic-device-searches>

²⁵ https://www.nytimes.com/2018/01/05/us/politics/trump-border-search-cellphone-computer.html?_r=0

²⁶ <https://www.cbp.gov/document/directives/cbp-directive-no-3340-049a-border-search-electronic-devices>

²⁷ *Ibid*

²⁸ <https://knightcolumbia.org/news/cbps-new-policy-searching-devices-offers-thin-protection>

²⁹ <https://www.cbp.gov/document/directives/cbp-directive-no-3340-049a-border-search-electronic-devices>

search of the digital contents of a cell phone during an arrest is unconstitutional. The court rejected the argument that the search of digital data on a cell phone was the same as the search of physical items. In September 2017, the ACLU and the Electronic Frontier Foundation (EFF) filed a lawsuit on behalf of 11 individuals - including at least two journalists - who had their devices searched at the border.

Denial of entry

Press freedom groups have been monitoring cases in which journalists have been denied entry entirely.³⁰ Having been denied visas through the Visa Waiver Program, some journalists have chosen to apply for B1/B2 visas but were still subjected to extended detentions and searches. RSF are aware of other journalists who have been denied entry at the border because of their placement on 'No Fly' or terrorist watch lists, often as a result of their work.³¹

Karl Penhaul



British journalist, Karl Penhaul, was placed on the US's 'No Fly' list in 2014 because of his contact with the FARC, the now demobilized Colombian armed group, in the course of his reporting. In 2016, the Department of Homeland Security notified him that they had corrected his records, but he is still unable to get a working journalist visa approved.³²

Manuel Martorell

Manuel Martorell, a Spanish journalist, former editor-in-chief of the prominent daily national newspaper *El Mundo* and a historian who specializes in Kurdish issues, was refused a tourist visa for a trip to the US with his family, in May 2015. When he applied for a visa, he was asked to fill out a questionnaire about his personal and professional history. Three months later, he received a letter from the US Department of State informing him that his visa application had been denied because he was alleged to have participated in 'terrorist activities'.

³⁰ <https://cpj.org/blog/2016/12/security-risk-for-sources-as-us-border-agents-stop.php>

³¹ <https://rsf.org/en/news/cpj-rsf-ask-journalists-share-information-about-border-stops-device-searches>

³² <https://rsf.org/en/news/rsf-reminds-us-karl-penhaul-journalist-not-terrorist>

3.3. Source protection

The US does not have a federal shield law but at least 34 states have legislation protecting journalists from being compelled to testify about their sources. Almost all of the states without legislation have case law providing some protections. However, recent federal court decisions have undermined the protection of sources. Under the Obama administration, the government used the 1917 Espionage Act to prosecute more leaks than all previous administrations combined, with journalists frequently caught up in these cases.

The first attempts to prosecute journalistic sources under the Espionage Act took place during President Nixon's presidency. The *Branzburg vs. Hayes* Supreme Court case of 1972 led to a tenuous equilibrium. While the judgment did allow for the subpoena of journalists, a concurring opinion set legal precedent for limiting the circumstances in which prosecutors could issue subpoenas of journalists. These were limited to cases where their testimony was central to determining guilt or innocence and where the information could not be obtained elsewhere.³³

This standard held until the Bush administration, when the D.C. Circuit Court upheld a subpoena against New York Times reporter Judith Miller.³⁴ Under President Obama, the 4th Circuit Court of Appeals upheld a subpoena against New York Times reporter James Risen. The Obama administration argued in federal court against reporters' privilege, subpoenaed Associated Press records, and named a Fox News journalist as a co-conspirator in an FBI affidavit. Jeffrey Sterling, a former CIA employee, was convicted in 2015 of leaking classified information to Risen and is currently serving the remainder of his sentence in a half-way house in St. Louis.

While Obama made initial promises to protect whistleblowers, during his tenure the Justice Department brought felony criminal charges under the Espionage Act against eight government employees or contractors accused of leaking classified information to the press. This compared to a total of three such prosecutions in all previous US administrations.³⁵ Ultimately, Obama's administration indicted, sentenced, and convicted more alleged leakers than any other administration in US history.

³³ https://www.cjr.org/special_report/president-threats-press.php

³⁴ <https://cpj.org/2004/10/judge-holds-times-reporter-in-contempt-in-cia-case.php>

³⁵ <https://cpj.org/blog/2017/05/how-us-espionage-act-can-be-used-against-journalis.php>

Press freedom groups and journalists heavily criticized the Obama administration for its aggressive leak prosecutions and subpoenas of reporters.³⁶ In the wake of this criticism, then Attorney General, Eric Holder, strengthened the Justice Department media subpoena guidelines for when to compel reporters' testimony, providing some measure of protection.³⁷ Experts have pointed out that while these guidelines were an important step forward, there is a loophole with regard to National Security Letters, which are not covered.

During his confirmation hearing in January 2017, Attorney General Jeff Sessions stated that he was unsure whether he would commit to following the media subpoena guidelines.³⁸ At a press conference, in August 2017, Sessions said that the Justice Department was reviewing the guidelines. While the Justice Department itself has not publicly given any additional information, legal analysts have said that relaxed guidelines could expand national security exemptions or make it easier to subpoena records held by third parties.

This raises the following concerns that the Justice Department may seek to: relax limits on subpoenas for media business records, including the communications data held by third party providers; narrow the definition of 'newsgathering', thereby limiting the scope of the guidelines applicability; and expand national security exemptions so that the guidelines are applicable in fewer cases.³⁹

At a House Oversight Committee hearing, in November 2017, Attorney General Sessions said that the Department of Justice had 27 open leak investigations. Sessions also told the Washington Post that: "Whenever a case can be made [against leakers], we will seek to put some people in jail."⁴⁰ This seems to be in line with comments by President Trump who has stated that intelligence agency whistleblowing was comparable to Nazi Germany and asked former FBI director James Comey to imprison reporters who published classified information.⁴¹ At the time of this report, we are aware of only two prosecutions of journalistic sources under the Trump administration. These are the cases of Reality

³⁶ <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>

³⁷ <https://www.justice.gov/opa/pr/attorney-general-holder-announces-updates-justice-department-media-guidelines>

³⁸ <https://www.c-span.org/video/?c4643703/sessions-news-media>

³⁹ Department of Justice Announces Review of Media Subpoena Policies' Latham & Watkins (August 28, 20, Number 2202)

⁴⁰ https://www.washingtonpost.com/world/national-security/justice-dept-debating-charges-against-wikileaks-members-in-revelations-of-diplomatic-cia-materials/2017/04/20/32b15336-2548-11e7-a1b3-faff0034e2de_story.html?utm_term=.f1a268865f51

⁴¹ <https://www.reuters.com/article/us-usa-trump/trump-accuses-u-s-spy-agencies-of-nazi-practices-over>

Winner, a former NSA contractor accused of leaking information to the Intercept about Russian influence in the election⁴² and Terry J. Albury, a former counterterrorism agent, who leaked documents to show how the FBI mistreated minority communities.⁴³

3.4. Free flow of information

Providing public data in a timely manner to reporters is a key tool in ensuring the public's right to know is met. The US has a freedom of information law that should, in principle, make it easier for journalists to uncover information that is of interest to the public. However, there is a longstanding unwillingness by state authorities to comply with freedom of information laws, with extended delays, prohibitive costs, and the use of technological tools preventing the release of public records. Journalists cited a lack of effective independent oversight and inadequate training of public officials as significant hurdles that hinder the proper implementation of freedom of information laws. Against a backdrop of shrinking newsrooms and financial resources for news media, it is even more important for authorities to adhere to both the letter and spirit of FOIA legislation.

“ *This is not a Trump administration issue. This is not a republican democrat issue. It's been getting worse and worse for a number of years. This is a lock down on information. Open records laws becoming less and less enforceable* ”

Reporter, Columbia, Missouri

Many journalists regularly make use of the federal FOIA, as well as of state or local laws, to obtain information from government bodies, with a recent analysis finding that 7.6% of requests to federal bodies were made by journalists.⁴⁴ Latest statistics recently reported by Associated Press provide insight that in the year ending September 30, 2017, more information requests were denied than previous years.⁴⁵ We were informed that journalists were frustrated by the processes and the often long delays in response by many bodies, together with the perception that it can be more effective to use informal mechanisms to obtain information. FOIA use is mostly limited to either investigative journalists or those who are working on long term projects. Few media organizations are willing to file lawsuits although that number has increased recently.⁴⁶

⁴² <http://www.bbc.com/news/world-us-canada-40168417>

⁴³ <https://www.nytimes.com/2018/04/17/us/politics/fbi-leaker-terry-albury.html?mtrref=www.google.com>

⁴⁴ <https://foiamapper.com/who-uses-foia/>

⁴⁵ <https://apnews.com/714791d91d7944e49a284a51fab65b85>

⁴⁶ <http://foiaproject.org/2017/05/31/media-seek-records-from-trump-admin/> ; <http://foiaproject.org/2018/01/16/lawsuits-trump-first-year/>

“ *We can fight for records, but we don't want a lawsuit because it costs a lot of money.* ”

Journalist, St. Louis

The Freedom of Information Act (FOIA)

The US adopted one of the world's first right to information laws, the Freedom of Information Act (FOIA), in 1966. Every US state, the District of Columbia, and most territories, with the notable exception of Puerto Rico, have also adopted laws that give access to information or records held by state bodies.⁴⁷ Furthermore, many local entities, including cities and counties have adopted their own open government laws. There are also a number of laws and initiatives relating to providing open data, notably www.data.gov.

The FOIA, which was the model law for many other countries, has been amended numerous times since its adoption, most recently in 2016.⁴⁸ However, it still lacks significant features now commonly found in other countries' equivalent legislation. These include the lack of an effective, independent oversight and appeals body. The Office of Government Information Services (OGIS) in the National Archives provides some oversight and can offer to mediate between requesters and bodies but

its decisions are not binding; appeals must be made to a federal court, making the process slow and expensive. The Department of Justice has the conflicting duties of oversight of the FOIA and defending government bodies against legal appeals. It secretly lobbied against FOIA reforms in 2014.⁴⁹ Exemptions are not clear or specific enough, especially relating to national security. This gives authorities overly broad discretion to withhold information. Furthermore, there is no explicit public interest test for exemptions.

The law also lacks effective sanctions for uncooperative agencies and officials who violate requirements to provide information. In the last 20 years, there has been no reported case of a federal official being sanctioned for violating FOIA. At best, requesters can be awarded legal fees and costs. The law also suffers from limited application as it does not apply to the Office of the President, the National Security Council, Congress or the federal courts. Further, it does not apply to private bodies which receive federal funding or conduct public functions, such as private prisons.⁵⁰

⁴⁷ <https://www.nfoic.org/coalitions/state-foi-resources/state-freedom-of-information-laws>

⁴⁸ <https://nsarchive2.gwu.edu//nsa/foialeghistory/legistfoia.htm>; FOIA Improvement Act of 2016. <https://www.congress.gov/114/bills/s337/BILLS-114s337enr.xml>

⁴⁹ <https://news.vice.com/article/it-took-a-foia-lawsuit-to-uncover-how-the-obama-administration-killed-foia-reform>

⁵⁰ <https://www.citizensforethics.org/press-release/report-calls-for-foia-disclosure-from-private-prison-prof>

The law in practice

There are significant problems with the law in practice. These include poor agency compliance and significant delays to responses by agencies, often lasting several years, due to agency obstruction and a failure to adequately fund FOIA units. Many agencies have not updated their FOIA regulations to reflect changes in the law, nor implemented appropriate technology to enable compliance. National rules state that journalists receive a fee-waiver, which agencies frequently refuse to acknowledge. The imposition of significant fees for requests is used to dissuade requesters. The Pentagon charged MuckRock \$600 million for search fees on a single request, stating that it would take over 1,700 years to complete the request.⁵¹ The Drug Enforcement Administration charged \$1.4 million to do a search on Mexican drug trafficker Joaquín Guzmán.⁵²

There have also been overbroad denials of information in the public interest, especially on issues relating to anti-terrorism practices that affect human rights. These include surveillance, CIA self-reporting on torture practices, and requests for evidence supporting claims that whistleblowers have harmed national security. Additionally, both federal and state officials have used private communication technologies to avoid data retention on state administered systems and servers, including instant messaging applications and external email servers. Notable examples include Hilary Clinton when Secretary of State and the Governor of Missouri, Eric Greitens.⁵³ Since the mission, Geitens has amended the administration's policy on use of private messaging application.⁵⁴

“FOIA is a joke [because there are no penalties or enforcement]”

Data journalist, St. Louis

⁵¹ <https://www.muckrock.com/news/archives/2016/feb/26/biggest-foia-fee-all-time/>

⁵² <https://www.muckrock.com/news/archives/2015/feb/05/dea-wants-14-million-it-will-begin-processing-req/>

⁵³ <https://www.openthegovernment.org/node/5453>; <https://unredacted.com/2018/01/18/presidential-records-act-lawsuit-targets-white-houses-disappearing-messaging-apps-frinformsum-1-18-2018/>

⁵⁴ http://www.stltoday.com/news/local/crime-and-courts/greitens-mostly-forbids-text-deleting-app-use-his-of-vice-says/article_f2269d6f-eb2c-5330-98bb-85630fe9535d.html

Over the past year, new issues have emerged.⁵⁵ These include the disappearance of data from government websites, particularly information related to the environment, climate change, or LGBTQI+ issues.⁵⁶ Trump's refusal to release his tax records, which every other president had done for the past forty years, and his reported request that White House staff sign of non-disclosure agreements⁵⁷ also sets a negative precedent, as does the refusal to release the logs of people meeting with White House officials and the official schedules of members of the Cabinet. There are also reports of increased secrecy at government agencies, notably Immigration and Customs Enforcement and the Environmental Protection Agency.⁵⁸

3.5 Deteriorating rhetoric

“ *People feel more empowered to tell us that they don't trust us, believe us. It's not anything that's organized. It's pushback against what we represent.* ”

Reporter, Houston

Intimidation of journalists takes various forms of offline and online harassment, including physical assault, defamation, psychological abuse, and sexual harassment. The journalists we met agreed that the negative public rhetoric about the press was feeding into an increased public antipathy towards media workers, including social media posts that denigrate, harass or even threaten journalists.

Trump's attacks on the media

A number of journalists noted that negativity towards the press was evident before Trump's election. However, the inauguration of Trump has marked a sea change; the most prominent intimidation of journalists has come from the President and his aides. Executive Editor of the Washington Post, Marty Baron has observed that since Trump declared his candidacy in 2015 he has posted more than 1,000 tweets castigating the press.⁵⁹ In a speech on February 24 2017,⁶⁰ the President berated the media as “the enemy of the people”, a phrase which news organisations reported is more commonly associated with former Soviet leader Joseph Stalin and other

⁵⁵ <https://sunlightfoundation.com/2018/01/24/under-trump-u-s-government-moves-from-open-to-closed/>

⁵⁶ <https://www.openthegovernment.org/node/5427>; <https://thinkprogress.org/disappearing-data-2d806ddc4388>; <https://www.datarefuge.org>

⁵⁷ https://www.washingtonpost.com/opinions/trump-wont-release-his-ndas-thats-secrecy-in-the-service-of-secrecy/2018/03/22/d6d2c9b0-2e0a-11e8-8ad6-fbc50284fce8_story.html?utm_term=.372ab0ffb3bb

⁵⁸ <https://www.openthegovernment.org/node/5587>

⁵⁹ https://www.cjr.org/united_states_project/trump-twitter-spreadsheet-press-attacks.php

⁶⁰ <https://pressfreedomtracker.us/all-incidents/trump-calls-fake-news-enemy-people/>

dictators.⁶¹ Since his election, Trump's official spokespeople have repeatedly attacked journalists and aggressively defended false statements made by the President.

In tweets from his personal account, Trump has repeatedly called established news organizations, including the Washington Post, The New York Times, NBC news, CNN and ABC, 'failing' and purveyors of 'fake news'. Journalists who publicly challenge the Trump narrative have been labelled 'enemies of the American people' and repeatedly mocked on social media. Retweets, from the President's Twitter account have included at least three violent memes targeting CNN.⁶² CNN correspondent Jim Acosta was removed from the Oval Office, in January 2018, after asking the President about his reported comments about immigrants from "shithole" countries.⁶³

Lynne Patton, a senior official in Donald Trump's Department of Housing and Urban Development branded political reporter April Ryan "Miss Piggy" and a "bankrupt blogger" in a tweet in January 2018. Patton later apologised and deleted the tweet.⁶⁴

In January 2018, Ryan and Acosta both told an event at the Newseum, that they had received death threats because of their work as journalists, something which they say had not happened prior to the current administration.

“ *These are really, really dishonest people and they are bad people and I really think they don't like our country. I really believe that.* ⁶⁵ ”

Trump to a rally in Phoenix, Arizona
August 2017

Abuse from the President may have led to self-censorship and has broader implications for the trust of the media by some of the population. However, this rhetoric also appears to have galvanized the energy and resources of many media outlets and journalists.

⁶¹ <https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html>

⁶² This has included the Trump wrestling video, a train running over a man with CNN logo superimposed on his face, blood spatter and CNN logo on bottom of Trump's shoe

⁶³ <https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-jim-acosta-cnn-oval-office-immigration-questions-shithole-haiti-african-a8163296.html>

⁶⁴ https://www.huffingtonpost.com/entry/lynne-patton-april-ryan_us_5a6950e8e4b0022830094106

⁶⁵ <https://chicagotonight.wttw.com/2017/08/28/trump-says-most-media-dishonest-people-who-don-t-america>

Abuse from the public

The open attacks on the press by the President create an environment in which both officials and the public feel emboldened to denigrate reporters personally. The delegation was concerned that this is feeding into an environment in which threats are considered a routine part of journalists' everyday lives.

One reporter in Houston told us that she received disparaging emails when she wrote about immigration, nothing that most came from outside Houston. Another said, "*I am active on Twitter. I have received quite negative feedback [such as] 'They should fire you.' You don't who the person is. In the last year and a half, it has increased. Things I never received before.*"

Another reporter said that she received threats on Facebook after she worked on a series about a local community affected by Hurricane Harvey. "*They were armchair threats. I have kids, so of course I'm concerned. But, ultimately, you suck it up and hope it goes away. And it did. There are lots of reporters out there they cover topics much worse than this situation and that have to deal with this on a regular basis, but this situation is a rarity.*"

4. Local Media

The mission visited Missouri and Texas and met with journalists and state officials to gain a more in-depth understanding of the challenges facing local media in the US. We also met remotely with journalists from Illinois and Wisconsin. We found that an already adverse environment for local journalists had worsened in the year since Trump's inauguration.

Hostility to the press at the national level appears to have emboldened state officials to use harmful rhetoric and is contributing to a polarization of public attitudes towards the press. Missouri Governor, Eric Greitens, has called the media 'fake news', refused interviews and allegedly used software that immediately erases cell phone messaging chats.⁶⁶ In St. Louis, the delegation heard about the case of former Sheriff David Clarke who posted in a tweet, in December 2017, that the "the lying lib media" should be punched in the nose and made to "taste their own blood."⁶⁷

We also found examples in which the local public appeared to emulate Trump's rhetoric toward the media. The journalists we met were split on how the national discourse has affected their daily reporting, with some seeing it as simply one factor in an already difficult environment. Journalists in Texas

and Missouri stressed that this was not a new phenomenon but rather an acceleration of existing trends of public mistrust and political obstruction of the press. They also perceived a notable difference between public attitudes that were identified as local and those that were identified as national.

“*What happens in Missouri is almost identical to what happens at the national level. The governor has adopted a mantra of fake news and making news media the enemy*”
Reporter, St. Louis

Economic uncertainty

Hostility towards the media comes as some local and state media outlets have been hit hard by changing economic conditions. In some outlets declining revenues had reduced reporting ranks by two-thirds. One Wisconsin editor said some public meetings go uncovered, leaving the public uninformed about the use of tax dollars. In Texas, there has been a general clampdown on public information of their major chemical and oil industries in the name of 'security'.

Furthermore, proposed legislation in some states would shift mandated paid public notices to government websites, making the

⁶⁶ <https://statescoop.com/missouri-gov-greitens-bans-public-business-on-encrypted-messaging-app-confide>

⁶⁷ <https://www.usatoday.com/story/news/politics/onpolitics/2017/12/31/punch-them-nose-former-sheriff-david-clarke-says-news-media/993085001/>

information harder to find and potentially exacerbating the media's economic woes, especially at small community newspapers. It was noted that authorities might use public notice revenues as a means to influence editorial content. Local media and city newspapers typically have not received the bump in funding and subscriptions that bolstered some national papers after Trump's election. The lack of financial resources can make it harder to respond robustly when politicians deny access.

[heading a]Increased interest in journalism
In Missouri, we heard that there seems to be a surge in students who are interested in journalism, which may be partly the result of the political environment. It was reported that students are also talking about journalism more broadly, whether investigative, data, or documentary journalism.

Journalism on a see-saw

In Texas, we found that the state of independent journalism was seen by many media workers as being at a pivotal point, with one journalist using the phrase "on a see-saw" to explain how economic pressures were weighing on decisions to cover stories. One journalist brought up self-censorship when explaining considerations over whether it is worth pursuing a particular story. We are concerned that, if unchecked, the robustly independent media culture encountered

in Texas and other states potentially could start to accommodate financial and political interests, which would be detrimental to press freedom.

5. Recommendations

Protests and public events

1. Federal, state and local authorities need to clearly and publicly reconfirm the rights of journalists and media workers in covering and reporting on protests and public events;
2. Law enforcement officers needs to be trained on the rights of protesters and journalists covering demonstrations, rallies and other public events and receive regular training in this area; those who infringe these rights held accountable for their actions;
3. Journalists should be trained on their rights, possible risks and strategies to mitigate these risks when covering protest and public events. Training should cover mental health and support should be provided to address any trauma journalists and media workers may suffer.

Crossing the border

4. Federal authorities should adopt draft CBP guidelines (Addendum 1) on secondary searches of journalists and their devices, which has been provided to the Department of Homeland Security and Customs and Border Protection by RSF, CPJ, and the ACOS Alliance;

5. The 2009 internal CBP directive should be expanded to provide at least the same protections to journalists as are provided to individuals claiming attorney-client privilege;
6. Any proposal to require the provision of social media handles or log-in information to online accounts as a condition of entry to the US should be removed;
7. Training should be provided to border agents on press freedom and the rights of journalists;
8. Information should be made publicly available on how many journalists have been detained at the border and filed complaints.

Source protection

9. The authorities should publicly recognize the importance of whistleblowing and source protection in order to expose wrongdoing and corruption;
10. The Department of Justice should publicly announce that it will not seek to change the media subpoena guidelines, but rather ensure their enforcement.

Free flow of information

11. Federal and state agencies should provide sufficient funding and training to ensure the efficient and rapid processing of requests in compliance with the spirit and letter of FOIA;
12. National rules that journalists receive a fee waiver should be fully and consistently respected by federal and state agencies;
13. Public officials should not use private communication channels, servers, and technologies to avoid retention of information in the public interest and subject to FOIA;
14. The media community should work together on strategic litigation to challenge denied or obstructed FOIA requests;
15. Federal and state FOIA legislation should be reviewed and reformed to include:
 - a. Effective, independent oversight and appeal bodies;
 - b. Clear, legitimate, and narrow exemptions which include a public interest test, particularly for exemptions relating to national security;
 - c. Effective sanctions for uncooperative agencies and officials.

Deteriorating rhetoric

16. Public officials should desist from attacks on journalists and cease the blanket use of the term 'fake news' to discredit journalism;
17. Newsrooms should adopt security and safety protocols for dealing with online harassment.

Mission Report by ARTICLE 19, Committee to Protect Journalists (CPJ), Index on Censorship, IFEX, International Press Institute (IPI), and Reporters Without Borders (RSF - Reporters Sans Frontières).