



July 21, 2016

***Via U.S. Mail***

Memorial Hermann Emergency Care Centers  
Dan Walterman  
Memorial Hermann  
Corporate Office  
909 Frostwood Dr., Ste. 2206  
Houston, TX 77024

Re: **LIABILITY FOR UNCONSTITUTIONAL LAW ENFORCEMENT  
SEARCHES**

Dear Mr. Walterman:

We write to advise that your hospital could be at risk of legal liability if you conduct body cavity searches at the direction of U.S. Customs and Border Protection (“CBP”) agents absent a search warrant. This advisement is prompted by a recent case brought by the American Civil Liberties Foundation of Texas and the American Civil Liberties Union of New Mexico (collectively, the “ACLU”), *Jane Doe v. El Paso County Hospital District, et al.*, Case No. EP-13-CV-0406-DB in the United States District Court for the Western District of Texas, which resulted in a record monetary settlement against the doctors, hospital, and federal government. (A press release with more on this landmark settlement is attached as Exhibit A.) In investigating what happened to Jane Doe,<sup>1</sup> we learned that medical personnel may not understand the constitutional limits on CBP’s authority to demand a medical search or the hospital’s authority to perform one. In light of the potential liability your hospital could face for unconstitutional searches, we urge you to carefully consider the information provided here, which is consistent with and based in part on CBP’s own policy on medical searches for law enforcement purposes.

**Summary of the *Doe* Case**

In 2012, our client, a 54-year old U.S. citizen who resides in New Mexico, was subjected to a series of unnecessary, increasingly invasive, and demeaning searches for drugs by agents of CBP after crossing a port of entry in El Paso, Texas. The CBP agents in this case used their positions as law enforcement officers to subject our client to medical examinations, including highly invasive manual searches of her vagina and anus and unnecessary radiological scans, by pressuring doctors to conduct these searches without a warrant and over our client’s strenuous

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<sup>1</sup> Due to the sensitive nature of this case, our client filed anonymously and her identity remains protected under court order and the terms of the settlement agreement.

objection. The ordeal left our client fragile and traumatized, experiencing what we and our client considered a sexual assault.

With the help of the ACLU, our client sued individual agents of CBP, the United States, the El Paso Hospital District, the University Medical Center of El Paso, and various individuals associated with the hospital. The suit asserted that the Constitution prohibits the defendants from so invading a person's privacy and dignitary interests without an exceedingly compelling justification.

The medical defendants in the case settled for \$1.1 million, conducted an independent review of their policies and procedures, and revised their practices to require a search warrant. The United States also settled, as detailed in the attached press release. In addition to paying our client the sum of \$475,000, the United States agreed to provide additional training on proper search procedures.

### **The Limits of CBP's Authority in Medical Examinations**

CBP's role in medical examinations of detained persons is limited both by fundamental constitutional protections and by CBP's own written policy, set forth in the Personal Search Handbook (the "Handbook"), on conducting searches at the border. The Fourth Amendment to the U.S. Constitution protects individuals against unreasonable searches and seizures by the government, thereby safeguarding our most intimate spaces and bodily integrity against government intrusion.<sup>2</sup>

As a general matter, absent consent, the Constitution demands that government officials have a warrant supported by probable cause to search an individual. While courts may afford somewhat more latitude on searches within border regions, all such searches are still bound by constitutional limits. Some searches are so invasive that they are constitutionally prohibited *even with a warrant based on probable cause*. Searches that intrude on a person's body require a high degree of justification, even at the border: "In a civilized society, one's anatomy is draped with constitutional protections. The fourth amendment does not permit us to give border agents a freer hand or a more probing eye."<sup>3</sup> Except in very rare instances, government searches that intrude into the human body require a warrant because "[s]uch an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'"<sup>4</sup> The protections guaranteed by the Fourth Amendment extend to searches conducted by medical personnel who are acting at the request or direction of law enforcement officers.<sup>5</sup>

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<sup>2</sup> The Amendment reads: "*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*"

<sup>3</sup> *United States v. Afanador*, 567 F.2d 1325, 1331 (5th Cir. 1978); *see also Huguez v. United States*, 406 F.2d 366, 379 (9th Cir. 1968).

<sup>4</sup> *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)).

<sup>5</sup> *See, e.g., George v. Edholm*, 752 F.3d 1206, 1215 (9th Cir. 2014); *United States v. Gray*, 669 F.3d 556, 565 (5th Cir. 2012), *vacated on other grounds*, 133 S. Ct. 151 (2012).

CBP's Handbook acknowledges these constitutional limits and instructs officers to adhere to its policy. The pertinent portions of the Handbook are attached as Exhibit B.<sup>6</sup> The key sections that are relevant to medical personnel are highlighted below.

### ***CBP is Forbidden to Pressure Medical Personnel***

Your staff should know that CBP agents have no authority to compel healthcare professionals to assist in law enforcement searches. CBP policy absolutely forbids CBP officers from pressuring, cajoling, or otherwise requesting medical personnel to conduct medical examinations of individuals under their custody. The Handbook states that, when a person arrives at a medical facility, "medical personnel make all medical decisions." This policy denies CBP officers any "authority over the person's medical treatment." Further, it explicitly commands that "[n]o CBP officer is authorized to request, advise, or encourage medical treatment." Even if requested by medical personnel, CBP officers are prohibited from engaging in any form of medical treatment at a medical facility.

Thus, even if CBP personnel insist that a person in their custody may be concealing contraband such as illegal drugs, healthcare professionals are under no obligation to comply with a request to conduct a search. Even for persons in CBP custody, the healthcare professional retains the obligation to ensure that body cavity searches, X-rays, CT scans or similar procedures are for legitimate medical reasons and to adhere to the patient consent requirements appropriate for that procedure.

### ***Patient Consent Must Be Freely and Voluntarily Given***

Nor can CBP evade the rules by pressuring a person in custody to consent to searches. CBP policy expressly forbids CBP officers from coercing detained persons into consenting to medical examinations. The Handbook addresses the topic of consent within the context of medical X-rays, body cavity searches, and pelvic examinations. CBP's policy is unequivocal: "[o]btaining consent by coercion, through word or deed, is strictly prohibited." Further, the Handbook states that consent to searches "must be freely and voluntarily given."

Moreover, oral consent or mere acquiescence will not suffice. CBP policy requires officers to document consent using specific forms, which are attached as Exhibit C. For example, if the detained person consents to a body cavity search or pelvic examination, CBP officers must use the standard consent form in Appendix F of the Handbook to document the person's consent with a proper signature.<sup>7</sup> Without the proper signature on the correct consent forms, CBP acknowledges that the consent "may not be voluntary" and medical personnel are on notice that consent is inadequate.

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<sup>6</sup> To request a full copy of the Handbook, please contact the ACLU of Texas.

<sup>7</sup> For consenting to X-rays, CBP officers are required to use the standard form in Appendix E.

Further, CBP policy acknowledges that a person may revoke consent even after signing a consent form. The refusal to sign a medical consent form is considered a revocation of any previously given verbal consent. CBP officers are required to “immediately *stop*” all searches and notify their supervisors when a person revokes consent.

### ***In the Absence of Consent, Ask to See a Warrant***

Medical personnel should know that CBP’s own policy expressly requires officers to obtain a search warrant to authorize highly invasive searches, such as body cavity searches and medical X-rays. CBP defines a body cavity search as “any *visual or physical intrusion* into the rectal or vaginal cavity.” Only medical personnel may conduct a body cavity search, as CBP officers are strictly prohibited from doing so per the Handbook. CBP policy provides that body cavity searches are reserved for “the most exceptional circumstances.” As such, these highly invasive searches are not permitted unless the patient gives her free and voluntary consent *or* the agent obtains a search warrant from a judge.

CBP defines an X-ray search as “the use of a medical X-ray by medical personnel to determine the presence of material evidence within the body.” CBP officers cannot render an opinion regarding the interpretation of an X-ray. Only medical personnel may read and interpret the X-ray to determine the presence of foreign objects that may be contraband. As with body cavity searches, CBP policy forbids medical x-rays without either (1) the patient’s free and voluntary consent or (2) a search warrant. CBP officers are absolutely prohibited from subjecting a pregnant woman or a woman who refuses a pregnancy test to an X-ray search under any circumstances, regardless of consent.

In all cases, “when medical personnel determine that foreign objects are not present in the body, CBP must release the person, *unless* medical personnel determine that a medical condition requires the person to remain at the medical facility *and* the person consents to remain.”

### **Policy Recommendations from the ACLU**

It is incumbent on health care providers to exercise independent medical judgment and act in the best interest of their patients, rather than serve as an arm of law enforcement. Failure to heed this advisement may expose your hospital to liability for civil rights violations that can lead to significant legal costs, as were recently experienced by the medical defendants in the *Doe* case. The following policy guidelines for medical personnel, which are consistent with CBP’s policy, should help to mitigate the risk of legal liability to your hospital when confronted with demands from CBP for medical searches:

- Medical staff should never allow CBP officers to compel, cajole, or otherwise pressure them into providing any medical treatment, including medical examinations, to patients brought to the hospital by CBP.
- At no time and under no circumstance should medical staff allow CBP officers to direct any medical decisions, including whether to perform a procedure to determine the presence of contraband. Healthcare professionals must exercise their independent professional judgment and act in the best interests of the patient consistent with the patient’s wishes.

- Your consent procedures should address the need, independently and outside the presence of CBP officers, to ensure that any consent obtained from patients brought to the hospital by CBP was freely and voluntarily given. Obtaining written consent to each specific procedure prior to treatment should be required for individuals who are brought to the hospital by CBP.
- Your training should ensure that hospital personnel understand the limits of CBP authority and have access to the applicable standard consent forms in Appendix E and/or Appendix F to the Handbook.
- If a patient brought to the hospital by CBP refuses or otherwise does not give adequate consent, medical personnel should stop all medical treatment, unless CBP officers present a valid warrant.
- Medical personnel should demand to see a warrant for any searches that are involuntary.
- Your policies should provide sufficient guidance for medical staff who have questions about the validity or scope of a court order or warrant, including providing for consultation with the hospital's legal counsel.
- Medical staff should thoroughly document all communications with CBP officers at all times, including all decisions (and justifications for those decisions) arising from those communications.
- You should never bill a patient brought to the hospital by CBP officers for any services provided to the patient.

We hope this advisement is of value to your medical facility as you consider your interactions with law enforcement officers and, specifically, as you review your policies, procedures, and practices relating to the provision of care to patients brought to your facility by CBP. To the extent appropriate policies are not currently in place at your hospital, we urge you to act immediately to review the law with your legal counsel and to implement policies and practices to ensure that your patients' constitutionally protected rights and liberties are preserved.

If you have any questions or concerns, please feel free to contact the ACLU of Texas.

Regards,



Rebecca L. Robertson  
Edgar Saldivar  
AMERICAN CIVIL LIBERTIES UNION  
OF TEXAS  
1500 McGowen Street, Suite 250  
Houston, Texas 77004  
Telephone No.: (713) 942-8146  
Facsimile No.: (713) 942-8966

Maria Sanchez  
AMERICAN CIVIL LIBERTIES UNION  
OF NEW MEXICO  
P.O. Box 566  
Albuquerque, New Mexico 87103  
Telephone No.: (505) 266-5915  
Facsimile No.: (505) 266-5916

Mitra Ebadolahi  
AMERICAN CIVIL LIBERTIES UNION  
OF SAN DIEGO & IMPERIAL COUNTIES  
P.O. Box 87131  
San Diego, CA 92138  
Telephone No.: (619) 398-4187

Alessandra Soler  
AMERICAN CIVIL LIBERTIES UNION  
OF ARIZONA  
P.O. Box 17148  
Phoenix, AZ 85011-0148  
Telephone No.: (602) 773-6006