



## **U.S. Border Patrol's Interior Enforcement Operations**

### Proliferating Abuses

U.S. Customs and Border Protection (“CBP”) is the largest federal law enforcement agency in the nation with a FY 2014 budget of \$12.9 billion.<sup>i</sup> U.S. taxpayers now spend over \$18 billion on immigration enforcement agencies—more than on all other federal law enforcement combined.<sup>ii</sup> The Border Patrol has doubled in size over the past decade and today, with border crossings still near 40-year lows and crossing-related deaths at historic highs,<sup>iii</sup> there are over 21,000 Border Patrol agents nationwide.<sup>iv</sup> As the agency has grown, so too has the incidence of civil rights violations perpetrated by agents.<sup>v</sup>

The Border Patrol employs a “three-tiered” border enforcement strategy. The first tier consists of enforcement at and between Ports of Entry along the border. Second tier enforcement consists of line watch and “roving patrol” operations. Third tier enforcement consists of permanent and tactical interior checkpoints. The ACLU is increasingly documenting Border Patrol abuses occurring in the context of second and third tier enforcement, far into the interior of the country, raising serious questions about the legality of Border Patrol interior operations and their impacts on local communities.

For example, an ACLU investigation of roving patrol stops in New York found the vast majority of roving patrol stops occurred far from the border, with only 1% resulting in initiation of removal proceedings; many involved clear violations of agency guidelines, including improper reliance on race and hundreds of arrests of lawfully present individuals.<sup>vi</sup> Last year, CBP settled an ACLU lawsuit arising out of unlawful roving patrol stops on the Olympic Peninsula, in which the agency agreed to retrain agents on the Fourth Amendment and provide stop data to the ACLU.<sup>vii</sup> Border residents describe being pulled over by Border Patrol without justification many miles from the border,<sup>viii</sup> or being detained, interrogated and searched at checkpoints they must pass through daily to go to work, run errands, or take children to school.<sup>ix</sup> Some agents abandon any pretext of immigration enforcement, conducting generalized criminal investigations, which the Supreme Court has declared unconstitutional.<sup>x</sup> Others rely on false alerts by service canines to establish probable cause for invasive searches.<sup>xi</sup> Additionally, Border Patrol agents collude with local law enforcement officials, including in states like Arizona where anti-immigrant laws have led to widespread racial profiling.<sup>xii</sup> Finally, the ACLU has documented examples of agents entering onto private lands, destroying fences, livestock, and other private property and refusing to compensate landowners.<sup>xiii</sup>

Exacerbated by the near total absence of effective internal and external agency oversight and accountability mechanisms, many of these problems stem from CBP’s outdated and ill-defined legal authority.

## The “100 Mile Zone”

In 1946, revisions to the Immigration and Nationality Act (INA) granted extra-constitutional authority to CBP (then INS) to search any vehicle for “aliens” within a “reasonable distance” of any external boundary of the U.S.<sup>xiv</sup> That distance was later defined in federal regulations—with no public comment or debate—as 100 miles.<sup>xv</sup> That area now encompasses roughly two-thirds of the U.S. population, nine of the ten largest cities, and the entirety of ten states. At the time those regulations were issued, the Border Patrol was comprised of fewer than 1,100 agents; today, there are over 21,000. The INA also gives CBP authority to enter private lands within 25 miles of the border for purposes of preventing unlawful entries.<sup>xvi</sup>

The Supreme Court has since recognized the 100 miles regulation as a geographical limitation on the operational authority of CBP agents: “The only formal limitation on that discretion [to stop vehicles] appears to be the administrative regulation defining the term ‘reasonable distance’ . . . to mean within 100 air miles from the border.”<sup>xvii</sup> Nonetheless, while federal courts have expressed both skepticism and unease with Border Patrol operations extending 100 miles into the interior,<sup>xviii</sup> the Fifth and Tenth Circuit Courts of Appeals have disregarded Supreme Court guidance and the federal regulations entirely, repeatedly holding that Border Patrol *does* have authority to conduct vehicle stops more than 100 miles from the border.<sup>xix</sup>

Federal court decisions are also inconsistent with regard to the appropriate *scope* of interior Border Patrol stops, both within and outside of the 100 mile zone. In the Ninth Circuit, for example, district courts have held that Border Patrol may refer motorists to checkpoint secondary inspection areas upon a “minimal” showing of suspicion<sup>xx</sup>—in effect, for virtually any reason whatsoever—while other courts have held that “reasonable suspicion” of criminal wrongdoing—still a very low standard—is required for non-immigration-related checkpoint inquiries.<sup>xxi</sup> Agents frequently overstep the limits of their authority, undermining the Supreme Court’s prohibition on general crime control checkpoints, and federal courts and agents alike have struggled to apply the Supreme Court’s vague prescription that Border Patrol checkpoints stops consist only of “a brief question or two and possibly the production of a document evidencing a right to be in the United States.” As a result, residents’ experiences at checkpoints bear little resemblance to those envisioned by the Supreme Court almost 40 years ago, when the Border Patrol was less than one tenth its current size.<sup>xxii</sup>

For its part, the Border Patrol routinely rejects any geographic limitation on agents’ authority, stopping motorists at checkpoints and in roving patrols sometimes hundreds of miles into the interior of the country, approaching pedestrians on city streets and on public transportation, as well as on private property both within and beyond the 25 mile limit.<sup>xxiii</sup> Furthermore, agents routinely ignore or misunderstand the limits of their legal authority in the course of individual stops, resulting in rights violations of innocent residents. These problems are clearly exacerbated by inadequate training. For example, agents at Arizona checkpoints are given pocket-sized cards that provide minimal, misleading guidance about their legal authority. Among other omissions, the cards do not specify that, by law, questioning must be confined to a “limited inquiry into residence status” or that searches must be based on probable cause. The Border Patrol itself acknowledges that, in order to achieve rapid growth in recent

years the agency watered down training and hiring standards.<sup>xxiv</sup> The DHS Office of Inspector General recently concluded that Border Patrol agents do not understand the agency’s use-of-force policies,<sup>xxv</sup> and the same problem clearly extends to interior enforcement as well.

### Absence of Information

Congress and the American public currently know very little about the day-to-day interior enforcement operations of the largest law enforcement agency in the country, and internal agency oversight is almost nonexistent.<sup>xxvi</sup> In 2009, the GAO was asked to study Border Patrol “checkpoint performance” and “performance measures,” as well as the “impact of checkpoint operations on nearby communities.”<sup>xxvii</sup> The GAO found numerous problems, including “information gaps and reporting issues [that] have hindered public accountability, and inconsistent data collection and entry [that] have hindered management’s ability to monitor the need for program improvement.”<sup>xxviii</sup> The GAO noted that Border Patrol was not using performance measures to evaluate “the extent that checkpoint operations affect quality of life in surrounding communities.”<sup>xxix</sup> The GAO’s inquiry into community impact, however, was itself fairly narrow: the GAO did not, for example, consider residents’ experiences at checkpoints, or raise any civil rights or civil liberties concerns related to checkpoint operations. The GAO’s review of Border Patrol’s use of service canines did not consider the ways in which the agency addresses or fails to address false alerts. The report concluded that residents who responded to GAO’s request for input “generally supported” local checkpoint operations, though some expressed concern regarding property damage caused by individuals circumventing the checkpoints.<sup>xxx</sup>

By contrast, the ACLU receives frequent checkpoint-related complaints and one Arizona community is now petitioning for the removal of one of three local checkpoints, citing ongoing rights violations and harassment by agents, as well as harm to property values, tourism, and quality of life resulting from checkpoint operations (a University of Arizona study revealed that local property values are negatively impacted by the I-19 checkpoint, as the GAO’s review merely implied).<sup>xxxi</sup> Border Patrol has attempted to thwart local residents’ efforts to peacefully observe and monitor checkpoint interactions.<sup>xxxii</sup>

The GAO’s report was issued five years ago—the last time the federal government independently reviewed any aspect of Border Patrol interior operations. That report, and a 2005<sup>xxxiii</sup> GAO report also concentrating on “checkpoint performance” constitute the *only* federal review of CBP second and third tier enforcement operations over the past decade, a period in which the Border Patrol has nearly doubled in size. The Border Patrol generally does not document its encounters—including unlawful searches and seizures—with residents *not* resulting in arrest, and even basic information, such as the current number and location of Border Patrol checkpoints is not publicly available.<sup>xxxiv</sup> The ACLU has submitted additional FOIA requests to DHS to obtain additional data from Border Patrol interior enforcement operations (though we anticipate litigation will be required to obtain stop data and other key information). What is already clear, however, is that Border Patrol interior enforcement operations regularly result in civil rights violations of innocent residents.

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<sup>i</sup> See DEP’T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF, 6 (2013), available at <http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf>.

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<sup>ii</sup> See Meissner, Doris, *et al.*, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, MIGRATION POLICY INSTITUTE, (Jan. 2013), available at <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>.

<sup>iii</sup> See Bob Ortega, *Border Apprehensions Up, But Still Near Historic Lows*, ARIZONA REPUBLIC, Jun. 3, 2013 available at <http://www.azcentral.com/news/politics/articles/20130531mexico-border-apprehensions-up.html>

<sup>iv</sup> See UNITED STATES BORDER PATROL, BORDER PATROL AGENT STAFFING BY FISCAL YEAR (Oct. 1 through Sept. 30), available at [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/usbp\\_statistics/usbp\\_fy13\\_stats/usbp\\_staffing\\_stats.ctt/usbp\\_staffing\\_stats.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy13_stats/usbp_staffing_stats.ctt/usbp_staffing_stats.pdf)

<sup>v</sup> From 2004-2011, complaints involving CBP nearly tripled, the majority involving excessive force and discrimination. See DEP'T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, "DEPARTMENT-WIDE DATA ON COMPLAINTS RECEIVED," available at <http://www.dhs.gov/department-wide-data-complaints-received>. Given the many problems with DHS oversight and complaints system it is likely that incidents of abuse are substantially under-reported.

<sup>vi</sup> See NYCLU, JUSTICE DERAILED, (Nov. 2011), available at [http://www.nyclu.org/files/publications/NYCLU\\_justicederailedweb\\_0.pdf](http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf)

<sup>vii</sup> See Manuel Valdes, *ACLU, Immigrant Groups to Keep an Eye on U.S. Border Patrol After Profiling-case Win*, WASH. POST, Sept. 24, 2013, available at [http://www.washingtonpost.com/politics/aclu-immigrant-groups-to-keep-an-eye-on-us-border-patrol-after-profiling-case-win/2013/09/24/d400ae3a-2583-11e3-b75d-5b7f66349852\\_story.html](http://www.washingtonpost.com/politics/aclu-immigrant-groups-to-keep-an-eye-on-us-border-patrol-after-profiling-case-win/2013/09/24/d400ae3a-2583-11e3-b75d-5b7f66349852_story.html)

<sup>viii</sup> See *e.g.*, ACLU OF ARIZONA, COMPLAINT AND REQUEST FOR INVESTIGATION OF UNLAWFUL ROVING PATROL STOPS BY U.S. BORDER PATROL IN SOUTHERN ARIZONA INCLUDING UNLAWFUL SEARCH AND SEIZURE, RACIAL PROFILING, TRESPASSING, EXCESSIVE FORCE, AND DESTRUCTION OF PERSONAL PROPERTY, (Oct. 9, 2013) available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf>

<sup>ix</sup> See ACLU OF ARIZONA, COMPLAINT AND REQUEST FOR INVESTIGATION OF ABUSES AT U.S. BORDER PATROL INTERIOR CHECKPOINTS IN SOUTHERN ARIZONA, INCLUDING UNLAWFUL SEARCH AND SEIZURE, EXCESSIVE FORCE, AND RACIAL PROFILING, (Jan. 15, 2014), available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20202014%20001%2015.pdf>.

<sup>x</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

<sup>xi</sup> In two-thirds of the checkpoint encounters documented in our Jan. 15 complaint, Border Patrol service canines falsely "alerted" in the absence of contraband. The ACLU recently filed a lawsuit on behalf of a U.S. citizen subjected to a strip search, multiple genital and cavity searches, a forced bowel movement, an X-ray, and a CT scan following a similar false alert by a CBP service canine. See *Jane Doe v. El Paso County Hospital District, et al.*, No. 3:13-CV-00406-DB (W.D.Tex. filed Dec. 18, 2013); Complaint available at <http://www.aclu-nm.org/wp-content/uploads/2013/12/Complaint-Jane-Doe-v-Variou-Defendants-12-18-13.pdf>

<sup>xii</sup> See PRESS RELEASE, ACLU CHALLENGES THE IMPLEMENTATION OF SECTION 2(B) OF SB 1070 IN ARIZONA (Nov. 12, 2013), available at <http://www.acluaz.org/issues/immigrant-rights/2013-11/4272>

<sup>xiii</sup> See also Michel Marizco, *Living Life Under Federal Watch On The Border*, NPR, Aug. 5, 2013, available at <http://www.fronterasdesk.org/content/living-life-under-federal-watch-border>

<sup>xiv</sup> See 8 U.S.C. § 1357(a)(3)

<sup>xv</sup> See 8 C.F.R. § 287.1(b). The Justice Department published regulations defining "reasonable distance" as 100 miles in 1957. See *Field Officers: Powers and Duties*, 22 Fed. Reg., 236, 9808-09 (Dec. 6, 1957) (to be codified at C.F.R. § 287). There is no public history to indicate *why* the Justice Department chose 100 miles as the "reasonable distance" from the border. It may have been that 100 miles had historically been considered a "reasonable" distance in the context of various discovery issues under federal law. See, *e.g.*, 10 U.S.C. § 849; FED. R. CRIM. P. 7; FED. R. CIV. P. 45.

<sup>xvi</sup> See 8 U.S.C. § 1357(a)(3).

<sup>xvii</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-883 (1975); see also *U.S. v. Peltier*, 422 U.S. 531, 539-40 (1975) ("The Border Patrol agents who stopped and searched respondent's automobile were acting pursuant to §287(a)(3) of the Immigration and Nationality Act of 1952 . . . Pursuant to this statutory authorization, regulations were promulgated fixing the 'reasonable distance' as specified in §287(a)(3) at '100 air miles from any external boundary of the United States.'") (internal citations omitted).

<sup>xviii</sup> See, *e.g.*, *United States v. Gabriel*, 405 F.Supp.2d 50, 59 (D. Maine 2005).

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<sup>xix</sup> See e.g., *United States v. Pacheco-Espinosa*, 121 Fed. Appx. 352, 256–57 (10th Cir. 2005) (“Current regulations interpret “reasonable distance” as 100 air miles from the border. The Tenth Circuit has nevertheless held that the regulation does not foreclose searches beyond that limit...this Court determines that the approximately 120-mile distance in which Defendant was stopped was a reasonable distance from the border.”) (citations omitted); *United States v. Orozco*, 191 F.3d 578, 584 (5th Cir. 1999) (Dennis, J., dissenting) (“As I read *Brignoni-Ponce*, the Supreme Court’s authorization of roving Border Patrol stops on the basis of reasonable suspicion is limited to such stops within the 100 mile border zone created by 8 U.S.C. § 1357(a)(3) and 8 C.F.R. § 287.1. It would be unreasonable to assume that the Supreme Court meant to dilute the protections of the Fourth Amendment so as to authorize the Border Patrol to make suspicion-based roving patrol stops anywhere in the United States. The Court’s opinion indicates no such intention.”); *United States v. Garcia*, 732 F.2d 1221, 1229 (5th Cir. 1984) (Tate, J., dissenting) (“Quite unfortunately, we have the opportunity only to review the successful guesses of these agents; we are never presented with the unconstitutionally intrusive stops of Hispanic residents and citizens that do not result in an arrest. Differentiating the United States from police states of past history and the present, our Constitution in its Fourth Amendment prohibition against unreasonable searches protects all our residents, whether middle-class and well-dressed or poor and disheveled, from arbitrary stop by governmental enforcement agents in our travel upon the highways of this nation.”).

<sup>xx</sup> See e.g., *United States v. Lewis*, 2011 WL 2692914 (D.Ariz. July 12, 2011).

<sup>xxi</sup> See, e.g., *United States v. Ellis*, 330 F.3d 677, 680 (5th Cir. 2003).

<sup>xxii</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

<sup>xxiii</sup> See, e.g., Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013, available at [http://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html?pagewanted=all&_r=0) (describing checkpoint stop of Senator Patrick Leahy 125 miles from the border in New York state: “When Mr. Leahy asked what authority the agent had to detain him, the agent pointed to his gun and said, ‘That’s all the authority I need.’”); Michelle Garcia, *Securing the Border Imposes a Toll on Life in Texas*, AL JAZEERA AMERICA, Sept. 25, 2013, available at [http://america.aljazeera.com/articles/2013/9/25/living-under-the-law-of-border-security.html#mainpar\\_adaptiveimage\\_0](http://america.aljazeera.com/articles/2013/9/25/living-under-the-law-of-border-security.html#mainpar_adaptiveimage_0) (“[W]hen it was pointed out that [Alice, Texas] sits more than 100 miles from the border, [a Border Patrol spokesman] explained that ‘the law does not say that we cannot patrol. Our jurisdiction kinda changes.’”); see also *United States v. Venzor-Castillo*, 991 F.2d 634 (10th Cir. 1993) (finding Border Patrol lacked reasonable suspicion to stop and search vehicle 235 miles from the border); David Antón Armendáriz, *On the Border Patrol and Its Use of Illegal Roving Patrol Stops*, 14 SCHOLAR 553 (2012) (describing numerous roving patrol stops occurring more than 100 miles from the border).

<sup>xxiv</sup> See Greg Morgan, *Hiring Practices Questioned after Border Agent’s Arrest*, SAN DIEGO UNION TRIBUNE, Apr. 1, 2011, available at <http://www.utsandiego.com/news/2011/Apr/01/hiring-practices-questioned-after-border-agents-ar/> (quoting a Border Patrol representative, “Pretty much everyone was being pushed through because they needed the bodies.”)

<sup>xxv</sup> See Brian Bennett, *Many Border Agents Don’t Understand Use-Of-Force Rules, Report Says*, LA TIMES, Sept. 18, 2013, available at <http://articles.latimes.com/2013/sep/18/nation/la-na-nn-border-patrol-use-of-force-20130918> (An audit showed that many agents “do not understand use of force and the extent to which they may or may not use force.”)

<sup>xxvi</sup> The agencies ostensibly responsible for CBP oversight, the DHS Office of Inspector General and Office for Civil Rights and Civil Liberties – each lacking in independence, enforcement authority, and internal transparency – have not kept pace with CBP’s rapid growth. Overall, the combined budget of the OIG and CRCL accounted for less than .005 percent of the total DHS budget in FY 2011. See DEP’T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, FISCAL YEAR 2004 ANNUAL PERFORMANCE PLAN 6 (2004), available at [http://www.oig.dhs.gov/assets/OIG\\_APP\\_FY04.pdf](http://www.oig.dhs.gov/assets/OIG_APP_FY04.pdf); DEP’T OF HOMELAND SEC., FY 2014 BUDGET IN BRIEF, 6 (2013), available at <http://www.dhs.gov/sites/default/files/publications/MGMT/FY%202014%20BIB%20-%20FINAL%20-508%20Formatted%20%284%29.pdf>; DEP’T OF HOMELAND SEC., OFFICE OF CIVIL RIGHTS AND CIVIL LIBERTIES, FISCAL YEAR 2011 AND ANNUAL REPORT TO CONGRESS, 6 (June 2012), available at <http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2011-final.pdf>. The ACLU is still awaiting a substantive response to a complaint filed with OIG and CRCL on April 26, 2012 on behalf of eleven individuals abused by agents at Ports of Entry. Unfortunately, the lack of attention by DHS and its agencies to these complaints is common.

<sup>xxvii</sup> See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL’S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND

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PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS, GAO-09-824, (Aug. 2009) available at <http://www.gao.gov/products/GAO-09-824>.

<sup>xxviii</sup> *Id.* at \*28.

<sup>xxix</sup> *Id.* at \*1.

<sup>xxx</sup> *Id.* at \*58.

<sup>xxxi</sup> *Id.* at \*58–59. See also Judith Gans, THE BORDER PATROL CHECKPOINT ON INTERSTATE 19 IN SOUTHERN ARIZONA: A CASE STUDY OF IMPACTS ON RESIDENTIAL REAL ESTATE PRICES, UNIVERSITY OF ARIZONA, (Dec. 2012), available at [http://udallcenter.arizona.edu/ucpubs/gans\\_2012b.pdf](http://udallcenter.arizona.edu/ucpubs/gans_2012b.pdf).

<sup>xxxii</sup> See Paul Ingram, *Observers Tracking Border Patrol Stops at Arivaca Checkpoint*, TUCSON SENTINEL, Feb. 27, 2014, available at [http://www.tucson sentinel.com/local/report/022714\\_arivaca\\_observers/observers-tracking-border-patrol-stops-arivaca-checkpoint/](http://www.tucson sentinel.com/local/report/022714_arivaca_observers/observers-tracking-border-patrol-stops-arivaca-checkpoint/)

<sup>xxxiii</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, BORDER PATROL: AVAILABLE DATA ON INTERIOR CHECKPOINTS SUGGEST DIFFERENCES IN SECTOR PERFORMANCE, GAO-05-435, (July 2005) available at <http://www.gao.gov/products/GAO-05-435>

<sup>xxxiv</sup> As of Fiscal Year 2008, there were a total of 128 permanent and tactical checkpoints nationwide. See Bob Ortega, *Interior Border Checks Spur Suit*, ARIZONA REPUBLIC, Jan. 16, 2014, available at <http://www.azcentral.com/news/politics/articles/20140115interior-border-checks-spur-suit.html>. The Arizona Republic now estimates that number has grown to approximately 170. See Bob Ortega, *Some in Town to Monitor Border Patrol Checkpoint*, THE ARIZONA REPUBLIC, Feb. 26, 2014, available at <http://www.azcentral.com/news/arizona/articles/20140225arizona-town-monitor-border-patrol-checkpoint.html>