

# The U.S. Border Patrol's Constitutional Erosion in the "100-Mile Zone"

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## ABSTRACT

Supreme Court jurisprudence has established that some established constitutional provisions do not apply at the U.S. border, and protections against governmental privacy incursions are significantly reduced. As such, U.S. Customs and Border Protection (CBP) and the U.S. Border Patrol as an arm of CBP have more authority to search, seize, and detain individuals and property at border crossings than law enforcement agencies would have in other contexts. Justified by reference to the national interest in monitoring and controlling entrants to the country, the doctrine is known as the "border search exception."

However, Border Patrol does not restrict its operations to the U.S. border. Originating in a decades-old federal statute, CBP has the authority to conduct stops and searches within a "reasonable distance" of a border, defined by regulation as 100 miles. This "100-mile zone" has been used for permanent and temporary internal checkpoints and roving stops. The extent to which the agency's assumed expansive authority within this zone squares with constitutional principles is open to question. This Article will analyze how Fourth Amendment principles should apply to CBP authority inside national borders, including its authority to stop, question, search, and detain individuals. It will analyze the legal problems and risks attendant to an expansion of Border Patrol authority into an area encompassing the residence of about two-thirds of the U.S. population, suggesting an alternative approach that provides both clearer guidelines and more robust protections for civil liberties. Ultimately, Border Patrol activity that occurs beyond the nation's border should be bound by ordinary constitutional restrictions applicable to all other law enforcement.

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#### I. INTRODUCTION

The United States Border Patrol is an arm of the federal Customs and Border Protection Agency (CBP), housed within the Department of Homeland Security (DHS). It was created by regulation to enforce the border control provisions of the Immigration and Nationality Act (INA). CBP is the largest law enforcement agency in the country and is tasked with monitoring and enforcing border security, customs, trade, agriculture, and immigration at over 300 ports of entry. Border Patrol is tasked with “securing our international land borders and coastal waters between ports of entry.”<sup>1</sup>

However, Border Patrol does not limit its operations exclusively to the U.S. border and to those who are in the process of entering the U.S. Instead, asserting authority well beyond that area, Border Patrol routinely stops, questions, searches, and seizes individuals who are not crossing the border (and perhaps have never done so at all). In fact, these individuals may be hundreds of miles away from the border when interacting with Border Patrol. The extent of these interior operations appears to be expansive but secretive, the scope of which, therefore, cannot be fully known. Although available evidence indicates that internal Border Patrol operations have been increasing, the agency has been resistant to reporting relevant data and information necessary to provide a thorough understanding of the situation.<sup>2</sup> The constitutional implications of these

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1. *What We Do*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/careers/usbp-what-we-do> (last modified Mar. 29, 2019).

2. See discussion *infra* Part II and Sections IV.A., C.

operations, and the extent to which Border Patrol activities violate the rights of those they encounter, is the subject of much debate. Many troubling accounts exist of Border Patrol abuses, including unlawful searches, seizures, detentions, use of excessive force, and a consistent lack of oversight and accountability in response to such abuses, from the lowest to the highest levels of agency authority.<sup>3</sup> Evidence suggests that Border Patrol agents largely act with impunity, and disciplinary action for even the most egregious abuses is nonexistent.<sup>4</sup> Thus, there is little incentive to operate within either constitutional constraints or agency guidelines.

This Article will analyze the current jurisprudential and statutory guidelines for Border Patrol activity and whether they comport with reasonable constitutional limits. It will also address the ways those guidelines are ignored in practice, raising additional concerns about the dilution and disregard of constitutional rights. Further, this Article argues that both the practices and legal framework of current Border Patrol authority are of dubious constitutional validity, and that Border Patrol activity occurring anywhere other than at the nation's border should be bound by ordinary constitutional restrictions applicable to all other law enforcement.

## II. CUSTOMS AND BORDER PATROL HISTORY AND OPERATIONS

The U.S. Border Patrol began as a formal federal government agency in 1924 and was merged into the Immigration and Naturalization Service (INS) in 1933.<sup>5</sup> Initially, the primary focus of the agency was to secure the Canadian border, but immigrants and Americans of Mexican descent increasingly became the target of government focus in the 1930s. During that decade, mass deportations saw 500,000 people "dumped across the border in Mexico."<sup>6</sup> In 1954 the agency stepped up its efforts at the southern border in what was officially termed "Operation Wetback,"<sup>7</sup> which led to the deportation of thousands of individuals of Mexican descent.<sup>8</sup> Border-securing operations, however, were not a serious

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3. See discussion *infra* Part II and Sections IV.A., C.

4. See discussion *infra* Part II and Sections IV.A., C.

5. *Timeline*, U.S. CUSTOMS & BORDER PROTECTION, <https://bit.ly/38TT2Vm> (last visited Dec. 29, 2019) [hereinafter *CBP Timeline*].

6. Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO/CHICANA/O LATINA/O L. REV. 1, 3 (1995) (citing FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 23 (1995)) (indicating that over 51,000 people were deported in California alone as a result of this operation).

7. *Id.*; see also *CBP Timeline*, *supra* note 5.

8. Cervantes, et al., *supra* note 6, at 3 (indicating that over 51,000 people were deported in California alone as a result of this operation) (citing Juan Ramon Garcia, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* 200, 230–31 (1980)).

government priority until the 1990s.<sup>9</sup> At the beginning of the Clinton administration in 1993, Border Patrol had 4,000 agents. But in 2001, this number had more than doubled to 9,800.<sup>10</sup>

After the 9/11 attacks, Border Patrol structure and operations changed quickly and significantly. Congress gave new attention to border security, and there was a massive push to increase the ranks well beyond the nearly 10,000 agents employed at that time and to fund the agency more adequately. The INS was disbanded, and its operations were moved from the Department of Justice to the newly-created DHS, comprising three new agencies: Immigration and Customs Enforcement (ICE), Citizenship and Immigration Service (CIS), and CBP. By 2016, Border Patrol had swelled to about 21,000 agents. President Trump has said he wants to continue to increase that number by another 5,000,<sup>11</sup> and that increase appears to be in process.<sup>12</sup>

From a non-government perspective, the country appeared to be doing exactly what needed to be done to address border security problems that were at the forefront of public attention after the 9/11 attacks. Certainly, increased appropriations to address border security would appear sensible. However, there were significant internal concerns about the process by which it took place. W. Ralph Basham, the new CBP commissioner in 2005, expressed serious reservations about the push for such rapid growth. He believed such quick expansion prevented the opportunity to carefully plan and selectively hire agents to work in what he termed a “tough environment.”<sup>13</sup> Nevertheless, the Bush administration and Congress pushed ahead, allocating millions of dollars in funding under the view that “[a]lmost any body in the field was better than no body.”<sup>14</sup> Gil Kerlikowske, the CBP commissioner under President Obama, noted the inevitable problems with such swift staffing increases, stating that “[I]aw enforcement always regrets hiring quickly.”<sup>15</sup> James Wong, a retired senior CBP internal affairs official, also shared concerns about the diminished quality of agents resulting from such a fast increase in the

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9. See *Border Patrol History*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/border-security/along-us-borders/history> (last modified Oct. 5, 2018) (discussing multiple operations beginning in 1993, the creation of new units, and a “defined national strategic plan” for the future of the agency).

10. U.S. BORDER PATROL, BORDER PATROL AGENT NATIONWIDE STAFFING BY FISCAL YEAR (2019), <https://bit.ly/3bTUj0A>

11. Brian Naylor, *Trump’s Plan to Hire 15,000 Border Patrol and ICE Agents Won’t be Easy*, NPR (Feb. 23, 2017, 5:12 AM), <https://n.pr/2mHzz7n>.

12. U.S. DEP’T HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2019, at 27 (2019), <https://bit.ly/2tmtiNY>.

13. Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, POLITICO MAG., Nov.–Dec. 2014, at 1, 3, available at <https://politi.co/2mkdpYF>.

14. *Id.* at 3.

15. *Id.* at 7.

ranks during the post-9/11 push: “[a]t some point, it became more important to have people in the seats than it was to have qualified people in the seats,”<sup>16</sup> and as could be expected, the level of experience of agents declined.<sup>17</sup> In an effort to recruit more people, CBP spent millions on advertising,<sup>18</sup> while DHS Inspector General Richard Skinner said the necessary management and training systems were not built to accommodate the hiring surge.<sup>19</sup> As a result, agents were put into the field without full background checks, and some were promoted as supervisors and trainers with little experience.<sup>20</sup> It turned out that some of those hired were gang members and drug cartel members, according to CBP Commissioner Basham.<sup>21</sup> CBP officials themselves estimated that employee integrity problems likely existed and warranted removal of a stunning 10-20% of their entire agent force.<sup>22</sup> Making matters even worse, leadership also acknowledged an internal culture of not reporting misconduct.<sup>23</sup>

The influx of new agents brought with it a surge in complaints, including claims of excessive force.<sup>24</sup> Misconduct *arrests* (not complaints) of CBP officers or agents averaged nearly one per day every day for seven years between 2005 and 2012.<sup>25</sup> In just five years between 2007 and 2012, there were about 1,700 claims of excessive force, although exact numbers are difficult to ascertain due to inadequate record-keeping.<sup>26</sup> The American Civil Liberties Union (ACLU) found 2,178 complaints of misconduct from January 2012 to October 2015, with physical abuse being the most common complaint, at 59% of the total.<sup>27</sup> Agency officials expressed concern about the rise in “disturbing events” and employee arrests.<sup>28</sup> Although such concern prompted multiple high-level warnings and requests for action, bureaucratic and other issues, turf battles, lack of investigatory authority of CBP internal affairs, and inertia made these issues nearly impossible to address.<sup>29</sup> Similarly, the hiring surge, insufficient training, and misconduct of newly hired agents no doubt had

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16. *Id.*

17. DANIEL E. MARTINEZ ET AL., NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE 2 (2014), <http://bit.ly/2lXSlqt>.

18. *See* Graff, *supra* note 13, at 3.

19. *See id.*

20. *See id.* at 3–4.

21. *Id.* at 4.

22. *See id.* at 5.

23. *See id.* at 4.

24. *See id.*

25. There were 2,170 misconduct arrests in total between 2005 and 2012. *See id.*

26. *See id.* at 5.

27. GUILLERMO CANTOR & WALTER EWING, STILL NO ACTION TAKEN: COMPLAINTS AGAINST BORDER PATROL AGENTS CONTINUE TO GO UNANSWERED 7–8 (2017), <http://bit.ly/2kfiL6G>.

28. Graff, *supra* note 13, at 4.

29. *See id.* at 4–5.

a significant impact on the current state of affairs with CBP, including the agency's apparent unwillingness and inability to ensure constitutional safeguards in carrying out its duties.

### III. OVERVIEW OF CUSTOMS AND BORDER PATROL LEGAL AUTHORITY

The Fourth Amendment to the U.S. Constitution provides that “[t]he 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. . . .”<sup>30</sup> In effect, this means that before conducting a search of a person or her belongings, law enforcement officers must first obtain a warrant from a judge, based on probable cause that evidence of a crime will be found. Failing to do so runs afoul of the Constitution and violates the rights of the individual.

#### A. *Authority at the International Borders and Border Equivalents*

While ordinary state and federal law enforcement officers can make use of some judicially-expounded exceptions or limitations to this requirement under some specific circumstances, the Border Patrol has been treated somewhat differently when it comes to constitutional boundaries. In cases testing the Fourth Amendment limits of Border Patrol's authority to conduct warrantless searches of those entering the country at ports of entry (including functional border equivalents, such as international airports), the courts have used a balancing test whereby the Fourth Amendment privacy rights of entrants are weighed against the sovereign's security interests at the border.<sup>31</sup> The Supreme Court has decided that there is a reduced expectation of privacy at the border, holding that the government's interest in monitoring and controlling entrants outweighs the privacy interest of the individual. Thus, routine searches without a warrant, probable cause, or reasonable suspicion are considered inherently reasonable and automatically justified in that particular context.<sup>32</sup> Fourth Amendment rights are therefore significantly circumscribed at the border, and CBP is given an expansive authority to randomly—and without suspicion—search, seize, and detain individuals and property at border crossings that law enforcement officers would not have in other circumstances.

Although nothing in the Fourth Amendment (or Constitution generally) provides for such a principle, this doctrine has become known as the “border search exception” to the warrant requirement of the Fourth

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30. U.S. CONST. amend. IV.

31. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 272–73 (1973).

32. *Id.*

Amendment.<sup>33</sup> The precise limits to this exception are disputed and continue to be tested, as the Border Patrol has engaged in searches not only of suitcases and bags but also increasingly of electronic devices such as cell phones and laptops, sometimes confiscating them without cause.<sup>34</sup> Agents have also detained entrants for long periods of time without an apparent or stated reason,<sup>35</sup> even engaging in invasive body searches with no legal justification.<sup>36</sup> There have been recent calls for the Border Patrol to publicize its policies and justifications, and numerous complaints have challenged these practices and their constitutionality.<sup>37</sup> The Fourth Circuit recently came down with some guiding principles regarding cell phone searches,<sup>38</sup> but the general standards are disputed, inconsistently applied, and in a state of flux.<sup>39</sup> The Supreme Court has not taken a recent case dealing with these issues. What the Court has made clear, however, is that the border search exception applies only to the narrow purpose of enforcing immigration and customs laws, which entails ensuring that required duties are paid on imported goods and that harmful goods and people do not enter the country.<sup>40</sup> Other potential government interests—including general crime control—may not be effectuated via the border search exception.

#### B. *Authority Within the Border*

The authority of Border Patrol and the rights of individuals at locations other than at the national border and international ports of entry are not only less clear than they are at the border, but are also much more controversial. Where CBP is responsible for facilitating trade, customs, and immigration laws and regulations *at* the border,<sup>41</sup> Immigration and

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33. See, e.g., *D.E. v. John Doe*, 834 F.3d 723, 727 (6th Cir. 2016).

34. See Esha Bhandari, *The Government's New Policy on Device Searches at the Border: What You Need to Know*, ACLU (Jan. 9, 2018, 12:45 PM), <https://bit.ly/2l9mwer> (noting that searches of electronic devices rose by about 60% from 2016 to 2017).

35. See Sophia Cope, *Law Enforcement Uses Border Search Exception as Fourth Amendment Loophole*, ELEC. FRONTIER FOUND. (Dec. 8, 2016), <https://bit.ly/2hgJzxF>.

36. See Susan Ferriss, *In Horrifying Detail, Women Accuse U.S. Customs Officers of Invasive Body Searches*, WASH. POST (Aug. 18, 2018), <https://wapo.st/2kD6V6O>.

37. See, e.g., Bhandari, *supra* note 34 (noting that in January 2018 CBP issued a new policy against "advanced" searches of electronic devices with suspicion of wrongdoing, but that "basic" searches, which reveal items located on the phone without a download, are permissible with no suspicion).

38. *United States v. Kolsuz*, 890 F.3d 133, 143–44 (4th Cir. 2018) (holding that the search of a cell phone is not considered part of a "routine" border search and must be based on at least reasonable suspicion).

39. See, e.g., Esha Bhandari et al., *Can Border Agents Search Your Electronic Devices? It's Complicated*, ACLU (Mar. 14, 2017, 10:45 AM), <https://bit.ly/2pQXwYz>.

40. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 880–84 (1975); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 566–67 (1976).

41. *About CBP*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/about> (last modified Sept. 18, 2018) ("CBP takes a comprehensive approach to border

Customs Enforcement (ICE) is the agency tasked with enforcing immigration laws *within* the country, including the apprehension, prosecution, and deportation of undocumented individuals.<sup>42</sup> Yet CBP regularly asserts authority well beyond the border, moving into ICE immigration enforcement territory. Border Patrol agents routinely stop, question, search, and seize individuals who are not crossing the border (and perhaps have never done so at all), and may, in fact, be hundreds of miles away from it when interacting with CBP.

The statute apparently supporting Border Patrol's authority within the border provides agents the authority to "board and search for aliens" on any "aircraft, conveyance, or vehicle" within a "reasonable distance from any external boundary of the United States."<sup>43</sup> This language appears to come from a change to the INA in 1946.<sup>44</sup> The statute does not define "reasonable distance," so a federal regulation implementing the change was written in 1953 establishing the reasonable distance as 100 air miles from any external boundary, including all coasts and waterways.<sup>45</sup> The same regulation also authorizes CBP to enter private property, other than residences, within 25 miles of the border without a warrant. There appears to have been little deliberation on either the statute or the regulation, and it is unclear why 100 miles was the distance chosen.<sup>46</sup> The regulation also provides exceptions to the 100-mile rule whereby the Commissioner of CBP or the Assistant Secretary for ICE may declare a larger distance to be "reasonable" on a case-by-case basis.<sup>47</sup> Although the language states that such exceptions should take place only under unusual circumstances, evidence suggests that there exists within CBP a presumption of reasonableness for operations further than 100 miles from a boundary.<sup>48</sup>

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management and control, combining customs, immigration, border security and agricultural protection . . .").

42. *What We Do*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/overview> (last modified Dec. 4, 2018) ("Immigration enforcement is the largest single area of responsibility for ERO [Enforcement and Removal Operations] . . . [and] the majority of its immigration enforcement mission takes place in the interior of the country.").

43. 8 U.S.C. § 1357 (a)(3) (2012).

44. Act of Aug. 7, 1946, Pub. L. No. 79-613, 60 Stat. 865 (1946).

45. Definitions, 8 C.F.R. § 287.1(a) (2019).

46. See AM. CIVIL LIBERTIES UNION, CUSTOMS AND BORDER PROTECTION'S (CBP'S) 100-MILE RULE 2 n.4 (2014), <https://bit.ly/2kJjAVT> [hereinafter *100-Mile Rule*] (first citing H.R. REP. NO. 79-186 (1945); and then citing S. REP. NO. 79-632 (1945)).

47. 8 C.F.R. §287.1(a)(2), (b) (2019).

48. See *United States v. Lamas*, 608 F.2d 547, 548 (5th Cir. 1979) (involving a stop 190 miles from the border); see also *United States v. Cervantes*, 797 F.3d 326, 330 (5th Cir. 2015) (involving a stop 200 miles from the border); JAMES LYALL ET AL., RECORD OF ABUSE: LAWLESSNESS AND IMPUNITY IN BORDER PATROL'S INTERIOR ENFORCEMENT OPERATIONS 6 (2015), <https://bit.ly/2lPjy9j> (discussing a stop 125 miles from the border); David Anton Armendariz, *On the Border Patrol and its Use of Illegal Roving Patrol Stops*, 14 SCHOLAR 553, 559 (2012) (discussing a stop 190 miles from the border).

The effects of this regulation are sweeping. Because “external boundary” has been interpreted by CBP to include oceans and all other waterways, regardless of how unlikely it might be that undocumented individuals will arrive via that route, the entire eastern seaboard is covered (including Washington, D.C., New York City, Philadelphia, and Boston), as well as most of California (including San Diego, Los Angeles, San Francisco, and Sacramento), the most highly populated areas of Oregon and Washington (including Portland and Seattle), the entire states of Florida and Michigan, many of the northeastern states, and most of the nation’s other large cities (including Chicago, Detroit, Houston, and New Orleans).<sup>49</sup> For instance, the shortest drive from Chicago to the Canadian border is approximately 280 miles, or 248 air miles.<sup>50</sup> Although Chicago is well beyond the 100-mile limit for CBP activity, the entire city (and 100 miles southward into Illinois) are all subject to extended Border Patrol enforcement authority and the “border search exception” because Chicago is adjacent to Lake Michigan, which is considered an “external boundary.” The implications of such wide authority are sweeping, especially in light of the fact that approximately 200 million people—over 65% of the U.S. population,<sup>51</sup> and 75% of its Hispanic population<sup>52</sup>—live within the “100-mile zone.”

#### IV. THE FOURTH AMENDMENT AND INTERNAL CBP ENFORCEMENT ACTIVITY IN PRACTICE

Constitutional considerations regarding Border Patrol enforcement activities are dependent upon the location at which those activities take place. Although Supreme Court jurisprudence dictates that constitutional rights are circumscribed at the border and ports of entry, the same is not the case at other locations within the U.S.

##### A. *Interior Checkpoints and the Border Search Exception*

In addition to its regular operations at the border and ports of entry, CBP operates approximately 32 permanent “interior border checkpoints” throughout the country, along with another 39 temporary internal or

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49. See, e.g., *KNOW YOUR RIGHTS: 100 MILE BORDER ZONE*, ACLU, <https://www.aclu.org/know-your-rights/border-zone/> (last visited Dec. 19, 2019).

50. *How Far is it Between*, FREE MAP TOOLS, [https://www.freemaptools.com/how-far-is-it-between-chicago-and-windsor\\_ontario.htm](https://www.freemaptools.com/how-far-is-it-between-chicago-and-windsor_ontario.htm) (last visited Dec. 29, 2019) [hereinafter *Distance Calculator*] (calculating the distance between Chicago, IL and Windsor, ON, CA).

51. *100-Mile Rule*, *supra* note 46, at 1.

52. Tanvi Misra, *Inside the Massive U.S. “Border Zone,”* CITYLAB (May 14, 2018), <https://bit.ly/2k1D0kt>.

“tactical” checkpoints.<sup>53</sup> In the Tucson sector,<sup>54</sup> in 2003, temporary checkpoints were mandated to be moved every seven days,<sup>55</sup> then an “average” of every 14 days in 2005,<sup>56</sup> but information about other sectors and specifics about the frequency of movement is difficult to come by. Border Patrol has refused to disclose how many of these temporary checkpoints exist; however, reports place the number at about 170.<sup>57</sup> In Texas, the permanent Falfurrias border checkpoint is 70 miles north of the border on US 281, the main route connecting the southern McAllen area to other cities such as Houston, Austin, and San Antonio. Seventeen other checkpoints exist throughout Texas, with others in New Mexico, Arizona, and California.<sup>58</sup> Every traveler heading away from the border on the highways where these checkpoints exist is required to stop and answer questions about their citizenship or legal status, without ever having left or re-entered the country. Some of these travelers are subjected to considerably more than a brief inquiry, including extensive questioning, detention, canine searches, and agent searches of persons and vehicles.<sup>59</sup> The basis for these activities is not always clear (and is sometimes quite suspect).

While the checkpoints can pose a nuisance to the occasional traveler, there are more severe consequences for local residents of the area who must engage with CBP regularly in their daily lives by traveling through checkpoints to reach school, work, shopping, or other regular activities, all without ever having crossed any border. At best, the checkpoints pose a time delay, and vehicle back-ups can sometimes make this extreme, particularly when added up over the course of days, weeks, and months of regular travel. At worst, many residents are required to regularly provide proof of citizenship or legal residence and may be subject to search and detention on multiple occasions, with evidence suggesting that these extended detentions, searches, and questioning are significantly more

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53. As of fiscal year 2008. U.S. GOV'T ACCOUNTABILITY OFF., *Border Patrol checkpoints Contribute to Border Patrol's Mission, but More Consistent Data Collection and Performance Measurement Could Improve Effectiveness* 8, 34 n.44 (2009), <https://www.gao.gov/new.items/d09824.pdf> (stating that there are 71 total checkpoints, and 39 of them are tactical).

54. For a listing of Border Patrol Sectors, including specific stations within each sector, see *Border Patrol Sectors*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors>.

55. U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-435, *Border Patrol: Available Data on Interior Checkpoints Suggest Differences in Sector Performance* 24 (2005), <https://www.gao.gov/new.items/d05435.pdf>.

56. *Id.* at 25.

57. Bob Ortega, *Border Patrol Sued for Harassing at Arivaca Checkpoint*, AZCENTRAL (Nov. 26, 2014, 11:08 PM), <https://bit.ly/2m2N9C4>.

58. David Branham, Sr., *The Influence of Seclusion: Immigration and Border Security Attitudes of Registered Voters Living Behind the Interior Border Patrol Checkpoints in the State of Texas*, 16 MIDSOUTH POL. SCI. REV. 1, 1 (2015).

59. LYALL ET AL., *supra* note 48, at 1.

common for Hispanic residents.<sup>60</sup> Even former Arizona governor Raul Castro—at 96 years old—was detained and required to stand in 100-degree heat for more than 30 minutes at a checkpoint.<sup>61</sup> Checkpoint detentions can sometimes last for hours.<sup>62</sup> Even when no wrongdoing is found, residents are nevertheless subject to delays, privacy violations, embarrassment, and even property damage.<sup>63</sup> This creates an entire region of the country where legal residents and citizens are accorded less privacy and more invasive government monitoring as a matter of course than those further inland. Although Border Patrol activity is more intensive in the southern region of the country, it has greatly expanded in recent years in other areas as well, particularly in the northern U.S. region.<sup>64</sup> It is undisputed, even by Border Patrol, that such stops amount to a seizure by Fourth Amendment standards, but the agency nevertheless claims the right to “temporarily seize all vehicles that drive up to an immigration checkpoint . . . to conduct an immigration inspection,” according to a CBP spokesperson.<sup>65</sup> This 100-mile border region has consequently been termed the “band of isolation,”<sup>66</sup> a “no man’s land”<sup>67</sup> where local residents perpetually live with diminished rights and constant government intrusion and suspicion in their lives. By virtue of its practices in the region, the Border Patrol has been referred to as “part police force, part occupying army, part frontier cavalry.”<sup>68</sup> Patrick Eddington, a policy analyst with the CATO Institute, has referred to this 100-mile band around the country area as a “Constitution-free zone” where Border Patrol is “allowed to nullify people’s rights.”<sup>69</sup>

Border Patrol asserts that these checkpoints are necessary to effectively secure the border against “illegal aliens” and “illegal narcotics.”<sup>70</sup> Indeed, the strong government interest in those matters is precisely the justification for the Court’s decision that permitted the border

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60. See, e.g., Ron Nixon, *Under Trump, Border Patrol Steps Up Searches Far From the Border*, N.Y. TIMES (Feb. 21, 2018), <https://nyti.ms/2CArHqg>; Jay Skebba, *Border Patrol checks on Greyhound buses raise eyebrows*, BLADE (Sept. 23, 2018, 9:06 PM), <http://bit.ly/2kOtJjX>.

61. Todd Miller, *The US-Mexico Border: Where the Constitution Goes to Die*, MOTHER JONES (July 15, 2014), <https://bit.ly/2mjXqcT>.

62. See, e.g., Mona Kosar Abdi, *Ohio Woman woman detained by Border Patrol agents, wrongfully accused of “Smugglingalien smuggling,”* RTV6 INDIANAPOLIS (Oct. 13, 2018, 4:58 PM), <https://bit.ly/2kQj1tg>.

63. LYALL ET AL., *supra* note 48, at 2.

64. See *infra* Section IV.C.

65. Misra, *supra* note 52.

66. Branham, Sr., *supra* note 58, at 2.

67. Misra, *supra* note 52.

68. Graff, *supra* note 13, at 1.

69. Misra, *supra* note 52.

70. *Border Patrol Overview*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/border-security/along-us-borders/overview> (last modified Apr. 26, 2018).

search exception to the warrant requirement of the Fourth Amendment in the first place. Border Patrol claims, however, that those needs extend beyond the border into the interior as well. Yet, constitutional issues aside, a number of facts call that claim into question. These checkpoints often result in the arrest of U.S. citizens (who by definition are legally present in the U.S.), and at significantly higher levels than non-citizens.<sup>71</sup> One checkpoint 75 miles inside the border in the Yuma, Arizona sector reported in a three year period just one non-citizen immigration apprehension.<sup>72</sup> But the checkpoint received multiple civil rights complaints in the same time frame.<sup>73</sup> In all of 2013, nine out of 23 checkpoints in the Tucson sector did not arrest a single “deportable subject.”<sup>74</sup> The Yuma sector, in fact, arrested eight times as many citizens as non-citizens in 2013, and eleven times as many in 2011.<sup>75</sup> Further, those arrests were primarily for drug violations<sup>76</sup> and not immigration violations, as all citizens are legally present in the country.

There are many indications that operations at these checkpoints often involve racial profiling as well as Fourth Amendment violations in the form of unreasonable searches and detentions without a warrant, probable cause, or reasonable suspicion. For example, at one checkpoint, evidence suggested that Latinos were twenty times more likely to be detained than non-Latinos.<sup>77</sup> Additionally, CBP arrest records from Rochester, New York bus terminals and railway stations show that of the 2,776 arrests between 2005 and 2009, just 0.9% of those arrested had a fair complexion.<sup>78</sup> Reports of Border Patrol operations have resulted in concerns about the use of “racial and ethnic profiling techniques to determine who to stop, question or arrest.”<sup>79</sup> Passengers aboard commuter buses and trains boarded by Border Patrol agents often report that only the non-white passengers are targeted.<sup>80</sup> A class action lawsuit was filed against CBP for regularly stopping vehicles in Washington state and interrogating individuals without any legal justification, based solely on

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71. LYALL ET AL., *supra* note 48, at 3.

72. *Id.*

73. *Id.*

74. *Id.* at 14.

75. *Id.*

76. For example, “four out of five drug-related arrests by Border Patrol involved U.S. citizens.” *Id.*

77. Imelda Mejia, *Border Patrol Check: Some Arivaca Residents Want Checkpoint Gone*, CRONKITE NEWS (Nov. 20, 2014), <http://bit.ly/2kAKlvz>.

78. Miller, *supra* note 61.

79. N.Y. CIVIL LIBERTIES UNION, JUSTICE DERAILED: WHAT RAIDS ON NEW YORK’S TRAINS AND BUSES REVEAL ABOUT BORDER PATROL’S INTERIOR ENFORCEMENT PRACTICES 26 (2011), <http://bit.ly/2mmi3W4> [hereinafter *N.Y.C.L.U.*]; see also Armendariz, *supra* note 48, at 556–58.

80. Nixon, *supra* note 60.

race and ethnicity.<sup>81</sup> CBP settled that suit and agreed to require additional training for agents.<sup>82</sup> When the Department of Justice banned racial profiling by federal law enforcement in 2014, CBP lobbied for—and received—an exemption to the requirement.<sup>83</sup> Additional questioning was met with reticence, but one official anonymously indicated that race and nationality “could be factors” in official enforcement activity.<sup>84</sup>

Individuals detained at checkpoints beyond brief questioning about immigration status report troubling experiences. Checkpoint detentions have been reported to last anywhere from minutes<sup>85</sup> to hours<sup>86</sup> to days.<sup>87</sup> People report being told they were detained at checkpoints for reasons as questionable as their car smelling like a skunk or because they had prescription medications.<sup>88</sup> Three humanitarian aid workers were detained because they had backpacks, which an agent said was inherently suspicious.<sup>89</sup> Another was not only detained but threatened with a weapon because the agent “didn’t recognize” him.<sup>90</sup> A number of individuals had their property damaged by agents, with no restitution provided.<sup>91</sup> Motorists with damaged property are often told to file a lawsuit to obtain reimbursement, but if they attempt to do so, they are told by CBP that the law does not permit them to receive reimbursement for property damage caused by CBP employees.<sup>92</sup>

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81. *Sanchez v. U.S. Office of Border Patrol*, No. 12-5378 BHS, 2012 WL 3715719, at \*1–2 (W.D. Wash. Aug. 27, 2012).

82. Settlement Agreement at 3, *Sanchez v. U.S. Office of Border Patrol*, No. 12-5378 BHS, 2012 WL 3715719 (W.D. Wash. Aug. 27, 2012), available at <https://www.clearinghouse.net/chDocs/public/IM-WA-0018-0005.pdf>.

83. Sari Horwitz & Jerry Markon, *Racial Profiling will still be allowed at airports, along border despite new policy*, WASH. POST (Dec. 5, 2014), <https://wapo.st/355t9Hk>.

84. Daniel Denvir, *Curbing the Unchecked Power of the U.S. Border Patrol*, CITYLAB (Oct. 30, 2015), <https://bit.ly/2Mz6s05>

85. See, e.g., *N.Y.C.L.U.*, *supra* note 79, at 22 (45 minute detention); Letter from James Lyall, Staff Att’y, ACLU of Ariz., to Charles K. Edwards, Deputy Inspector Gen., Dep’t of Homeland Sec., and Tamara Kessler, Officer for Civil Rights & Liberties, Dep’t of Homeland Sec. 5–11 (Jan. 15, 2014), available at <https://bit.ly/2mcGANi> [hereinafter *Lyall Letter*] (describing multiple detentions lasting 10–45 minutes).

86. See *N.Y.C.L.U.*, *supra* note 79, at 6 (detentions lasting “hours” and “a few hours”); see also *Lyall Letter*, *supra* note 85, at 3, 7 (describing detentions lasting “over an hour”).

87. See *N.Y.C.L.U.*, *supra* note 79, at 7, 20, 22 (detentions lasting “several days”).

88. *Lyall Letter*, *supra* note 85, at 7.

89. *Id.* at 4.

90. *Id.* at 7.

91. LYALL ET AL., *supra* note 48, at 5.

92. *Id.* This is something of a misrepresentation of the law, however. Technically, CBP is liable for damages resulting from its negligence. See *Kisak v. United States*, 465 U.S. 848, 862 (1984). However, damage resulting from the inspection of goods is not generally considered negligence and, in practice, CBP has largely been held immune from damage or destruction caused during inspection of goods, even from activities such as drilling holes into goods. See Kevin G. Hall, *When Damage Occurs, Don’t Bill Customs*, JOC (Sept. 1, 1999, 8:00 PM), [https://www.joc.com/when-damage-occurs-dont-bill-customs\\_19990901.html](https://www.joc.com/when-damage-occurs-dont-bill-customs_19990901.html).

Numerous allegations have stated that agents claim a canine alert as a basis for conducting a search, resulting in detention and searches of individuals and vehicles that often turn up nothing.<sup>93</sup> Some claims of canine alerts have taken place when an agent suggested the dog had changed its “breathing pattern,”<sup>94</sup> or even when there were no dogs in the area.<sup>95</sup> One canine “alert” resulted in a U.S. citizen being forcibly strip-searched, subjected to genital and cavity searches and a forced bowel movement, along with X-rays and CT-scans, all of which revealed no illegal activity.<sup>96</sup> The reliability of canine alerts has been called into question in multiple cases. The dissent in the Seventh Circuit *Doe v. Renfrow* case, for example, pointed out that 35 alerts out of 50 were, in fact, false.<sup>97</sup> Similarly, the Eleventh Circuit in *Merrett v. Moore* noted that narcotics were not found in a staggering 27 out of 28 canine alerts at a temporary checkpoint.<sup>98</sup> Nevertheless, courts have continued to accept canine alerts in establishing probable cause for detention and searches, without any particular requirements for training, certification, or documentation of reliability in the field.<sup>99</sup> This remains so even in the face of evidence indicating that the rate of accurate alerts is as low as 7%, with the *highest* canine accuracy rate in that study at 56%—just over half the time<sup>100</sup>—with a false alert average of 74% or more.<sup>101</sup> A positive alert, therefore, was three times more likely to be false than accurate.<sup>102</sup> A more recent study resulted in a false alert rate of about 80%.<sup>103</sup>

The U.S. Supreme Court has held that immigration checkpoints are permissible, but only insofar as they involve a minimally intrusive “brief detention of travelers” with a “routine and limited inquiry into residence

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93. See, e.g., LYALL ET AL., *supra* note 48, at 1–2, 5 (reporting at least 44 instances of false canine alerts that resulted in detentions and/or searches); see also *Lyall Letter*, *supra* note 85, at 1 n.2.

94. *Lyall Letter*, *supra* note 85, at 13 n.26.

95. *Id.* at 8.

96. See *id.* at 1 n.2.

97. *Doe v. Renfrow*, 631 F.2d 91, 94–95 (7th Cir. 1980) (Fairchild, C.J., dissenting).

98. *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995).

99. *Florida v. Harris*, 568 U.S. 237, 246–47 (2013) (stating that even in the absence of any “formal certification,” a dog’s recent completion of a “training program that evaluated his proficiency in locating drugs” may be presumed to be sufficient for generating probable cause, without discussion of the nature or type of training program or the level of proficiency required).

100. OMBUDSMAN NEW SOUTH WALES, POLICE POWERS (DRUG DETECTION DOGS) ACT 2001 REVIEW OCTOBER 2006 PART 1, at 57 (Sept. 14, 2006), [https://www.ombo.nsw.gov.au/\\_data/assets/pdf\\_file/0020/4457/Review-of-the-Police-Powers-Drug-Detection-Dogs-Part-1\\_October-2006.pdf](https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0020/4457/Review-of-the-Police-Powers-Drug-Detection-Dogs-Part-1_October-2006.pdf).

101. Brief of Amici Curiae National Association of Criminal Defense Lawyers et al., *Florida v. Harris*, 568 U.S. 237 (2013) (No. 11-817), 2012 WL 3875241., at \*7.

102. *Id.*

103. *Id.* at \*7 n.6.

status" that maintains an immigration focus.<sup>104</sup> Any secondary inspection (not a search) must be "made for the sole purpose of conducting a routine and limited inquiry into residence status that cannot feasibly be made of every motorist where the traffic is heavy."<sup>105</sup> Further detention or questioning must be founded on reasonable suspicion of wrongdoing.<sup>106</sup> Vehicle searches beyond what can be seen via ordinary visual inspection are not permitted without probable cause or consent<sup>107</sup> that has been provided knowingly and voluntarily and without coercion.<sup>108</sup> Probable cause is defined as an objectively reasonable belief, based on the circumstances, that an immigration violation or crime has likely occurred, which is a higher standard to meet than reasonable suspicion.<sup>109</sup> However, Border Patrol agents appear to ignore these requirements in internal non-border operations. Agents often provide no reason at all for conducting a search or offer reasons that cannot rise to the level of probable cause, such as the ones laid out above including the vehicle smelling like a skunk, possessing a backpack, and possessing prescription medication. Searches have also been justified on the basis of the motorist not consenting to a search,<sup>110</sup> resulting in a legal catch-22 where a search with no legal cause will be conducted no matter what, either with consent (often provided under pressure) or via "probable cause" manufactured through the lack of consent. Probable cause as a legal condition would thus effectively be eliminated. This elimination of Fourth Amendment restrictions results in something less like a "border search exception" and more like a "Border Patrol search exception."

The Supreme Court has also held that immigration checkpoints must operate with a primary purpose of immigration enforcement.<sup>111</sup>

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104. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976); *see also* *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001) ("The scope of an immigration checkpoint stop is limited to the justifying, programmatic purpose of the stop: determining the citizenship status of persons passing through the checkpoint.").

105. *Martinez-Fuerte*, 428 U.S. at 560.

106. *Id.*; *see also* *United States v. Ellis*, 330 F.3d 677, 680 (5th Cir. 2003) ("[A]n agent at an immigration stop may investigate nonimmigration matters beyond the permissible length of the immigration stop if and only if the initial lawful stop creates reasonable suspicion warranting further investigation."); *United States v. Preciado-Robles*, 964 F.2d 882, 884–85 (9th Cir. 1992) (articulable suspicion is required for detention following immigration questioning and "there must be a valid basis for any additional intrusion, and it must be of a brief duration").

107. *See Martinez-Fuerte*, 428 U.S. at 558; *see also* *United States v. Ortiz*, 422 U.S. 891, 896–97 (1975).

108. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

109. *See, e.g., Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

110. *Lyall Letter*, *supra* note 85, at 15.

111. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 40–42 (2000) (a highway checkpoint violates the Fourth Amendment if its "primary purpose" is drug interdiction); *see also Martinez-Fuerte*, 428 U.S. at 558 (immigration checkpoints near the southern U.S. border are permissible only if they involve a "brief detention of travelers" during which all

Immigration checkpoints may not be operated as drug checkpoints or primarily focused on broader law enforcement crime control aims;<sup>112</sup> such use would be an unconstitutional violation of Fourth Amendment protections against unreasonable searches and seizures.<sup>113</sup> However, the individual reports and complaints undermine each of these premises and conditions. For example, Border Patrol enforcement activities often appear to be aimed at drug enforcement. Checkpoints are much more likely to uncover drug offenses than immigration ones—particularly small amounts of marijuana—and U.S. citizens are largely the ones impacted.<sup>114</sup> The New Hampshire case discussed above is one such example. Drug interdiction appeared to be the primary focus of the New Hampshire checkpoint because drug dogs were brought in, the state police were enlisted in advance with the specific purpose of handling drug cases, and plans were made as to how to most efficiently proceed with the anticipated drug evidence and suspects so that state police could pursue prosecution. Afterward, the local police chief lauded the operation, stating that Border Patrol has “a lot more leeway” than the police do when it comes to constitutional rights, as he would have needed reasonable suspicion before conducting the drug searches that took place.<sup>115</sup> Given that local police have no official interest in or jurisdiction of immigration enforcement, their heavy involvement in the CBP checkpoint strongly suggested that the primary purpose of the activity was drug enforcement. The trial court agreed, holding that the checkpoint involved government drug enforcement activity that violated both the state and federal constitutions.<sup>116</sup>

Indeed, at checkpoints across the country, many individuals report being detained, searched, and questioned about weapons, drugs, and even medical history, without ever being asked about immigration-related

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that is required of the travelers is “a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States”).

112. *City of Indianapolis*, 531 U.S. at 44 (“[W]e decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control.”). This would include objectives such as gun control, deterrence of criminal activity, location of suspects, etc. See Jason Fiebig, *Police Checkpoints: Lack of Guidance from the Supreme Court Contributes to Disregard of Civil Liberties in the District of Columbia*, 100 J. CRIM. L. & CRIMINOLOGY 599, 599 (2010).

113. *City of Indianapolis*, 531 U.S. at 42 (“Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.”).

114. LYALL ET AL., *supra* note 48, at 3, 15; Nixon, *supra* note 60; Misra, *supra* note 52.

115. Defendants’ Memorandum of Law in Support of their Consolidated Motion to Suppress at 1, *State v. McCarthy*, No. 469-2017-CR-01888 (N.H. Dec. 8, 2017), available at <http://bit.ly/2mpkOWO>.

116. *State v. McCarthy*, No. 469-2017-CR-01888, at \*12 (N.H. 2d Cir. 2017), available at <https://bit.ly/3bU26LQ>.

issues or residence status at all.<sup>117</sup> In a forceful dissent in a 1993 Ninth Circuit case, Judge Kozinski noted the significance of the fact that 50 million vehicles per year pass through just two Border Patrol checkpoints in California.<sup>118</sup> The sheer amount of contraband seized there, combined with the special drug enforcement training received by agents,<sup>119</sup> provides “reason to suspect the agents working these checkpoints are looking for more than illegal aliens . . . [which] turns a legitimate administrative search into a massive violation of the Fourth Amendment,” according to Judge Kozinski.<sup>120</sup> As such, evidence suggests that “the Constitution is being routinely violated at these checkpoints,” as they have been turned into “general law enforcement checkpoints” in violation of the Fourth Amendment.<sup>121</sup>

### B. *Roving Patrols*

In addition to the permanent and temporary internal checkpoints, CBP also conducts roving patrols, whereby Border Patrol agents pull over motorists and question them outside of established checkpoint locations. These stops sometimes result in searches, detentions, and arrests, and have been the subject of frequent complaints by motorists who claim they were stopped without any justification,<sup>122</sup> sometimes reporting additional privacy violations as well as aggressive and abusive treatment.

Federal regulation provides 100 miles as the limit of what is a “reasonable distance” for Border Patrol activity, and all established checkpoints appear to fall within that range. However, the agency itself appears to reject that limitation with respect to its roving stops.<sup>123</sup> Despite the vast territory covered by the federal 100-mile regulation, Border Patrol regularly operates more than 100 miles into the interior of the U.S., which has been condoned by the Fifth and Tenth Circuits.<sup>124</sup> For example, in

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117. See, e.g., *Lyall Letter*, *supra* note 85, at 13 (reporting that ten of fifteen individuals involved in the complaint in question were never asked about residence status).

118. *United States v. Soyland*, 3 F.3d 1312, 1315 (9th Cir. 1993) (Kozinski, J., dissenting).

119. See *id.* at 1318.

120. *Id.* at 1316.

121. *Id.* at 1319–20.

122. LYALL ET AL., *supra* note 48, at 6.

123. *Id.* at 6 n.19.

124. See, e.g., *United States v. Pacheco-Espinosa*, 121 Fed. Appx. 352, 356–57 (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 . . . [and] this Court determines that the approximately 120-mile distance in which Defendant was stopped was a reasonable distance from the border.”); *United States v. Orozco*, 191 F.3d 578, 581 (5th Cir. 1999) (holding that because there is no “bright line test” regarding proximity to the border, a search conducted between 200 and 300 miles of the border can be reasonable.). *But see Orozco*, 191 F.3d at 584 (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

2010 a man was pulled over by Border Patrol north of San Antonio, 167 miles from the nearest border crossing. The justification for the stop consisted of “body posture” and “never acknowledg[ing] the agents” as he drove past them.<sup>125</sup> A number of similar stories can be found from the same area (e.g. San Antonio, 146 miles from the nearest border crossing; San Angelo, 156 miles from the nearest border crossing).<sup>126</sup>

Other cases have involved stops that took place 125 miles from the border,<sup>127</sup> 190 miles from the border,<sup>128</sup> 200 miles from the border,<sup>129</sup> 235 miles from the border,<sup>130</sup> and 300–400 miles from the border.<sup>131</sup> Although the distance from the border in these cases was relevant in determining whether reasonable suspicion existed (under the presumption that closer proximity to the border increases the likelihood that a person recently crossed it illegally), the distance from the border does not appear to be of concern to some courts in determining whether Border Patrol possessed authority to act in the first place, despite the 100-mile zone rule. This has resulted in an implicit acceptance of Border Patrol’s practice of ignoring the regulation. Additionally, Border Patrol regularly operates on tribal lands as well, conducting frequent searches and seizures of tribal members, often with no constitutional justification.<sup>132</sup> When the issue of operational jurisdiction has been explicitly addressed by the courts, a few have accepted the Border Patrol’s argument for disregarding the 100-mile regulation. These courts concluded that distances greater than 100 miles from the border are in fact “reasonable” for Border Patrol to operate.<sup>133</sup>

### C. *Constitutional Considerations*

Supreme Court jurisprudence holds that when law enforcement stops an individual and restrains his or her freedom to leave, including with a vehicular traffic stop, this constitutes a seizure for Fourth Amendment

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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.”).

125. Armendariz, *supra* note 48, at 557.

126. *Id.*

127. LYALL ET AL, *supra* note 48, at 6.

128. United States v. Lamas, 608 F.2d 547, 548 (5th Cir. 1979).

129. United States v. Cervantes, 797 F.3d 326, 330 (5th Cir. 2015).

130. United States v. Venzor-Castillo, 991 F.2d 634, 635, 640 (10th Cir. 1993) (holding that a search 235 miles from the border exceeded CBP authority).

131. United States v. Ortega-Serrano, 788 F.2d 299, 301 (5th Cir. 1986).

132. *Lyall Letter*, *supra* note 85, at 9.

133. See United States v. Pacheco-Espinosa, 121 Fed. Appx. 352, 356–57 (10th Cir. 2005); see also United States v. Orozco, 191 F.3d 578, 581 (5th Cir. 1999).

purposes.<sup>134</sup> The legitimacy of such seizures, then, depends on the reasonableness of the stop. In cases litigating the constitutionality of Border Patrol enforcement activity, the U.S. Supreme Court has held that agents may conduct roving immigration stops involving brief questioning of motorists, but they must have “reasonable suspicion” that the vehicle contains aliens who may be illegally present in the country before the stop in order for it to pass constitutional muster.<sup>135</sup> The Court defined “reasonable suspicion” as “specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”<sup>136</sup> Random vehicular stops are clearly prohibited,<sup>137</sup> and the decision explicitly limits the scope of the relevant administrative regulations and the authority granted to Border Patrol agents.<sup>138</sup> The Court determined that the alternative argued for by the government, which was to allow Border Patrol officers to conduct roving stops without any reasonable suspicion at all, would amount to “potentially unlimited interference” with lawful residents’ use of any streets and highways, simply because those residents live within the applicable zone.<sup>139</sup> Similarly, the Court concluded such unlimited interference would clearly run afoul of Fourth Amendment principles. Not only does the stop need to be reasonable at its inception, but the subsequent actions of the officer “must be ‘strictly tied to and justified by’” the grounds justifying the stop.<sup>140</sup>

What qualifies as “reasonable suspicion,” however, is not entirely clear. The analysis must take into account the “totality of circumstances,”<sup>141</sup> which often includes the officer’s subjective impressions.<sup>142</sup> Yet the Fifth Circuit has held that even when an officer subjectively believes suspicion is warranted, that alone is insufficient; the objective reasonableness of the suspicion must be assessed.<sup>143</sup> A combination of factors that would each be insufficient alone may, when

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134. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (holding that a traffic stop without “at least articulable and reasonable suspicion . . . [is] unreasonable under the Fourth Amendment”).

135. *See* *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975); *see also* Standards for Enforcement Activities, 8 C.F.R. § 287.8(b)(2) (2019) (discussing when interrogations and detentions do not amount to an arrest).

136. *Brignoni-Ponce*, 422 U.S. at 884.

137. *Id.*

138. *Id.*

139. *Id.* at 882–83.

140. *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

141. *United States v. Arvizu*, 534 U.S. 266, 277 (2002).

142. *See, e.g., Brignoni-Ponce*, 422 U.S. at 885 (stating that officers may base their assessment on their “experience in detecting illegal entry and smuggling”); *see also* *United States v. Lopez-Moreno*, 420 F.3d 420, 433 (5th Cir. 2005).

143. *United States v. Lamas*, 608 F.2d 547, 548–49 (5th Cir. 1979).

taken together, provide reasonable suspicion.<sup>144</sup> The Court has specified some factors that may be relevant to a reasonable suspicion inquiry (known as the *Brignoni-Ponce* “reasonable suspicion” test), including: 1) “characteristics of the area”; 2) “previous experience [of the agent] with alien traffic”; 3) “proximity to the border”; 4) usual traffic patterns on the road in question; 5) known “information about recent illegal border crossings in the area;” 6) “the driver’s behavior” (such “as erratic driving or obvious attempts to evade officers”); 7) obvious “aspects of the vehicle” (such as large hidden compartments, apparent heavy load, large number of passengers); and 8) the number, appearance, or behavior of the passengers (such as a very full vehicle or passengers attempting to hide).<sup>145</sup> However, although proximity to the border may be relevant, it is not enough in itself. The Fifth Circuit expressed reluctance to allow interference with motorists within proximity of the border, even when close to it, noting that the border proximity element for reasonable suspicion should also contain some evidence that the vehicle actually recently crossed the border.<sup>146</sup> Courts have frequently focused on whether the agent had reason to conclude that the stopped vehicle had in fact recently crossed a border.<sup>147</sup> In fact, border crossing is considered to be a “vital element” (though not essential) in the reasonable suspicion analysis.<sup>148</sup> The Fifth Circuit held that the mere fact that a vehicle is traveling on a road leading away from the border is “not sufficient cause to believe the vehicle came from the border,” and held that the further the stop occurs from the border, the weaker this factor will be.<sup>149</sup> The court also held that vehicles traveling more than 50 miles from the border are considered a “substantial distance from the border,” rendering obsolete the proximity element of reasonable suspicion.<sup>150</sup> Proximity has thus been found missing with stops that took place 50 miles,<sup>151</sup> 55 miles,<sup>152</sup> 60 miles,<sup>153</sup> 70 miles,<sup>154</sup> and 190 miles<sup>155</sup> from the border. In another case, the Fifth Circuit determined—apparently without irony—that agents did not have reason to believe that a vehicle “spotted some 300–400 miles north of the border . . . had recently come from the border.”<sup>156</sup>

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144. See *Brignoni-Ponce*, 422 U.S. at 884–85; see also *Lopez-Moreno*, 420 F.3d at 433–34.

145. See *Brignoni-Ponce*, 422 U.S. at 884–85.

146. *United States v. Melendez-Gonzalez*, 727 F.2d 407, 411 (5th Cir. 1984).

147. See *United States v. Inocencio*, 40 F.3d 716, 722 (5th Cir. 1994).

148. *Lamas*, 608 F.2d at 549.

149. *Melendez-Gonzalez*, 727 F.2d at 411.

150. *Inocencio*, 40 F.3d at 722 n.7.

151. *United States v. Martinez*, 526 F.2d 954, 955 (5th Cir. 1976).

152. *United States v. Lopez*, 564 F.2d 710, 712 (5th Cir. 1977).

153. *United States v. Del Bosque*, 523 F.2d 1251, 1251 (5th Cir. 1975) (per curiam).

154. *United States v. Escamilla*, 560 F.2d 1229, 1230 (5th Cir. 1977).

155. *United States v. Lamas*, 608 F.2d 547, 548 (5th Cir. 1979).

156. *United States v. Ortega-Serrano*, 788 F.2d 299, 301 (5th Cir. 1986).

The reasons claimed for stops vary considerably. For example, agents have claimed suspicion based on how drivers were holding the steering wheel, because they were looking straight ahead, because they looked “nervous” while driving,<sup>157</sup> or because of construction equipment in the vehicle.<sup>158</sup> Similarly, some motorists were accused of simultaneously looking “stoic and nervous,”<sup>159</sup> an odd combination that appears to not be an uncommon claim. This very accusation was used in *United States v. Alvarado*.<sup>160</sup> Additionally, motorists have been stopped for driving too fast, too slow, driving on less-used roadways, driving early in the morning, or with no explanation at all.<sup>161</sup> Occasionally, agents do not bother hiding their profiling, claiming that the stop was due to the fact that the motorist looked “Mexican”<sup>162</sup> or when questioned as to the reason for the stop, simply stating, “We’ll think of something.”<sup>163</sup> Vehicle searches after stops have been justified due to motorists not looking the agent in the eyes or declining to answer questions about employment.<sup>164</sup>

Courts have held some purported “suspicious” factors to be insufficient to justify a stop. For example, neither an officer’s mere hunch<sup>165</sup> nor the individual’s racial or ethnic appearance is enough.<sup>166</sup> Other elements that have been held insufficient, even sometimes in the context of multiple factors. A few such factors include slouching in one’s seat,<sup>167</sup> an uneven vehicle paint job,<sup>168</sup> a car that did not look like a “typical tourist’s car,”<sup>169</sup> out of state plates,<sup>170</sup> not making eye contact with an agent as they drove past,<sup>171</sup> a passenger picking up a newspaper,<sup>172</sup> wearing seat belts,<sup>173</sup> passengers not conversing with one another,<sup>174</sup> not carrying

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157. Armendariz, *supra* note 48, at 557.

158. *Id.* at 559.

159. *Id.*

160. *United States v. Alvarado*, 635 F. Supp. 2d 586, 587 (W.D. Tex. 2009).

161. LYALL ET AL., *supra* note 48, at 5.

162. Armendariz, *supra* note 48, at 559.

163. LYALL ET AL., *supra* note 48, at 5.

164. *Id.* at 23.

165. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

166. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975); *see also United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (holding that “Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required”); *United States v. Ortega-Serrano*, 788 F.2d 299, 302 (5th Cir. 1986).

167. *See United States v. Rodriguez-Rivas*, 151 F.3d 377, 381 (5th Cir. 1998); *see also United States v. Lamas*, 608 F.2d 547, 549 (5th Cir. 1979).

168. *Ortega-Serrano*, 788 F.2d at 302.

169. *Lamas*, 608 F.2d at 549.

170. *Id.*

171. *Id.* at 550.

172. *United States v. Montero-Camargo*, 208 F.3d 1122, 1135–36 (9th Cir. 2000).

173. *United States v. Rangel-Portillo*, 586 F.3d 376, 381 (5th Cir. 2009).

174. *Id.*

shopping bags while leaving a Wal-Mart,<sup>175</sup> having uncombed hair, or being “kind of dirty looking.”<sup>176</sup> However, as these examples demonstrate, the reasons given for agent suspicion are case-specific, highly variable, and sometimes odd. What amounts to a suspicion that is legally “reasonable” is highly unsettled, and as will be shown below, is sometimes baseless. The practice of stopping vehicles without reasonable suspicion and coming up with reasons later is so common that it is internally nicknamed: “shotgunning,” according to two CBP whistleblowers.<sup>177</sup>

Roving patrols are widely reported to be largely based on ethnic appearance (those with darker complexion are more likely to be targeted for interrogation),<sup>178</sup> often take place far from the border, and data shows they are highly unproductive. Indeed, an investigation from 2006 to 2009 revealed that recent border crossers are not targeted, many lawful residents are wrongfully arrested, and approximately 1% of stops resulted in the removal proceedings of undocumented individuals.<sup>179</sup> Some offices even offer agents incentives for arrests. For example, agents in Rochester, New York were offered cash bonuses and gift cards based on their arrest numbers.<sup>180</sup> From 2006 to 2010, the Rochester office was responsible for the arrests of approximately 300 legal individuals, who were later released with no charges.<sup>181</sup>

Additionally, CBP appears to be conflating court decisions dealing with its authority at immigration checkpoints, with its authority to stop vehicles and question their occupants as part of a roving patrol. At regular checkpoints, no suspicion is required for brief questioning about immigration status, but for roving stops, reasonable suspicion is required.<sup>182</sup> CBP appears to sometimes treat all stops as de facto “checkpoints” that it asserts are justified even with no suspicion at all. A complaint in 2012 asserted that a Border Patrol supervisor instructed agents to stop all vehicles on a road near the border simply because the vehicles were on the road. Remarkably, the complaint was submitted from within the agency, by a Border Patrol agent. There is no evidence that the complaint was ever investigated or that the supervisor was ever disciplined.<sup>183</sup> Indeed, the increasing reports of Border Patrol stops of buses and trains, without any suspicion of wrongdoing, represents such a

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175. *Id.*

176. *United States v. Ortega-Serrano*, 788 F.2d 299, 302 (5th Cir. 1986).

177. LYALL ET AL., *supra* note 48, at 7.

178. *N.Y.C.L.U.*, *supra* note 79, at 2.

179. *Id.*

180. ANNA SCHOENFELDER ET AL., UNCOVERING USBP: BONUS PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS, at iv (2013), <http://bit.ly/2IWFxr6>

181. *Id.*

182. *See* discussion *supra* Section IV.A.

183. LYALL ET AL., *supra* note 48, at 4.

conflation. But in reality, outside of established checkpoints, reasonable suspicion is required for such stops—even within the 100-mile zone.

Such stops of vehicles of mass transportation might be termed “roving checkpoints,” which are neither formal temporary checkpoints nor individual stops based on purported reasonable suspicion and therefore do not meet the requirements of either type of stop, even within the 100-mile zone. Multiple reports have surfaced of Border Patrol agents in places as far-flung as Florida, New York, and Washington state stopping and boarding passenger buses and trains and demanding citizenship or residency information from passengers.<sup>184</sup> Where the granting authority to conduct such searches was previously limited to CBP headquarters in Washington, D.C., the decision-making power has been delegated to field supervisors under the Trump administration.<sup>185</sup> The delegation of authority to field supervisors appears to be an expansion of CBP authority to question individuals at border checkpoints, but is more akin to a roving stop without the required reasonable suspicion necessary to justify the stop.

CBP asserts its authority to conduct such suspicion-less seizures via the 100-mile regulation, although they appear to be reaching well beyond that distance as well. For example, one report indicated that Border Patrol agents boarded a bus at an agricultural checkpoint near the California/Nevada border demanding “documentation from passengers.”<sup>186</sup> The location was almost 205 miles from the Mexico border.<sup>187</sup> Other incidents involved the boarding of buses traveling from Orlando to Miami and Seattle to Montana, neither of which originated or ended anywhere near the Mexican border, but reports suggest during these stops passengers were racially profiled.<sup>188</sup> Similarly, Border Patrol agents also detained and boarded multiple buses at a gas station in Sandusky, Ohio,<sup>189</sup> as well as in Spokane, Washington (the latter of which is about 100 air miles from the Canadian border), questioning passengers

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184. See Nixon, *supra* note 60; see also Skebba, *supra* note 60 (noting that Border Patrol activity has been reported on trains passing through Toledo).

185. See Nixon, *supra* note 60.

186. Megan Cerullo, *California Woman Who Knows Her Rights Forces Border Patrol off Greyhound Bus at Agricultural Checkpoint*, N.Y. DAILY NEWS (June 14, 2018, 2:30 AM), <https://bit.ly/2lkraGK>.

187. The route from Bakersfield to Las Vegas is via Interstate 15. At the point where that route approaches the Nevada border from California, the distance to the Mexican border is approximately 205 air miles. See *Distance Calculator*, *supra* note 50, <https://www.freemaptools.com/how-far-is-it-between-primm-nv-usa-and-mexicali-mexico.htm> (calculating the distance between Primm, NV and Mexicali, Mexico).

188. Nixon, *supra* note 60.

189. Skebba, *supra* note 60.

demanding proof of legal status.<sup>190</sup> Passengers present at such stops often report that the non-white passengers are targeted for questioning and demanded to produce documentation.<sup>191</sup>

Legally, these activities are problematic. Agents are not permitted to stop vehicles without first having reasonable suspicion of an immigration crime. Mere presence on a bus or train certainly does not qualify. CBP appears to be treating these stops under the same sweeping authority with which they operate general immigration checkpoints where all motorists are stopped. However, these stops are not general administrative immigration checkpoints. Additionally, CBP has not disclosed any information about these operations, therefore, passenger reports are the sole source of information. It is unclear whether agents have conducted additional searches or detentions without probable cause in the course of these activities.

The standard for when such transit checks will take place, according to CBP spokesperson Stephanie Malin, is whenever and wherever there is an “operational benefit” to doing so.<sup>192</sup> No definition of “operational benefit” was provided. Therefore, conceivably, any chance of apprehending an undocumented immigrant (however small) might be considered to qualify. Indeed, the agency’s own data indicates that only 2–3% of illegal entrants were apprehended at interior checkpoints.<sup>193</sup> Additionally, the majority of those impacted at interior checkpoints are citizens, with non-white individuals disproportionately targeted. CBP has also asserted that these mass transit checks are “consensual encounters,” suggesting that passengers are free to refuse to respond or cooperate, which is directly contradicted by reports that indicate that passengers are required to cooperate.<sup>194</sup> In addition to these frequent stops of motorists, there have also been increasing reports of Border Patrol agents approaching and interrogating people at hospitals (including maternity wards), courthouses, gas stations,<sup>195</sup> laundromats thought to be used by farm workers,<sup>196</sup> and on sidewalks.<sup>197</sup>

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190. Mitch Ryals, *US Border Patrol has been arresting people from Spokane’s Greyhound station. The ACLU says to cut it out*, INLANDER (Mar. 21, 2018, 2:38 PM), <http://bit.ly/2mkMufi>.

191. *See, e.g.*, Skebba, *supra* note 60.

192. Nixon, *supra* note 60.

193. *Id.*; Misra, *supra* note 52.

194. Misra, *supra* note 52.

195. *See, e.g.*, Saucedo-Carrillo v. United States, 983 F. Supp. 2d 917, 920 (N.D. Ohio 2013) (mother and daughter were approached by Border Patrol agent while purchasing gasoline; agent blocked their vehicle and began questioning them, allegedly due to their Hispanic appearance).

196. Miller, *supra* note 61.

197. *100-Mile Rule*, *supra* note 46, at 2; *see also* Vasquez-Palafox v. United States, No. 3:12 CV 2380, 2013 WL 1500472, at \*1 (N.D. Ohio Apr. 10, 2013) (discussing how

There are frequent complaints of agent abuse, including agents aggressively driving and tailgating; displaying knives; threatening motorists with electroshock weapons and assault rifles in routine traffic encounters; mocking and insulting people; forcibly taking cell phones when motorists attempted to record the encounter and deleting footage; threatening to shoot people and pets; unprovoked physical assault; and even spitting on motorists.<sup>198</sup> For example, two teenage sisters recently reported that a Border Patrol agent conducted a strip search of them without cause, during which he sexually assaulted each of them.<sup>199</sup> The sisters immediately reported the offense and an investigation ensued (which itself is a relatively rare response to complaints). However, no charges resulted and there is no indication of any disciplinary action against the agent either, despite investigators noting the agent's suspicious behavior during the interview.<sup>200</sup>

Such a result appears unusual only in that there was any investigation at all. One study found that in a five-and-a-half-year period beginning in 2010, there were 84 complaints against CBP agents of coerced sexual contact.<sup>201</sup> Of those, only seven investigations were conducted, and of those, no charges were filed.<sup>202</sup> Part of the difficulty appears to be related to internal CBP culture, while the other part concerns a complaint handling process that is structurally dysfunctional. CBP environment promotes a culture of dehumanization and impunity that leads to abuse and assault on the part of agents, according to one former agent, who summed up the approach as one of "kick ass, ask questions later."<sup>203</sup> Agents were encouraged to "operate in the gray."<sup>204</sup> As disturbing as are some of the reports about Border Patrol actions at checkpoints and roving stops, their activities patrolling the remote areas along the border appear to be even more disturbing,<sup>205</sup> but are beyond the scope of this paper.

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a man was approached and questioned by two Border Patrol agents while walking down a street in Fremont, Ohio after picking up his son at school).

198. LYALL ET AL., *supra* note 48, at 7.

199. Nomaan Merchant & Claudia Lauer, *Immigrants face hurdles to prove abuse by U.S. agents*, PBS NEWS HOUR (Oct. 14, 2018, 11:29 AM), <https://to.pbs.org/2P0ee5s>.

200. *Id.*

201. *Id.*

202. *Id.*

203. See John Washington, "Kick Ass, Ask Questions Later": A Border Patrol Whistleblower Speaks Out About Culture of Abuse Against Migrants, INTERCEPT (Sept. 20, 2018, 4:00 AM), <https://bit.ly/2OC910s>; see also FERCHIL RAMOS, NEGLECT AND ABUSE OF UNACCOMPANIED IMMIGRANT CHILDREN BY U.S. CUSTOMS AND BORDER PROTECTION 2 (2018), <http://bit.ly/2kMGOKs> [hereinafter *ACLU NEGLECT AND ABUSE*].

204. Washington, *supra* note 203.

205. For instance, Border Patrol policy permits deadly force in response to "rocking," or throwing rocks at agents. This not only has resulted in multiple deaths at the hands of agents, but also may encourage false claims of thrown rocks when migrants are killed. See Graff, *supra* note 13, at 5–6.; see also Brian Bennett & Joseph Tanfani, *Times Investigation: A Family Outing, then a Deadly Border Patrol Shooting*, L.A. TIMES (Oct.

Border Patrol norms strongly resist the reporting of misconduct; the operational philosophy is to keep things internal, with a “frontier justice” approach and a “what happens in the field stays in the field” attitude, according to former DHS Inspector General Richard Skinner.<sup>206</sup> Referred to as the “Green Line of silence,” the internal understanding that activities will not be spoken about publicly is “higher and wider than it’s ever been before,” according to the former head of CBP Internal Affairs James Tomscheck.<sup>207</sup> Any such speaking out is well understood to elicit retaliation and the end of one’s career.<sup>208</sup>

The DHS Office of the Inspector General (OIG) is responsible for handling complaints against Border Patrol agents, but there is no clear or uniform system by which the OIG either receives or manages complaints.<sup>209</sup> For example, complaints may be submitted to the OIG, Joint Intake Center (JIC), CBP Office of Internal Affairs (OIA), the DHS Office for Civil Rights and Civil Liberties (CRCL), or local CBP offices.<sup>210</sup> Complaints coming to OIG are typically referred back to the CBP office where they originated for handling.<sup>211</sup> In 2012, OIG retained only three complaints for investigation nationwide; in 2013, the number was four.<sup>212</sup> Additionally, none of the complaints investigated in 2012 or 2013 involved Fourth Amendment search and seizure violations, even though these types of complaints are common.<sup>213</sup> Furthermore, OIG does not disclose the complaints received.<sup>214</sup> Occasionally, a complaint is referred to the CRCL, which has no disciplinary authority and does not even offer recommendations on individual cases. Rather, the CRCL simply makes general recommendations to DHS about policies, practices, and training.<sup>215</sup> Nevertheless, in 2016 alone, that office received over

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18, 2014, 12:00 PM), <https://lat.ms/211fjbc>. “Tuning up” refers to roughing migrants up in the field before bringing them in to the station and “tonk” is a term for migrants that refers to the sound a flashlight makes when it hits them on the head. According to one agent, when an agent uses force via pepper spray or a baton, a written memo is required, however, blunt force on the head with a flashlight does not, so agents were encouraged to go that route. See Washington, *supra* note 203. Various forms of torture and abuse have been reported, including handcuffing two migrants together around a cactus. *Id.* Records reveal rampant physical abuse, refusal of medical services, denial of food and water, and improper deportation, including of children, in what one ACLU report concludes is “neglectful at best and sadistic at worst.” See *ACLU NEGLECT AND ABUSE*, *supra* note 203, at 2.

206. Graff, *supra* note 13, at 4.

207. Washington, *supra* note 203.

208. *Id.*

209. See *Lyll Letter*, *supra* note 85, at 8.

210. MARTINEZ ET AL., *supra* note 17, at 2.

211. LYALL ET AL., *supra* note 48, at 8.

212. *Id.* at 9.

213. *Id.*

214. *Id.* at 10.

215. See U.S. DEP’T OF HOMELAND SEC., OFFICE FOR CIVIL RIGHTS AND CIVIL LIBERTIES 2 (2017), <http://bit.ly/2kPK4VB> (providing a handout that explains the role of the CRCL).

2,000 complaints.<sup>216</sup> Additionally, the OIA also conducts investigations regarding allegations of misconduct.<sup>217</sup> However, the ACLU reports that the types of complaints OIA investigates are limited and the office frequently sends complaints back to the originating sector where the complaints are usually dismissed.<sup>218</sup> There is no public report of the number or types of cases that OIA investigates.<sup>219</sup> Tomscheck, the former head of the OIA, stated that DHS oversight was “clearly engineered to interfere with our efforts to hold the Border Patrol accountable.”<sup>220</sup> The few records that are available suggest a stark lack of oversight or accountability.<sup>221</sup>

Additionally, CBP does not accurately disclose its complaints to the public or to Congress. For example, in the CRCL FY 2014 report to Congress, only two Fourth Amendment “complaints opened” were reported nationwide.<sup>222</sup> However, the ACLU alone provided to CRCL over a dozen complaints from that period, just from Arizona.<sup>223</sup> In addition, the definition of “corruption” was altered by CBP to a much narrower conception, so that nearly a third of all corruption cases were eliminated in reports. Subsequently, what the agency deems “non-mission compromising” corruption, such as sexual assault of detainees, is not included in any report to Congress.<sup>224</sup> However, CBP agent misconduct is so common that it was the top criminal priority for the FBI in McAllen, Texas in 2014.<sup>225</sup> One report indicates that Border Patrol agents are arrested five times more often than other types of law enforcement agents.<sup>226</sup> CBP reported no Fourth Amendment complaints at all for FY 2013.<sup>227</sup> However, CBP’s own records from that period, covering just two sectors out of twenty, show at least 134 Fourth Amendment complaints, which itself is vastly incomplete because about half of the relevant documents were withheld.<sup>228</sup> In 2014, the ACLU submitted a FOIA request for information about Border Patrol activities. After receiving no

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216. *Id.*

217. *How CBP Handles Traveler Complaints*, U.S. CUSTOMS & BORDER PROTECTION, <http://bit.ly/2ISdCC4> (last modified June 2, 2017).

218. *Lyall Letter*, *supra* note 85, at 10.

219. *Id.*

220. *Id.*

221. *ACLU NEGLECT AND ABUSE*, *supra* note 203, at 2.

222. LYALL ET AL., *supra* note 48, at 10.

223. *Id.*

224. Graff, *supra* note 13, at 7.

225. *Id.*

226. See Justin Rohrlich & Zoe Schlanger, *Border Officers are arrested 5 times more often than other US law enforcement*, QUARTZ (July 16, 2019), <http://bit.ly/2IY60hf>. (noting 176 arrests of Border Patrol agents between October 2018 and July 2019).

227. *Lyall Letter*, *supra* note 85, at 9–10.

228. LYALL ET AL., *supra* note 48, at 5.

response, the ACLU filed suit,<sup>229</sup> after which CBP released half of the relevant records, heavily redacted.<sup>230</sup>

In response to this FOIA litigation, the CBP produced complaint data indicating that in a three-year period beginning in January 2009, there were 809 complaints of misconduct filed against Border Patrol agents.<sup>231</sup> This number is likely a small percentage of the total incidents of misconduct, given the strong barriers and incentives weighing against the filing of a complaint. Evidence suggests that the vast majority of violations result in no complaint;<sup>232</sup> those who have been deported, who do not have legal status, who lack financial resources, or whose first language is not English (complaint forms are only available in English),<sup>233</sup> for example, are especially unlikely to come forward.<sup>234</sup> Of the abuse complaints that were filed (including physical, sexual, and verbal abuse), a staggering 97% resulted in “no action taken.”<sup>235</sup> Specific complaints included death threats; improper strip searches at checkpoints; hitting a person’s head against a rock and causing a hematoma; kicking a pregnant woman and causing a miscarriage; kicking and stomping on people who were handcuffed and/or laying on the ground; sexual touching and rape; and being left naked in a cell.<sup>236</sup> Additionally, over 7% of the alleged incidents were perpetrated against minors.<sup>237</sup> Physical abuse and excessive use of force accounted for 78% of complaints.<sup>238</sup> After “no action taken,” the most common result of a complaint was counseling for the agent, which was the result in six of the 809 complaints.<sup>239</sup> In addition, two complaints resulted in court proceedings, while two other agents received an oral reprimand. Of the complaints, only one resulted in the perpetrator’s suspension,<sup>240</sup> which was for a period of one day. The victim in that case, which alleged an unlawful vehicle stop, was a government employee and the son of a retired Border Patrol agent.<sup>241</sup> Civil rights complaints are designated as a lower priority and are then delegated to the local office where the agent in question is stationed, which preempts the possibility of

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229. *Id.* at 2.

230. *Id.* at 4.

231. MARTINEZ ET AL., *supra* note 17, at 4.

232. LYALL ET AL., *supra* note 48, at 5.

233. *Id.*; *see also* *Submit a Complaint or Concern*, U.S. CUSTOMS & BORDER PROTECTION, <https://bit.ly/2Q3dRWc> (last visited Oct. 15, 2019).

234. MARTINEZ ET AL., *supra* note 17, at 4.

235. *Id.* at 1.

236. *See id.* at 6.

237. *See id.* at 7.

238. *See id.* at 10.

239. *Id.* at 8.

240. *See id.*

241. LYALL ET AL., *supra* note 48, at 10.

independent oversight.<sup>242</sup> A follow-up investigation spanning 2012 to 2015 found strikingly similar results. For example, allegations included serious physical abuse, running a person over with a vehicle, sexually assaulting a woman in a hospital, and denying medical attention to children.<sup>243</sup> Nearly 96% of all complaints resulted in “no action.”<sup>244</sup>

Even agents' use of deadly force appears to be dismissed, with agents not being held accountable. Between 2005 and 2014, of 48 identified cases of Border Patrol agents killing people in the line of duty, not a single one resulted in internal discipline, much less criminal charges.<sup>245</sup> One of these cases involved a Border Patrol agent killing an unarmed teenager, whom he shot in the back ten times through the border fence into Mexico;<sup>246</sup> he was far from the only victim who has been shot in the back.<sup>247</sup> An internal report indicated that Border Patrol agents sometimes shoot their weapons out of “frustration.”<sup>248</sup> Additionally, in a report by the Police Executive Research Forum, 67 incidents of use of lethal force were identified in a period spanning two years and nine months beginning in 2010, with many being deemed unjustifiable by the report.<sup>249</sup> Not a single use of lethal force resulted in either internal discipline or legal action.<sup>250</sup> This is nothing short of stunning. By way of comparison, the Chicago Police Department (CPD) had a force of approximately 12,100 officers in 2016,<sup>251</sup> compared with Border Patrol's 19,400.<sup>252</sup> CPD has taken disciplinary action against officers in 1,360 separate cases between 2000 and 2016<sup>253</sup>—a figure representing 1.2% of all complaints, which is widely considered to be problematically low. Yet, with more than 7,000 additional officers in Border Patrol ranks than in the CPD and thousands of documented

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242. *See id.* at 16.

243. CANTOR & EWING, *supra* note 27, at 1.

244. *Id.* at 4.

245. Bob Ortega, *Name of border agent who shot teen released by judge*, AZCENTRAL (Nov. 13, 2014, 9:22 PM), <http://bit.ly/2IT12mf>.

246. *Id.*

247. Graff, *supra* note 13, at 20 (quoting James Wong, a CBP internal affairs investigator who stated that “there were a number of people shot in the back”).

248. *Id.* at 6.

249. *See* Bob Ortega, *CBP: No action against border agents in deadly-force cases*, AZCENTRAL (June 8, 2015, 11:24 AM), <http://bit.ly/2m2OYP2>; *see also Deaths by Border Patrol Since 2010*, SOUTHERN BORDER COMMUNITIES COALITION, <http://bit.ly/2kQQNOU> (last updated Nov. 6, 2019) (identifying 99 people who have died “as the result of an encounter with U.S. border agents” since 2010).

250. *See* Ortega, *supra* note 249.

251. Cecilia Reyes, *To Grow Size of Police Department, Chicago Will Need Twice What is Planned*, CHI. TRIB. (Oct. 17, 2016, 10:37 AM), <http://bit.ly/2kR7Wbn>.

252. U.S. CUSTOMS & BORDER PATROL, SECTOR PROFILE – FISCAL YEAR 2017, at 1 (2017), <http://bit.ly/2moYgoZ> [hereinafter *CBP Sector Profile*].

253. Jason Tashea, *Only 1.2% of Chicago police complaints lead to suspension or firing, new data says*, A.B.A. J. (Aug. 16, 2018, 8:00 AM), <http://bit.ly/2IY2gg1> (citing *Citizens Police Data Project*, INVISIBLE INST., <http://bit.ly/2kTF81P> (last visited January 6, 2020)).

complaints, there have been virtually no cases of disciplinary action against Border Patrol officers. The report on Border Patrol concluded that CBP's own policies regarding the use of force were well beyond mainstream law enforcement standards in the U.S., with many cases failing to "meet the test of objective reasonableness."<sup>254</sup> The American Immigration Council concluded that the CBP complaint system is merely "ornamental," having no appreciable influence on the agency at all.<sup>255</sup> Thus, CBP internal complaints are a woefully inadequate remedy for the violation of constitutional rights.

In the face of a dysfunctional internal complaint process, the only other recourse for a victim of unconstitutional Border Patrol action is through the courts. However, this route is fraught with difficulties and roadblocks as well. In a civil lawsuit, the expenses are high, the possibility of any recovery low, and it is difficult to prove damages. For those individuals without legal residency status, they will likely be placed in removal proceedings or will agree to voluntary departure, since the consequences of a removal order are more severe than a voluntary departure.<sup>256</sup> In either case, the victim of the unconstitutional activity will soon be out of the country, making it virtually impossible to file any sort of lawsuit seeking a remedy. If a claim of rights violation is brought while removal proceedings are underway, the victim may be reluctant to bring up the claim out of fear of government reprisal,<sup>257</sup> if they do, the government will argue that the removal is proper even if the initial stop was not legal.<sup>258</sup> Such a claim is unlikely to occur in the context of removal proceedings, however, because a skilled lawyer is required and individuals in removal proceedings are not entitled to appointed counsel, and only 14% of detained immigrants have legal representation.<sup>259</sup> Even immigration attorneys, however, are often not well-versed in the area of constitutional rights violations in the context of removal.<sup>260</sup> These disadvantages are compounded by the fact the burden falls on the immigrant to make a prima facie case showing that the evidence was obtained illegally before the government has any responsibility to justify the method that the evidence was obtained.<sup>261</sup>

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254. Graff, *supra* note 13, at 6.

255. MARTINEZ ET AL., *supra* note 17, at 3.

256. See Voluntary departure, 8 U.S.C. § 1229c (2018) (providing voluntary departure provisions); Inadmissible aliens, 8 U.S.C. § 1182(a)(9) (2018) (providing length of time for which a person previously ordered removed is barred from applying for entry).

257. Armendariz, *supra* note 48, at 569.

258. *Id.* at 568.

259. INGRID EAGLY & STEVEN SHAFER, ACCESS TO COUNSEL IN IMMIGRATION COURT 2 (2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

260. Armendariz, *supra* note 48, at 570.

261. Barcnas, 19 I&N Dec. 609, 611–12 (B.I.A. 1988), available at <https://www.justice.gov/eoir/precedent-decisions-volume-19>.

When suspicion-less stops that take place in the 100-mile zone result in removal proceedings, these cases are also necessarily the ones in which the Border Patrol agents were correct in their speculation, no matter how flimsy the reasons. This makes it inherently more difficult to challenge the agent's actions, as it tends to lend them an air of reasonableness. The unknown number of cases where the agent's suspicions bore no fruit and rights violations could have been extreme therefore do not come before the immigration courts. This conundrum was highlighted by a dissenting opinion in the Fifth Circuit, which pointed out that:

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>262</sup>

The only cases where Border Patrol activities are legally challenged are a small fraction of those in which some evidence of wrongdoing was found, given that a legal challenge is expensive, difficult, and rare. The small fraction of cases where some evidence of wrongdoing is found gives a skewed perception that agent suspicions are highly accurate and reasonable because the outside view is limited to cases involving a complainant without clean hands, however small a percentage that might be of the total who have been forced to engage with Border Patrol. Baseless reasons for stopping, therefore, typically go unchallenged. Even the Supreme Court acknowledged this reality when it stated that:

[e]very . . . agent knows . . . that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding. When an occasional challenge is brought, the consequences from the point of view of the officer's overall arrest and deportation record will be trivial.<sup>263</sup>

As a result of the lack of accountability, internal oversight or discipline, and the inability of victims to seek recourse, there is no disincentive for Border Patrol agents to engage in extensive unconstitutional stops and seizures.

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262. *United States v. Garcia*, 732 F.2d 1221, 1229 (5th Cir. 1984) (Tate, J., dissenting).

263. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984).

Further exacerbating the problem, CBP does not maintain records of stops that do not result in arrest.<sup>264</sup> Such lack of records naturally enables pervasive abuse and unconstitutional searches at locations far from the actual border, sometimes even further inland than the “100-mile zone.” In such cases, individuals are ultimately released and there is no record that an incident even took place.<sup>265</sup> Even when the agent conducts a search of a vehicle, if nothing is found, no record is made of the event, despite the fact that the “border search exception” does not apply in these locations. Moreover, because these individuals are released, there is likewise no ensuing court proceeding where the Fourth Amendment violations may be brought to light. Therefore, there is no way to know beyond anecdotal evidence how widespread the abuses are and how many innocent people have had their rights violated. But these anecdotal reports—both from victims and from insiders who have spoken out—are troubling.

In practical terms, then, even if one entirely accepted the established legal framework and limitations of CBP enforcement activity, frequent and serious Fourth Amendment violations are perpetrated against individuals by Border Patrol. Substantial evidence suggests that even CBP’s own internal regulations are regularly disregarded by agents.<sup>266</sup> Clearly, existing oversight and accountability mechanisms, to the extent that they are present at all, are not working to protect against constitutional violations in the course of Border Patrol operations, and almost no recourse is available when they take place. The incentives and disincentives in place lend themselves only to aggressive enforcement activity and disregard of constitutional limitations or protection of individual rights. The purpose of the Fourth Amendment—and the Supreme Court’s interpretations of it—is to restrain government power and intrusiveness and to protect the rights of individuals from overreaching law enforcement abuse of power. In the case of Border Patrol, the Fourth Amendment is not functioning as the restraint it was intended to be. Whether this is due to intentional disregard of individual rights or simply over-zealous and committed agents is irrelevant. In discussing the prevalence of airport checks and the their potential for governmental abuse, Judge Kozinski of the Ninth Circuit observed that “[l]iberty—the freedom from unwarranted intrusion by government—is as easily lost through insistent nibbles by government officials who seek to do their jobs too well as by those whose purpose it is to oppress; the piranha can be as deadly as the shark.”<sup>267</sup> In the case of Border Patrol, evidence suggests we are dealing with activities more extreme and intrusive than the “insistent nibbles” Judge Kozinski worried about.

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264. LYALL ET AL., *supra* note 48, at 7, 11.

265. *See id.* at 11.

266. Armendariz, *supra* note 48, at 555.

267. *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1243 (9th Cir. 1989).

## V. LEGAL ANALYSIS

In addition to the apparent violations of constitutional rights by Border Patrol in practice, there are legal questions about the constitutional validity of the framework under which CBP currently operates. The 100-mile zone, established by regulation, is neither a constitutionally-based line nor a line with any operational meaning at all. Although Border Patrol uses the regulation to justify conducting border enforcement activities well inside the border, including with established checkpoints and roving patrols, Border Patrol also ignores the regulation when it conducts activities more than 100 miles from the border and refuses to acknowledge the regulation as a limitation on its operations in those cases. Likewise, Border Patrol uses the regulation to support random searches with no suspicion, but in practice rejects court decisions requiring reasonable suspicion for vehicle stops and searches.<sup>268</sup>

The 100-mile regulation was not enacted by Congress. There is no record of any public or institutional debate on the matter, why 100 miles was the designated number, or whether any other distance might be more reasonable. Its use to justify otherwise questionable practices is therefore exceptionally weak. Given that the regulation was written by the Department of Justice, it amounts to the government's own assertion of what type of government action is "reasonable." Although law enforcement agencies may have a voice in the conversation concerning where constitutional lines should be drawn in carrying out activities, their own conclusions on those questions are entitled to no special deference. Indeed, law enforcement agencies might reasonably be met with a healthy dose of skepticism, given the incentives at play. Thus, to suggest that the 100-mile rule warrants any special treatment or is otherwise binding is not only misguided, but legally and constitutionally wrong. Law enforcement agencies may not determine what law enforcement is permitted to do under the Constitution. Rather, this should be left to Congress and the courts to resolve. If left to determine the appropriate constitutional limits on its own, natural incentives and pressures intrinsic to law enforcement work will often result in these agencies diminishing constitutional protections in favor of efficiency, convenience, or other interests. More objectivity than the agency's own assessment is needed to adequately determine what is constitutional in the context of Border Patrol activities beyond the nation's borders. A robust analysis of the legality of both the regulation and CBP practices is the first necessary step in that process.

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268. See, e.g., discussion *infra* Section IV.A, B.

A. *Questioning the “Reasonable Distance” Law*

Contrary to the 100-mile regulation, the law upon which it is based was duly enacted by Congress.<sup>269</sup> That fact alone, however, does not necessarily make the law constitutionally valid any more than it would be if Congress passed a law permitting indiscriminate law enforcement searches of individual homes with no warrant or probable cause. The fact that a principle was enacted into law by a legislature provides it with no definitive claim to constitutional validity. Indeed, Congress has fallen on the wrong side of constitutional rights and provisions more than 170 times with laws that have been struck down by the Supreme Court.<sup>270</sup>

The statute provides that Border Patrol may “board and search for aliens any vessel” within a “reasonable distance from any external boundary” for the purpose of preventing “the illegal entry of aliens.”<sup>271</sup> There appears to be no reasonable suspicion standard required by the statute at all. Taken at face value, this statute could mean regular and sweeping Border Patrol searches of *all* cars, buses, trains, and airplanes operating anywhere within the relevant zone, without any evidence or suspicion, even when traveling domestically.<sup>272</sup> Border Patrol agents recently engaged in such activity when they demanded identification of all deplaning passengers on an October 2017 domestic flight originating in San Francisco and landing in JFK airport in New York City.<sup>273</sup> It is difficult to imagine that this sort of law enforcement intrusiveness is what Congress had in mind when it passed the statute, particularly given that when it was written, CBP had only 1,100 agents,<sup>274</sup> compared to the more than 19,000 of today.<sup>275</sup> In fact, another paragraph of the same statute limits Border Patrol authority to search an individual without a warrant to situations where the agent has “reasonable cause to suspect that grounds exist for denial of admission to the United States.”<sup>276</sup> This limitation on warrantless searches *at* the border (evidenced by the reference to the denial

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269. See 8 U.S.C. § 1357(a)(3) (2012).

270. See *Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States*, JUSTIA, <https://bit.ly/2m6dYF7> (last visited Sept. 26, 2019) (listing 182 times an act of Congress has been struck down as unconstitutional by the Supreme Court from 1789 to 2006).

271. 8 U.S.C. § 1357(a)(3) (2012).

272. Wesley Lowery, *Federal agents ask domestic flight passengers to show IDs in search for immigrant ordered deported*, WASH. POST (Feb. 24, 2017), <https://wapo.st/2kXaJzE>.

273. *Id.* However, the ACLU achieved a settlement with CBP over this incident, resulting in new protocols prohibiting Border Protection officers from detaining domestic flight passengers for search or inspection without suspicion. See *CBP Issues New Protocols Restricting Domestic Flight Passenger Identification Checks Following ACLU Lawsuit*, ACLU (July 11, 2019), <https://bit.ly/2m5ffwc>.

274. LYALL ET AL., *supra* note 48, at 6 n.19.

275. *CBP Sector Profile*, *supra* note 252 at 1.

276. 8 U.S.C. § 1357(c) (2012).

of admission) is inconsistent with a suggestion that Border Patrol was meant to have much more expansive authority to search without probable cause *away* from the border at internal checkpoints and on roving stops.

It is not clear whether, when enacting this statute, Congress envisioned the sort of suspicion-less checkpoints and roving stops that are now undertaken against U.S. residents and citizens by Border Patrol. However, it is clearly within the purview of the courts to limit or strike down the provision altogether. Courts have, in fact, already limited the seemingly unfettered authority provided by the statute to indiscriminately search all manner of transportation. For example, courts have held that even within a "reasonable distance" of the border, the Fourth Amendment requires that reasonable suspicion is required for a roving patrol stop (with probable cause for any subsequent search). Additionally, courts have also held that at a checkpoint, any questioning beyond limited issues of citizenship requires reasonable suspicion, with probable cause needed for a search.<sup>277</sup> Courts could similarly restrict the 100 mile "reasonable distance" as well, or provide additional constitutional limits on Border Patrol activity inside the border.

Some federal courts have expressed disquiet with Border Patrol conducting operations in the country's interior, in effect "pushing the border in" with respect to its broad border enforcement powers.<sup>278</sup> In striking down a Border Patrol search 235 miles from the border, the Tenth Circuit ruled that "[t]he further one gets from the border, the greater the likelihood the volume of legitimate travelers will increase."<sup>279</sup> Although the court expressed skepticism about the legality of a search so far from the border, it is not clear why, constitutionally speaking, the "volume of legitimate travelers" alters the analysis. Focusing on the volume of travelers suggests that constitutional rights are properly diminished or eliminated if there exists a greater likelihood that violating them will bear fruit. This would be logically no different than claiming a warrantless search of a home for stolen property is unconstitutional in an upscale neighborhood, but constitutionally acceptable in a low-income area, because stolen property is more likely to be located there and the warrantless searches would therefore be more fruitful. The absurdity of the latter argument applies equally to the former. Evaluations of constitutional rights cannot come down to assumptions about how successful the results of violating them will be. Motorists and residents traveling closer to the border are entitled to the same constitutional rights as those everywhere else.

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277. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

278. *See, e.g., United States v. Gabriel*, 405 F. Supp. 2d 50, 59 (D. Me. 2005).

279. *United States v. Venzor-Castillo*, 991 F.2d 634, 639 (10th Cir. 1993).

Additionally, the Fifth Circuit's holding that Border Patrol stops more than 50 miles from the border lack the "vital element" of border proximity<sup>280</sup> establishes a precedent for giving no deference to 100 miles as a reasonable distance. Although the question was not about Border Patrol authority per se, but rather about the reasonableness of specific stops (which could potentially be justified by other means), these decisions are important in establishing that Border Patrol does not possess *carte blanche* to stop and board any vehicle within 100 miles of the border without clear, articulable cause.

The Supreme Court noted that "no Act of Congress can authorize a violation of the Constitution."<sup>281</sup> As such, in applying broadly worded statutes, courts have read into their provisions a reasonableness requirement under the Fourth Amendment. For example, the language of 19 U.S.C. §1581 appears to authorize Customs officials to board and search any vessel, *anywhere* in the U.S., with no warrant, probable cause, or reasonable suspicion.<sup>282</sup> In interpreting that provision, the Fifth Circuit held that the statute was circumscribed by the Fourth Amendment such that probable cause, consent, a border search, or some other indicia of reasonableness was required.<sup>283</sup> A Florida Appeals Court noted that allowing customs officials such sweeping search authority as that statute suggests would "fly in the face of the historical purpose of the Fourth Amendment which was adopted to end the abuse of general exploratory searches..."<sup>284</sup> The courts thereby constrict the literal terms of the law in favor of constitutional principles. The same Fourth Amendment requirements apply to the 100-mile zone; both the regulation and the statute must give way in the face of the Amendment's reasonableness conditions.

Thus, regardless of whether and to what extent Border Patrol abuses its power in practice, the statute itself is constitutionally questionable. Government designating 100 miles as a "reasonable distance" for Border Patrol enforcement, by itself, does not make it reasonable—much less constitutional. The Fourth Amendment rights of individuals inside the country cannot reasonably depend so heavily on those individuals' specific locations within the country in a perverse system of increasing

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280. See *United States v. Rubio-Hernandez*, 39 F. Supp. 2d 808, 810 (W.D. Tex. 1999); see also *United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1171, 1196 (D.N.M. 2010).

281. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

282. 19 U.S.C. § 1401(a) (2018) ("Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters . . . and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.").

283. *United States v. D'Antignac*, 628 F.2d 428, 432 (5th Cir. 1980).

284. *Morales v. State*, 407 So. 2d 321, 329 (Fla. Dist. Ct. App. 1981).

rights as one travels closer to some arbitrary central point and diminishing rights heading the other direction. Whatever "likelihoods" are in play near the border, when Border Patrol operates anywhere other than the actual border, it should be bound by the same constitutional restrictions as all other law enforcement agencies. There is no reasonable argument for why Border Patrol in particular should be able to circumvent the Fourth Amendment in its efforts to prevent illegal immigration, especially when law enforcement officials fighting all other crimes, including extremely dangerous and violent ones, are still bound by it. Imagine the outcry if Congress were to permit the FBI to conduct warrantless searches of anyone within 100 miles of suspected terrorist cells.

*B. Problems with Reasonable Suspicion*

Using a reasonable suspicion standard for Border Patrol stops is problematic. For one thing, the standard is subjective and determined on a case-by-case basis. What is reasonable to one person may be unreasonable to the next, and court decisions on the issue are no more uniform. Even more problematic is that agents appear to often come up with their reasons for suspicion after the fact, lending some appearance of reasonableness to a stop that may not be initiated that way, once additional facts can be gleaned. When the investigation turns up nothing, the person is released. When it turns up evidence of wrongdoing, such evidence retrospectively lends an air of "reasonableness" to the suspicion that was claimed by the agent; they were correct in their suspicion, after all. However, the larger problem is that Border Patrol actions are so rarely challenged in court that the reasonable suspicion standard is not able to be addressed, nor is there any internal enforcement or agency oversight. This amounts to no applicable standard at all. Agents act accordingly. Constitutional rights mean nothing—and cannot be said to really exist—if there is no meaningful way to enforce them in the face of chronic violations.<sup>285</sup> Indeed, substantial evidence suggests that Border Patrol simply ignores the requirement altogether.

The result is the systematic violation of the constitutional rights of citizens and non-citizens, documented and undocumented alike, which is lent an unwarranted air of authority via the statute and regulation. Border Patrol is extending its broad constitutional exemptions at the border into its internal activities as well in what amounts to a sweeping exception to the Fourth Amendment that is used for a broad array of law enforcement purposes.

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285. See, e.g., *Weeks v. United States*, 232 U.S. 383, 393 (1914) (stating that if the exclusionary rule does not apply in cases of Fourth Amendment violations, then "the protection of the Fourth Amendment declaring his right . . . is of no value, and . . . might as well be stricken from the Constitution").

## VI. RECOMMENDATIONS

A few years ago, Senator Patrick Leahy of Vermont was stopped at a Border Patrol checkpoint 125 miles from the border and was made to leave his vehicle.<sup>286</sup> He later proposed a measure to lessen the “reasonable distance” for Border Patrol activity from 100 miles from the border to 25 miles.<sup>287</sup> The bill passed the Senate<sup>288</sup> but died in the House.<sup>289</sup> In 2018, Senator Leahy, along with Senator Patty Murray of Washington, again introduced legislation to similarly limit Border Patrol authority to 25 miles from the border rather than 100 miles. This bill would also restrict fixed checkpoints to no more than 10 miles from the border, unless reasonable suspicion of immigration violation existed. Additionally, the bill would limit searches of private property without a warrant or probable cause to 10 miles (from the current 25 miles).<sup>290</sup> The ACLU of Arizona has proposed a similar approach.<sup>291</sup>

This approach of modifying the number of miles allowed for circumscribed Fourth Amendment rights assumes, however, that it is constitutionally appropriate for Congress to carve out exceptions to particular amendments when it considers them to be prudent, efficient, or otherwise helpful for law enforcement. If 25 miles is reasonable (or 100, as the current law suggests), then why not 200 or 300 miles? Why not the entire country? This would, presumably, increase the ability of Border Patrol to seek out undocumented immigrants and border crossers. Furthermore, if the government interests of “safety” and “security” are sufficient to justify exceptions to rights for Border Patrol, then why not apply that to all law enforcement agencies, in the interests of the same safety and security? While Senator Leahy’s proposed 25 miles would certainly represent an improvement over the current framework, it is by no means a foregone conclusion that the agency should have any

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286. See Todd Miller, Opinion, *War on the Border*, N.Y. TIMES (Aug. 17, 2013), <https://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html>; see also Miller, *supra* note 61; Nixon, *supra* note 60.

287. Mark Davis, *Leahy Seeks Answers from Homeland Security on Border Checkpoints*, VTDIGGER (Oct. 1, 2013), <https://bit.ly/2msEnNP>; *Leahy Amendment To Limit Border Zone Vehicle Stops And Searches of Private Land Is Included In New Bipartisan Border Agreement*, U.S. SENATOR PATRICK LEAHY (June 21, 2013), <https://bit.ly/2m6gmf3> (providing a press release on the Leahy-Murray plan).

288. Border Security, Economic Opportunity, and Immigration Modernization Act, H.R. 15, 113th Cong. (2013), available at <https://www.congress.gov/bill/113th-congress/house-bill/15>.

289. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013), available at <https://www.congress.gov/bill/113th-congress/senate-bill/744>.

290. However, the bill did not make it out of committee. Border Zone Reasonableness Restoration Act of 2018, S. 3162, 115th Cong. (2018), available at <https://bit.ly/372jFXb>.

291. LYALL ET AL., *supra* note 48, at 17 (suggesting that Border Patrol activities be limited to 25 miles from the border).

constitutional exemptions at all. Allowing agents to board any vehicle, even within 25 miles, clearly exceeds Fourth Amendment limitations against warrantless searches and seizures.

The Constitution does not prohibit law enforcement operations; it simply requires that they take place in a manner that reasonably protects the rights of individuals. Although state and federal law enforcement officers rely on a number of judicially-created exceptions to the warrant requirement, those exceptions are at least ostensibly based on public health and safety and weighty government interests. Border Patrol similarly operates under the "border search exception," where courts have weighed the competing interests of border security and individual liberty in favor of government interests. Border Patrol may conduct its operations in a way that adheres to established constitutional requirements, but it simply does not wish to do so. Allowing Border Patrol to operate beyond Fourth Amendment restrictions in locations other than the border skews any existing balance so far towards government intrusion that meaningful individual liberties exist in name only when Border Patrol is involved. If probable cause and warrants are acceptable limitations for state police when searching for murderers and rapists, then it is difficult to see how they are unacceptable when searching for people who have crossed a national border without papers.

In addition, any exceptions to constitutional boundaries provided to Border Patrol are rendered more problematic by the fact that the agency and its employees do not appear to recognize or adhere to any restrictions that currently exist, and regularly violate their own internal regulations as well. Internal culture and external agency oversight are either nonexistent or entirely impotent at both deterring and punishing agent misconduct. Permitting any extra-constitutional behavior degrades constitutional rights in such an environment of impunity.

Therefore, all Border Patrol activity that takes place anywhere other than at the nation's border should be bound by ordinary constitutional restrictions applicable to all other law enforcement. This would mean that all stops of all vehicles cannot take place without reasonable suspicion of wrongdoing. When city police stop a car based on reasonable suspicion, it is typically a result of observing illegal behavior itself, such as speeding or running a stop sign. Police stops that are based on more of a guess or a hunch that the occupants are up to no good (or on the race of the occupants) are unconstitutional and often successfully challenged in court because they are not "reasonable." Border Patrol, on the other hand, is not legally permitted to stop vehicles for traffic violations; it may only make stops on suspicion of immigration violations. But what observable action might reasonably put a Border Patrol agent in suspicion of immigration violations? He has almost certainly not observed an actual illegal border crossing (in such a case, there would be no question as to his ability to

conduct a stop). By its very nature, the Border Patrol stop will usually be based on some sort of hunch, the reasonableness of which is subjective and difficult to determine, and is often based on race, ethnic appearance, or nothing at all. In practice, agents are granted considerable deference in their assessments. But allowing Border Patrol to stop vehicles within the interior of the country based on “reasonable suspicion” is inherently problematic. To the extent they are permitted, “reasonable suspicion” stops should be allowable under a narrow set of explicitly prescribed circumstances, where specific and limited observable factors that are statistically likely to be associated with recent illegal border crossings are present.

Checkpoints are likewise problematic, and abundant evidence suggests they are the location of significant rights violations and abuses. The U.S. Supreme Court held that sobriety checkpoints are constitutionally permissible,<sup>292</sup> but general crime control checkpoints are not.<sup>293</sup> The Court also decided that administrative immigration checkpoints are permissible, inasmuch as they entail brief questioning about citizenship status.<sup>294</sup> Any additional inspection, detention, and questioning must be based on probable cause. Yet the same constitutional violations are endemic here as with roving stops. What factor might cause an agent to suspect that a person is not a citizen or a legal resident? There may be some factors that are legitimate and statistically suspicious, but in practice, if a white person without an accent answers that they are a U.S. citizen, they are typically waved on, while others are significantly more likely to be detained. Border Patrol themselves acknowledge that whether a motorist is permitted through or pulled aside depends on the discretion of the agent. It is not difficult to guess how that discretion is likely to play out. This is substantiated by voluminous complaints and reports. But when the individual is innocent, there is no recourse. When they are guilty, there is little sympathy, and often still no recourse.<sup>295</sup>

However, the Court ruled that sobriety checkpoints are permissible because they are of limited scope and are related specifically to one’s ability to safely drive on public roads. Immigration checkpoints share no such feature. As a result, their constitutionality is questionable. While their operation may be less problematic if the specific requirements laid out by the Court were adhered to, it is clear that those requirements are often ignored. In addition, however, those requirements arguably do not solve all of the constitutional issues at play. If immigration checkpoints are an

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292. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 451–52 (1990) (finding the intrusion on motorists to be “slight” and therefore outweighed by the government interest in reducing drunk driving).

293. *City of Indianapolis v. Edmond*, 531 U.S. 32, 32 (2000).

294. *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976).

295. *See supra* Section IV.C.

acceptable intrusion into constitutional rights due to the need to root out undocumented immigrants, then the same question arises as to why not conduct them everywhere? If the response is that they are more likely to be effective nearer to the border, then the counter-argument is two-fold. First, checkpoints empirically are ineffective at locating undocumented immigrants at all. Second, and more importantly, constitutional rights do not and cannot turn on how likely it might be that ignoring them might enable law enforcement to catch wrongdoers.

Therefore, no internal immigration checkpoints should be permitted at all. Law enforcement may not set up checkpoints to apprehend criminals; CBP should not be permitted to do so either. Absent such a change, the existence of internal checkpoints should be severely circumscribed. To the extent that such checkpoints exist, they should be permitted no more than ten miles from the border, as Senator Leahy proposes, and should operate under the same "reasonable suspicion" guidelines as laid out for roving stops. Suspicion that is based on race or ethnicity should not be considered reasonable. Only a clearly defined list of factors may justify additional questioning or searches, rather than subjective feelings of individual agents, and documentation and evidence must be consistently taken and maintained in order to avoid the unfettered discretion and intrusions that are currently the norm. In other words, after the initial citizenship/legal residence question, agents may not pull aside anyone for detention and/or search based solely on some non-specific suspicion. Requiring anything less would effectively make those of Hispanic ethnicity or appearance perpetually subject to more government intrusiveness and entitled to fewer constitutional rights, simply by virtue of their ethnicity alone. This in no way comports with the requirements of due process and equal protection under the Fourteenth Amendment.

Certainly, CBP must also restructure its complaint and discipline processes so that each is meaningful and effective rather than simply a hollow pretense. Additionally, CBP must increase its transparency to Congress and the public. There is no justifiable reason why CBP should be permitted to remain so secretive in every aspect of its operations. However, these things are complex problems in their own right and warrant significantly more attention than can be provided here.

## VII. CONCLUSION

The activities of Border Patrol have increasingly encroached into the interior of the country and impact millions of people every year. The agency's methods and its lack of oversight keep much of the nation in a surveillance state as part of an expansion of police powers that allows constitutional rights to fall at the hands of government convenience, oppressiveness, or tyranny. Although there have been pockets of outcries in response, from policy-makers and the courts there seems to have been

something of a collective shrug in the face of such corrosion of rights. If the issues matter less because of the particular goals involved and/or the relative lack of power of those who suffer the most, then there is reason to believe that law enforcement actions violating Fourth Amendment rights might eventually expand to include others. That is, after all, the way these things tend to work. We are witnessing increasing government insertion into the everyday lives of citizens as well as intrusion, suspicion, and regular government questioning of everyone. This was precisely the sort of thing the Fourth Amendment was designed to prevent. With Border Patrol, the Fourth Amendment is not working. What is now taking place are the regular and systematic violations of the rights of the documented and the undocumented, citizens and legal residents alike.

As a result of the apparent lack of restraint (both practical and legal) of CBP and its employees, a fresh and critical analysis of the Border Patrol's internal activities is necessary. The "border search exception" has become a circumvention of the Fourth Amendment, used for broad law enforcement purposes beyond immigration law and in ways that regularly trample upon constitutional provisions. Border Patrol's use of immigration checkpoints and roving patrols must be reconsidered and restructured, with extensive limitations put into place with more of an eye toward the Constitution than law enforcement desires. The 100-mile rule must be eliminated, and courts should stop providing the rule any deference whatsoever in a constitutional analysis properly considering the Fourth Amendment. CBP's oversight system must be more than internal self-regulation, which is clearly ineffective. Rather, that system must involve clear guidelines, deference to constitutional rights, strong external oversight that includes meaningful enforcement and real consequences for misconduct, as well as transparency to Congress and to the public. Anything less would be a disservice to the nation, its people, and its governing principles.