



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

**Transparency, Trust and Verification: Measuring Effectiveness and Situational Awareness
along the Border**

**Submitted to the U.S. House of Representatives Committee on Homeland Security,
Border and Maritime Security Subcommittee**

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For nearly 100 years, the American Civil Liberties Union (ACLU) has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law. The ACLU’s Washington Legislative Office (WLO) conducts legislative and administrative advocacy to advance the organization’s goal of protecting border residents’ and immigrants’ rights.

The ACLU of New Mexico’s Regional Center for Border Rights (RCBR) stands with border communities to defend and protect America’s constitutional guarantees of equality and justice for all families. The RCBR works in conjunction with ACLU affiliates in California, Arizona, Texas, and across the Northern border.

The ACLU respectfully submits this statement for Rep. McSally’s first hearing as Chairman, “Transparency, Trust and Verification: Measuring Effectiveness and Situational Awareness along the Border.” We urge the Subcommittee to give due attention to the transparency and trust deficits in Customs and Border Protection’s enforcement operations. Under the leadership of Commissioner Kerlikowske, CBP has made important strides in improving its accountability, and his agenda also stresses greater transparency. Nevertheless, despite clear recommendations from independent law-enforcement experts, including the Police Executive Research Forum,ⁱ the President’s Task Force on 21st Century Policing,ⁱⁱ and the Homeland Security Advisory Council’s CBP Integrity Advisory Panel,ⁱⁱⁱ CBP has much work to do to modernize the nation’s largest law-enforcement agency through adoption of accepted best practices.

I. Interior Enforcement

As the Subcommittee assesses metrics for border security, it should keep in mind, and consider reducing, how far away from the actual border CBP operates within its “100-mile zone”^{iv} – an issue that Chairman McSally raised by means of amendment at her first Committee markup in January 2015.^v The agency’s own records suggest its interior operations—conducted up to 100 miles or more from the border— result in few tangible enforcement benefits and numerous civil rights violations.^{vi} To assess the impact of these wide-ranging operations accurately, Congress should require the agency to collect and disclose comprehensive data on its Border Patrol checkpoint and roving-patrol operations, including checkpoint and roving-patrol apprehension statistics, basic stop data including locations, and detailed complaint numbers.

II. Use of Force

Since January 2010, at least 51 individuals have died as the result of an encounter with CBP officials. At least 46 deaths resulted from the use of force or coercion. These cases include 19 individuals who were U.S. citizens and 6 individuals who were shot and killed while standing in Mexico—three of whom were teenagers, ages 15, 16 and 17.^{vii} In numerous cases individuals were shot multiple times, including through the back, such as Jose Antonio Elena Rodriguez who was struck by at least eight bullets—all but one in the back—across the border fence in Nogales, Sonora by agents responding to alleged rock throwing.^{viii} Also among the best-known cases is that of Anastasio Hernandez Rojas who—by the happenstance of witness video— was shown to be handcuffed and prostrate on the ground, contrary to CBP’s incident reporting, when dozens of agents beat and tasered him to death. The San Diego coroner classified Mr. Hernandez’s death as a homicide, noting in addition to a heart attack: “several loose teeth; bruising to his chest, stomach, hips, knees, back, lips, head and eyelids; five broken ribs; and a damaged spine.”^{ix}

The *Arizona Republic* in December 2013 documented more than 46 deaths for which CBP is responsible since 2004-05, and noted that in “none of [these] deaths has any agent or officer been publicly known to have faced consequences — not from the Border Patrol, not from Customs and Border Protection or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts.”^x There is now one pending DOJ indictment, from September 2015, in the Elena Rodriguez case for second-degree murder.^{xi}

CBP has for the first time released reliable use-of-force data,^{xii} in the wake of a DHS Inspector General report concluding that the agency was not properly tracking uses of force.^{xiii} Nevertheless, CBP has not defined a reportable “use of force” in its Policy Handbook. The definition, and related data collection, should correspond to the Department of Justice’s standard in consent decrees like that reached with the Albuquerque Police Department: The DOJ standard states that, “‘Use of force’ means physical effort to compel compliance by an unwilling subject above unresisted handcuffing, including pointing a firearm at a person.”^{xiv}

In addition to adding DOJ’s definition, the Policy Handbook must implement the CBP Integrity Advisory Panel’s recommendations on use of force (echoing the Police Executive Research Forum’s 2013 recommendations, which have not been fully adopted). These include that “CBP should revise its use of force policy guidelines, as follows: a. Emphasize that its overarching responsibility is to preserve human life. b. Implement specific restrictions on the use of firearms involving a moving vehicle and individuals throwing objects.”^{xv}

Moreover, the agency should include in the Policy Handbook what Congress, the press, and the public can expect after uses of force by officers or agents. CBP has not explained how it is implementing the Integrity Advisory Panel’s recommendation that “[p]olicies on use of force should clearly state what types of information will be released, when, and in what situation to maintain transparency.”^{xvi} As a result, after a recent CBP shooting a national-newspaper journalist reported that: “For two weeks, citing ongoing investigations by the FBI and the

Department of Homeland Security, the Border Patrol's parent agency, Customs and Border Protection, would not say whether the suspect was alive or dead or disclose further details of the shooting.^{xxvii} Such opacity is unacceptable for a 21st-century law enforcement agency.

III. Body-Worn and Other Camera Recording

The use of body-worn cameras is a best practice among law enforcement agencies and, when paired with strong privacy and civil rights protections, is an effective tool to strengthen accountability and transparency. As noted by the DHS CBP Integrity Advisory Panel, “law enforcement organizations are increasingly equipping their officers with body-worn cameras as a method of reducing complaints, de-escalating volatile situations (thus enhancing officer/agent safety) and ensuring compliance with use of force policies.”^{xxviii} At a time when policing practices are under scrutiny across the country, CBP—the nation’s largest law enforcement agency—must seize this opportunity and lead by example in implementing comprehensive body-worn and other camera recording along with strong policies and privacy protections.

In 2013, following its internal review of the agency’s use of force policies, CBP committed to pilot the use of body cameras (as well as vehicle-mounted cameras).^{xix} In July 2014, CBP Commissioner Kerlikowske established a Body Worn Camera Working Group to evaluate the feasibility of incorporating body-worn camera technology into CBP enforcement operations. In 2014 and 2015, CBP carried out a three-phase feasibility study of body-worn cameras that involved the following: phase 1) controlled environment evaluation; phase 2) field evaluation; and phase 3) data analysis and report creation. At the conclusion of this study in November 2015, Commissioner Kerlikowske affirmed that the expanded use of body-worn and other cameras “could have positive benefits for CBP,” but failed to commit to wide deployment of cameras at CBP.^{xx}

Public reaction to this announcement was highly critical. The *San Diego Union-Tribune* noted that “[i]f any agency could benefit from having body cameras be mandatory, it is one like the Border Patrol, which has exploded in size in recent years,”^{xxxi} while the *Arizona Republic* criticized “a disturbingly familiar approach from a secretive agency that has done little to dispel concerns about excessive use of force.”^{xxii} CBP’s hesitation in implementing body-worn cameras is not only troubling to the millions of border residents and visitors who regularly come into contact with CBP personnel, but stalls efforts to build public trust and provide much-needed, transparency in response to longstanding congressional and community demands to address problems regarding excessive use of force, misconduct and corruption.

The President’s Budget for FY 2017 provides \$5 million to support analysis, test and evaluation activities regarding the incorporation of body-worn camera technology at CBP. Congress has supported these efforts, urging CBP to complete its body-camera pilot program and provide a report to Congress.^{xxiii} Camera funding will help increase officer safety, transparency and public confidence in the agency, all of which will make CBP more effective in its mission. Congress should approve the budget request and provide additional funding for CBP to purchase

and fully implement body-worn camera and other recording technology across the agency, while requiring strong policies and privacy protections.

IV. Complaints and FOIA

Transparent law enforcement requires a responsive, effective, and publicly accountable process of redress for individuals and organizations alleging rights abuses. Although CBP has acknowledged shortcomings in its complaints system, particularly following the American Immigration Council's report *No Action Taken*,^{xxiv} and the ACLU of Arizona's report *Record of Abuse*,^{xxv} which were based on CBP's own records, the complaints system remains largely the same. While CBP has commendably improved its Spanish-language capacity,^{xxvi} comprehensive reform has not taken place despite AIC, ACLU, and other organizations' detailed recommendations for improvement.^{xxvii} Congress itself does not receive an accurate annual report of the number of complaints received about CBP operations because of data-collection and reporting limitations at the agency as well as its oversight components.

Another cornerstone of open government lacking at CBP is compliance with the Freedom of Information Act (FOIA). The ACLU and other groups have repeatedly filed FOIA requests that go unanswered, requiring wasteful, delaying, and unnecessary litigation. CBP must overhaul its attitude toward and processes for responding to FOIA requests, as the statute requires, and should as a matter of practice make its policies, statistics and other materials publicly available for review.

V. Detention Facilities

Conditions of confinement at CBP detention facilities are the subject of ongoing litigation and merit independent attention from the Subcommittee. CBP's transparency with respect to its large-scale detention operations, including a failure to permit access by independent monitors, has been abysmal. Indeed, the *Arizona Republic* has had to file a motion in court to argue against the government's attempt to hide evidence of CBP's troubling record under seal. According to the newspaper, "the public has an undeniable interest in monitoring a civil case concerning the allegedly inhumane conditions experience by civil border detainees lodged in government facilities;" the government "provides no compelling reason why they should be allowed to continue to litigate this action in secret, immune from public scrutiny."^{xxviii}

In recent years, reports of extremely poor conditions for U.S. citizens and immigrants held in CBP short-term custody facilities have proliferated. CBP short-term custody facilities, which are designed to detain individuals for up to 72 hours but in practice are often used to hold people for up to two weeks,^{xxix} lack comprehensive standards like those that govern Immigration and Customs Enforcement (ICE) facilities, as well as effective oversight and transparent data collection on detention activities. While CBP has made progress in releasing revised, yet incomplete detention standards in October 2015,^{xxx} these are minimal and often vague, lack

necessary accountability, oversight and training components, and do not provide for key elements of care, such as soap or bedding.

Immigrants in CBP custody report harsh conditions, overcrowding, lingering in custody for days or weeks, improper and abusive treatment by CBP officials, and being denied food, water, and medical aid.^{xxxii} Unaccompanied minors apprehended by CBP are also held in these facilities, which are not designed for children. DHS itself has acknowledged “recurring problems”^{xxxiii} and oversight failures.^{xxxiii} Multiple federal cases are pending, one of which credited evidence of “widespread and deplorable conditions,” adding that the record revealed Border Patrol facilities to be “overcrowded and unhygienic” and characterized by cold temperatures, an absence of blankets and trash cans, constant illumination, inadequate nutrition, and defective medical care.^{xxxiv}

As a matter of initial transparency, CBP must open its detention facilities to independent as well as nongovernmental inspection and publish statistics on its detention operations. In rebuilding trust with migrants, the agency urgently needs to take seriously its past detention-conditions failings and to implement robust, enforceable standards and oversight that are consistent with humane treatment as well as American values.

In sum, the ACLU commends the Subcommittee’s attention to CBP transparency and trust matters. Border communities continue to advocate for improvements in residents’ and migrants’ daily interactions with CBP. We urge the Subcommittee to approach issues of transparency and trust holistically and to ensure that CBP makes rapid progress on becoming a leader rather than a laggard on best law-enforcement practices.

ⁱ Police Executive Research Forum, “U.S. Customs and Border Protection, Use of Force Review: Cases and Policies.” (Feb. 2013), <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>

ⁱⁱ PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 69 (2015), http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf

ⁱⁱⁱ Interim Report of the CBP Integrity Advisory Panel (June 29, 2015), <https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf>

^{iv} See ACLU, “Customs and Border Protection’s (CBP’s) 100-Mile Rule.” (2015), https://www.aclu.org/sites/default/files/field_document/14_9_15_cbp_100-mile_rule_final.pdf

^v “Committee on Homeland Security Passes Secure Our Borders First Act.” (Jan. 22, 2015) (“An amendment, sponsored by Rep. Martha McSally, R-Ariz., to require the Chief of the Border Patrol to ensure that Border Patrol personnel are deployed and patrol as close to the physical land border as possible, and deploy the maximum practicable number of Border Patrol agents to forward operating bases.”), <https://homeland.house.gov/press/committee-homeland-security-passes-secure-our-borders-first-act/>

^{vi} See, e.g., ACLU of Arizona, RECORD OF ABUSE: LAWLESSNESS AND IMPUNITY IN BORDER PATROL’S INTERIOR ENFORCEMENT OPERATIONS (Oct. 2015), <http://www.acluaz.org/node/5415>; ACLU of NM Regional Center for Border Rights, GUILTY UNTIL PROVEN INNOCENT: LIVING IN NEW MEXICO’S 100-MILE ZONE (May 2015), <https://www.aclu-nm.org/guiltyuntilproveninnocent/2015/05/>

- vii ACLU of New Mexico Regional Center for Border Rights, “Deaths and Injuries in CBP encounters since January 2010.” (Nov. 12, 2015, with subsequent updates), <https://www.aclu-nm.org/wp-content/uploads/2015/11/11012015-Dead-and-Injured-by-CBP-Officials.pdf>
- viii Brian Skoloff, “Border Patrol Shot Mexican Teen Jose Antonio Elena Rodriguez 8 Times: Autopsy,” ASSOCIATED PRESS (Feb. 8, 2013), http://www.huffingtonpost.com/2013/02/08/border-patrol-shot-mexican-teen-jose-antonio-elena-rodriguez-autopsy_n_2646191.html
- ix See “Justice for Anastasio.” (May 28, 2015), <https://www.aclu.org/blog/justice-anastasio> and Nov. 2015 Department of Justice decision not to proceed with charges, <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas>
- x Cherrill Crosby, “Change occurring after Republic’s border investigation,” ARIZONA REPUBLIC (Aug. 4, 2014), <http://www.azcentral.com/story/news/politics/investigations/2014/08/02/border-force-republic-investigation-change/13534935/>
- xi CBS News, “Border Patrol agent indicted in 2012 fatal shooting.” (Sept. 24, 2015), <http://www.cbsnews.com/news/border-patrol-agent-lonnie-swartz-indicted-in-2010-fatal-shooting-of-mexican-teen/>
- xii <http://www.cbp.gov/newsroom/stats/cbp-use-force>
- xiii DHS Office of Inspector General, CBP Use of Force Training and Actions To Address Use of Force Incidents. (Sept. 2013), https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf
- xiv See *United States v. City of Albuquerque* (Settlement, Nov. 14, 2014), 13, http://www.justice.gov/sites/default/files/crt/legacy/2014/12/19/apd_settlement_11-14-14.pdf.
- xv Interim Report of the CBP Integrity Advisory Panel, supra, 16-17.
- xvi TASK FORCE ON 21ST CENTURY POLICING, supra, Action Item 1.3.2 (“When serious incidents occur, including those involving alleged police misconduct, agencies should communicate with citizens and the media swiftly, openly, and neutrally, respecting areas where the law requires confidentiality.”).
- xvii Nigel Duara, “A Border Patrol agent shot a drug-running suspect, but the agency won’t reveal much more.” Los Angeles Times (Feb. 10, 2016), <http://www.latimes.com/nation/la-na-ff-border-shootings-20160209-story.html>
- xviii Interim Report of the CBP Integrity Advisory Panel, supra, 19.
- xix U.S. Customs and Border Protection Use of Force Reviews, Recommendations and Next Steps, (Sep. 25, 2013), <http://www.cbp.gov/sites/default/files/documents/Use%20of%20Force%20Two%20Pager-FINAL.PDF>.
- xx “CBP Announces Way Forward on the Use of Body-Worn Cameras.” U.S. Customs and Border Protection. (November 12, 2015), <http://www.cbp.gov/newsroom/national-media-release/2015-11-12-000000/cbp-announces-way-forward-use-body-worn-cameras>
- xxi “Border Patrol Needs to Join 21st Century.” (Nov. 9, 2015), <http://www.sandiegouniontribune.com/news/2015/nov/09/border-patrol-body-cameras-skepticism/>
- xxii “Border Patrol’s ‘Move Along’ Act is Old...” (Nov. 10, 2015), <http://www.azcentral.com/story/opinion/editorial/2015/11/10/border-patrol-transparency/75486988/>
- xxiii Department of Homeland Security Appropriations Bill Report (House, 2016), <http://appropriations.house.gov/uploadedfiles/hrpt-114-hr-fy2016-hsecurity.pdf> (p. 29); Department of Homeland Security Appropriations Bill Report (Senate, 2016), <https://www.congress.gov/114/crpt/srpt68/CRPT-114srpt68.pdf> (p. 18).
- xxiv American Immigration Council, “No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse.” (May 4, 2014), <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>
- xxv ACLU of Arizona, RECORD OF ABUSE, supra.
- xxvi <http://www.cbp.gov/newsroom/national-media-release/2015-12-28-000000/us-customs-and-border-protection-information>
- xxvii Recommendations available at https://www.aclu.org/files/assets/14_5_5_recommendations_to_dhs_to_improve_complaint_processing_final.pdf
- xxviii Rob O’Dell, “The Republic intervenes in lawsuit over conditions at border detention facilities.” (Jan. 29, 2016), <http://www.azcentral.com/story/news/politics/immigration/2016/01/29/republic-intervenes-lawsuit-over-conditions-border-detention-facilities/79543134/>
- xxix Americans for Immigrant Justice, *The “Hieleras”: A Report on Human & Civil Rights Abuses Committed by U.S. Customs and Border Protection* (Aug. 7, 2013), <http://aijustice.org/the-hieleras-a-report-on-human-civil-rights-abuses-committed-by-u-s-customs-border-protection-2/>
- xxx <http://www.cbp.gov/newsroom/national-media-release/2015-10-05-000000/cbp-implements-agencywide-national-standards>
- xxxi Guillermo Cantor, *Hieleras (Iceboxes) in the Rio Grande Valley Sector*, American Immigration Council, (Dec. 2015), <http://www.immigrationpolicy.org/special-reports/hieleras-iceboxes-rio-grande-valley-sector>.

^{xxxii} Press Release, Department of Homeland Security Office of Inspector General, Improvements Continue at Detention Centers (Oct. 6, 2014), <http://1.usa.gov/1oKw2Kq>; see also NATIONAL PUBLIC RADIO (NPR), Transcript: Commissioner Kerlikowske’s Full Interview, July 18, 2014, <http://n.pr/1kCh2wg> (In response to complaints characterized as “being put in excessively uncomfortable rooms, being left with the lights on all night so that they couldn’t sleep, being denied medical care,” Commissioner Kerlikowske acknowledged that those complaints “about the facility[ies]” were “absolutely spot on. . . . I don’t disagree with those complaints at all.”).

^{xxxiii} Memorandum to DHS Secretary Jeh C. Johnson from DHS Inspector General John Roth on Oversight of Unaccompanied Alien Children 2–3 (July 30, 2014), <http://1.usa.gov/1r3Myd1> (noting that CBP’s system for documenting compliance with guidelines for detaining unaccompanied children is “unreliable due to frequent system outages which have resulted in inconsistent reporting. As a result, [it] is not a reliable tool for CBP to provide increased accountability for [children’s] safety and well-being during all phases of CBP’s custody process.”).

^{xxxiv} Julia Preston, “Judge Orders Release of Immigrant Children Detained by U.S.” New York Times (July 25, 2015), <http://www.nytimes.com/2015/07/26/us/detained-immigrant-children-judge-dolly-gee-ruling.html> (linking to court order in *Flores v. Johnson*).