



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

**For a Hearing on the Budget of U.S. Customs and Border Protection
Submitted to the Homeland Security Subcommittee
of the House Appropriations Committee**

Wednesday, April 2, 2014

ACLU Washington Legislative Office

Laura W. Murphy, Director

Georgeanne M. Usova, Federal Policy and Research Associate

I. Introduction and Background

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of individual liberty and justice embodied in the U.S. Constitution, we thank you for giving us the opportunity to submit this statement for the record on the FY 2015 Budget of U.S. Customs and Border Protection (CBP).

We urge Congress to help to ensure the safety and protect the civil liberties of individuals encountering CBP in all situations, including in the field, at ports of entry, and in CBP short-term custody facilities, through Department of Homeland Security (DHS) appropriations. Our recommendations, described in more detail below, include:

- Fund the use of body-worn cameras for CBP officials with strong privacy protections;
- Require the public release of investigations into CBP's use of force;
- Require data collection and public reporting on CBP's use of roving patrols and checkpoints;
- Require data collection and public reporting on the use of CBP's drone fleet; and
- Require the implementation of (1) enforceable CBP short-term custody conditions standards, (2) an online detainee locator, and (3) data collection and public reporting on short-term custody.

CBP's budget has skyrocketed in the last decade, from \$5.9 billion in FY 2004¹ to over \$12 billion in FY 2014,² with a request from the administration for over \$13 billion in FY 2015.³ CBP is now the largest federal law enforcement agency in the United States,⁴ having more than doubled the number of Border Patrol agents since 2000 from 9,212 to 21,391.⁵ Approximately 86 percent of that force is deployed along the Southwest border⁶—totaling about 10 agents per mile.⁷ This unprecedented militarization of border communities has exacerbated existing problems such as excessive use of force and racial profiling along both the southern and northern borders, and has continued unabated despite ample evidence that increased resources are not needed to ensure security. The number of apprehensions of unlawful border crossers is near a 40-year low,⁸ and net migration from Mexico is now zero or less.⁹ Meanwhile, examples of fraud, waste, and abuse within the agency abound.¹⁰ A recent Office of Special Counsel report found that CBP employees abuse the agency's overtime system so habitually that many have come to refer to it as the “candy bowl”¹¹—a widespread problem that the agency has been aware of and has failed to take action on since 2007.¹² This is just one example of the culture of impunity

pervasive throughout the agency. Because there has been no parallel investment in oversight and accountability to accompany the increased enforcement resources, DHS is ill-equipped to respond to abuses in its ranks.

As the House Appropriations Committee examines CBP's budget request, Members have the opportunity to demand greater transparency and accountability from this agency that demands such significant taxpayer resources.

II. Use of Force

Since January 2010, at least 27 people¹³ have died following encounters with CBP officials in which force was used. They include minors, U.S. citizens, individuals allegedly throwing rocks, and individuals killed while on the Mexican side of the border.¹⁴ In addition to these fatalities, administrative complaints indicate that CBP officials at ports of entry have a pattern of using force abusively.¹⁵

a. Body-worn cameras

The use of body-worn cameras, considered a best practice among law enforcement¹⁶ is growing in police departments nationwide, and can help both to reduce the number of incidents in which force is used and to protect CBP officials from false allegations of misconduct.¹⁷ Wearable cameras are particularly well suited to CBP officials who patrol a wide variety of terrain, both urban and rural, in vehicles, on foot, on horseback, bicycle, ATV, and boat.¹⁸ If deployed along with a strong policy framework to ensure appropriate use and protect the privacy of both CBP and the public,¹⁹ an agency-wide policy mandating appropriate use of body-worn cameras in interactions with the public would provide a measure of much-needed accountability. We recommend funding the implementation of such a policy, which CBP has already committed to following its internal review of the agency's use of force.²⁰

b. Use of Force Policy

Following a 2012 request by Members of Congress to investigate CBP's use of force,²¹ investigations into the agency's policy were conducted by the DHS Office of Inspector General (OIG), CBP itself, and the Police Executive Research Forum (PERF), a national nonprofit police research and policy organization. In September 2013, CBP released a short list of commitments to improve its use of force policy, but failed to release the full PERF report or full list of accompanying recommendations.²² Border Patrol Chief Mike Fisher then publicly rejected two key PERF recommendations, announcing that CBP would continue to use lethal force against people throwing rocks and driving vehicles, and dismissing PERF's recommendations to discontinue these practices as "too restrictive." To date, CBP has refused to make that report public or further discuss the recommendations with the public, even limiting access to Congressional offices seeking more information. We recommend that Committee include report language requiring the agency to make public the results of investigations into CBP policy that have been requested by Congress and funded by taxpayers.

III. The 100-mile "Constitution lite" zone

Decades-old regulations²³ grant CBP authority to conduct warrantless stops and searches up to 100 miles into the interior of the country—a "Constitution-lite" zone that encompasses a full two-thirds of the U.S. population and nine of the top 10 largest metropolitan areas.²⁴ In practice, the agency frequently disregards any geographic limitation on its authority, including the current 25 mile limitation on entering private property without a warrant.²⁵

a. Roving Patrols and Checkpoints

CBP sets up checkpoints and conducts roving patrols within the 100-mile zone and beyond.²⁶ While the Supreme Court has clearly stated that immigration checkpoints may only be used for brief inquiries into residence status and visual inspection of the exterior of vehicles,²⁷ CBP regularly conducts far more invasive searches and inquiries, and appears in many cases to use these stops as a pretext for general

criminal investigations.²⁸ This is not only unconstitutional, but seriously disrupts the lives of those in border communities, subjecting individuals to interrogation and a variety of abuses on a daily basis.²⁹ Complaints filed by the ACLU of Arizona chronicle these rights violations, including prolonged, unjustified detentions, unlawful searches, racial profiling, verbal harassment, physical assault, and more.³⁰ CBP recently settled a lawsuit involving allegations that its agents routinely made racially motivated traffic stops in Washington State in direct violation of existing policies and the Constitution, the terms of which require CBP to train Border Patrol agents in the area on Fourth Amendment protections against illegal searches and seizures, and to provide the ACLU with data regarding all traffic stops that take place in the area for the next 18 months.³¹ We recommend that the Committee include report language requiring the collection and public reporting of such information on CBP's practices nationwide to ensure that CBP is not violating the rights of individuals anywhere in the country.

b. CBP Drones

CBP also uses unmanned aerial vehicles (UAVs), or drones, to patrol the border zone. Each of the ten Predator drones owned by CBP costs approximately \$18 million,³² and from 2005 to 2011 were responsible for just 0.01 percent of apprehensions of those suspected of illegal activity—that's an average cost of \$44,800 per person apprehended and \$7,214 per pound of marijuana recovered.³³ CBP also allows state, local and federal law enforcement to access information from, and to borrow, its fleet of drones for use in domestic surveillance.³⁴ This essentially converts drones that have been funded—at great taxpayer expense—for the purpose of border protection to general law enforcement use, and a recent FOIA request revealed that it occurred on nearly 700 occasions between 2010 and 2012.³⁵ According to DHS OIG, CBP has never properly budgeted to support all of its existing aircraft, did not plan adequately for tracking and allocating flying hours, lacked a formal process for managing and prioritizing mission requests, and did not properly seek reimbursement for any expenses incurred while the aircraft fulfilled mission requests from other agencies.³⁶ The lack of oversight and planning that accompanied the agency's enormous investment in drones, coupled with the questionable constitutionality of providing access to other law enforcement agencies, raises serious concerns, and demands more information for the public that foots the bill. We recommend that the Committee include report language requiring CBP to collect and make publicly available comprehensive data on all missions flown by CBP's fleet of unmanned aerial systems, including those flown by other law enforcement agencies.

IV. CBP short-term custody

CBP's short-term custody facilities are designed to detain individuals for up to 72 hours but in practice are often used to hold people for up to two weeks.³⁷ While extensive resources have been invested in reforming the enormous immigration detention system managed by Immigration and Customs Enforcement (ICE), which is also within DHS, CBP has consistently refused to develop similar publicly available standards for its short-term custody facilities. As a result, immigrants in CBP custody, including a growing number of unaccompanied children,³⁸ report denial of food, water and medical aid, harsh conditions, overcrowding, and improper and abusive treatment by CBP officials. Little information is available about the safeguards for individuals in CBP custody, the size and demographics of the population in CBP custody, the duration of this population's detention, the internal CBP audit and inspection scheme for short-term facilities, and the circumstances of individuals' release including to whom they are released. Additionally, frequent relocation of those transferred from CBP to the custody of a variety of other agencies, including ICE, the Office of Refugee Resettlement, and the U.S. Marshals Service, makes it difficult for families to keep track of their detained loved ones and attorneys to keep track of their detained clients. We recommend that the Committee include report language directing DHS to (1) implement enforceable standards to govern conditions within short-term custody facilities, (2) develop a short-term detainee locator system equivalent to ICE's online detainee locator system, and (3)

require the collection and reporting of statistics on short-term detention facilities and the individuals housed in them.

V. Conclusion

CBP's enforcement budget has expanded rapidly in recent years, far out of proportion to investments in oversight and accountability. With the FY 2015 budget, appropriators can begin to change this trend by requiring the agency to shed light on its practices and answer to both Congress and the American people. For questions or more detailed recommendations, please contact Georgeanne Usova at (202) 675-2338 or gusova@aclu.org.

¹ U.S. Dep't. of Homeland Security, Budget-in-Brief, Fiscal Year 2005, available at http://www.dhs.gov/xlibrary/assets/FY_2005_BIB_4.pdf.

² Joint Explanatory Statement, Consolidated Appropriations Act, 2014, Pub. L. 113-76 (2014), <http://docs.house.gov/billsthisweek/20140113/113-HR3547-JSOM-D-F.pdf>.

³ U.S. Dep't. of Homeland Security, Budget-in-Brief, Fiscal Year 2015, available at <http://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf>.

⁴ Immigration enforcement spending now exceeds the budgets of the FBI, the DEA, the Secret Service, the U.S. Marshals Service, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) combined. Doris Meissner, et al, *Immigration Enforcement in the United States: Rise of a Formidable Machinery*, Migration Policy Institute at 12 (Jan. 2013), <http://www.migrationpolicy.org/pubs/pillars-reportinbrief.pdf>.

⁵ *United States Border Patrol: Border Patrol Agent Staffing by Fiscal Year*, U.S. Customs and Border Patrol, <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%201992-2013.pdf>.

⁶ Bob Ortega, *Numbers don't back need for lethal force at border*, USA TODAY (Jan. 9, 2014), available at <http://www.usatoday.com/story/news/nation/2014/01/08/lethal-force-border-patrol/4385405/>.

⁷ Lauren Fox, *On the Border, Fear of More Security Grows*, US NEWS & WORLD REPORT (Jul. 8, 2013), available at <http://www.usnews.com/news/articles/2013/07/08/on-the-border-fear-of-more-security-grows>

⁸ Bob Ortega, *Border apprehensions up, but still near historical lows*, USA TODAY (June 3, 2013), available at <http://www.usatoday.com/story/news/nation/2013/06/03/border-apprehensions-increase-fiscal-year/2383669/>.

⁹ Pew Research Center, *Net Migration from Mexico Falls to Zero — and Perhaps Less* (Aug. 6, 2012), <http://www.pewresearch.org/daily-number/net-migration-from-mexico-falls-to-zero-and-perhaps-less/>.

¹⁰ In recent years, nearly 160 CBP officials have been arrested or indicted on corruption-related charges in federal courts for crimes such as bribery, smuggling, transporting drugs, and selling agency equipment, while another 2,170 have been arrested for off-duty misconduct such as drunk driving, assault, or domestic violence. Greg Moran, *Border boost spiked corruption cases*, U-T SAN DIEGO (Dec. 8, 2013), <http://www.utsandiego.com/news/2013/Dec/08/crossing-the-line/?#article-copy>; See also *Border Security: Additional Actions Needed to Strengthen CBP Efforts to Mitigate Risk of Employee Corruption and Misconduct*, U.S. Gov't Accountability Office Report 13-59 (Dec. 4, 2012), <http://www.gao.gov/products/GAO-13-59>.

¹¹ See, e.g. Emily Wax-Thibodeaux, *Homeland Security workers routinely boost pay with unearned overtime, report says*, Washington Post (Oct. 31, 2013), http://www.washingtonpost.com/politics/homeland-security-workers-routinely-boost-pay-with-uneared-overtime-report-says/2013/10/31/3d33f6e4-3fdf-11e3-9c8b-e8deeb3c755b_story.html; Mike Ahlers, *Whistleblowers: Homeland employees earn OT while watching TV*, CNN (Nov. 1, 2013), <http://www.cnn.com/2013/11/01/politics/dhs-whistleblower-overtime/>.

¹² *Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense Before the Subcomm. on Nat'l. Security of the H. Comm. on Oversight and Govt. Reform*, 113th Cong. (Nov. 20, 2013) (statement of Carolyn Lerner, Special Counsel, U.S. Office of Special Counsel, available at <http://docs.house.gov/meetings/GO/GO06/20131120/101515/HHRG-113-GO06-Wstate-LernerC-20131120.pdf>; See also *Border Patrols Arrests Drop as Overtime Rises*, FOX NEWS LATINO (Feb. 4, 2012), <http://latino.foxnews.com/latino/news/2012/02/04/border-patrols-arrests-drop-as-overtime-rises/>.

¹³ ACLU of New Mexico Regional Center for Border Rights; Analysis of information gathered from various newspaper articles on deaths (Feb. 2014), on file with ACLU.

¹⁴ *Id.*

¹⁵ Complaint and request for investigation of abuse of power, excessive force, coercion, and unlawful confiscation of property by Customs and Border Protection at ports of entry along the U.S.-Mexico border, American Civil Liberties Union, May 9, 2012, https://www.aclu.org/files/assets/aclu_2012_cbp_abuse_complaint_2.pdf

¹⁶ See, e.g. Nancy LaVigne, *It's One Smart Step, Not a Solution*, NEW YORK TIMES, Oct. 23, 2013, available at <http://www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras/body-cameras-for-police-could-be-one-smart-step>; Neil Franklin, *Cameras Could Restore Trust in Police*, NEW YORK TIMES, Oct. 22, 2013, available at <http://www.nytimes.com/roomfordebate/2013/10/22/should-police-wear-cameras/body-cameras-could-restore-trust-in-police>.

¹⁷ Nathan Koppel, *Cameras Keep a Close Watch on the Police*, WALL STREET JOURNAL, Feb. 12, 2013, <http://online.wsj.com/article/SB10001424127887323511804578298060326177182.html>;

¹⁸ 16-year-old Jose Antonio Elena Rodríguez was shot to death by Border Patrol agents in a boat who claimed that Rodriguez was in a group throwing rocks from the Mexican side of the border. Cameras would have provided much clearer evidence. Melissa del Bosque, *Are*

U.S. Agents Who Shoot Mexicans Across the Border Above the Law, TEXAS OBSERVER (Oct. 22, 2012), available at <http://www.texasobserver.org/lawsuit-could-grant-constitutional-protections-to-mexicans-shot-on-mexican-side-of-the-border-fence/>.

¹⁹ This should include policies regarding control over when recordings are made, access to recordings, subject notification, recording retention and use, and strong technological controls. ACLU, “Police Body-Mounted Cameras: With Right Policies in Place, a Win for All” (Oct. 9, 2013), <https://www.aclu.org/technology-and-liberty/police-body-mounted-cameras-right-policies-place-win-all>.

²⁰ U.S. Customs and Border Protection *Use of Force Reviews, Recommendations and Next Steps* (Sep. 25, 2013), http://www.cbp.gov/xp/cgov/border_security/bs/force_reviews.xml; See also Ted Hesson, *Immigration Problems Obama Can Fix Now*, FUSION (Feb. 11, 2014), <http://fusion.net/justice/story/immigration-problems-obama-fix-now-423335>.

²¹ Cristina Costantini, *Anastasio Hernandez Rojas Death: 16 Members Of Congress Call For Justice*, HUFFINGTON POST (May 10, 2012), http://www.huffingtonpost.com/2012/05/11/anastasio-hernandez-rojas_n_1507274.html.

²² U.S. Customs and Border Protection, *U.S. Customs and Border Protection Use of Force Reviews, Recommendations and Next Steps* (Sept. 25, 2013), http://www.cbp.gov/xp/cgov/border_security/bs/force_reviews.xml.

²³ 8 C.F.R. § 287.1(b). The INA was amended in 1946 to grant INS expanded authority within a “reasonable distance” of the nation’s boundary. 8 USC § 135.7. DOJ regulations defined “reasonable distance” as 100 miles in 1957, when there were under 1,500 Border Patrol agents nationwide. See *Field Officers: Powers and Duties*, 22 Fed. Reg., 236, 9808–09 (Dec. 6, 1957) (to be codified at C.F.R. § 287). There is no public history to indicate why DOJ chose 100 miles as the “reasonable distance.” See, e.g., 10 U.S.C. § 849; FED. R. CRIM. P. 7; FED. R. CIV. P. 45.

²⁴ ACLU, “Fact Sheet on U.S. ‘Constitution Free Zone,’” (Oct. 22, 2008), <https://www.aclu.org/technology-and-liberty/fact-sheet-us-constitution-free-zone>.

²⁵ See, e.g., Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013, available at http://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html?pagewanted=all&_r=0 (checkpoint stop of Sen. Patrick Leahy 125 miles from the border); Michelle Garcia, *Securing the Border Imposes a Toll on Life in Texas*, AL JAZEERA AMERICA, Sept. 25, 2013, available at <http://america.aljazeera.com/articles/2013/9/25/living-under-the-law-of-border-security.html>; see also *United States v. Venzor-Castillo*, 991 F.2d 634 (10th Cir. 1993) (finding Border Patrol lacked reasonable suspicion to stop and search vehicle 235 miles from the border); David Antón Armendáriz, *On the Border Patrol and Its Use of Illegal Roving Patrol Stops*, 14 SCHOLAR 553 (2012).

²⁶ See, e.g. New York Civil Liberties Union, NYU Law School Immigrant Rights Clinic, and Families for Freedom, *Justice Derailed: What Raids on New York Trains and Buses Reveal about Border Patrol’s Interior Enforcement Practices* (Nov. 2011), http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf; Andrew Becker, et al, *Four of five Border Patrol drug busts involve U.S. citizens, records show*, CENTER FOR INVESTIGATIVE REPORTING (Mar. 26, 2013), <http://cironline.org/reports/four-five-border-patrol-drug-busts-involve-us-citizens-records-show-4312>.

²⁷ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 558–60 (1976).

²⁸ Complaint and request for investigation of abuses at U.S. Border Patrol interior checkpoints in southern Arizona, including unlawful search and seizure, excessive force, and racial profiling, ACLU of Arizona and ACLU Border Litigation Project (Jan. 15, 2014), <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20202014%2001%2015.pdf> [hereinafter “Checkpoints complaint”].

²⁹ Bob Ortega, *Border patrol hit with abuse complaints*, AZ Central (Oct. 8, 2013), <http://www.azcentral.com/news/articles/20131008border-patrol-hit-abuse-complaints.html>.

³⁰ Checkpoints complaint, *supra* note 28; Complaint and request for investigation of unlawful roving patrol stops by U.S. Border Patrol in southern Arizona including unlawful search and seizure, racial profiling, trespassing, excessive force, and destruction of personal property, ACLU of Arizona and ACLU Border Litigation Project (Oct. 9, 2013), <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf>; Press Release, *Border Patrol checkpoints in southern Arizona violate the constitutional rights of border residents, ACLU of Arizona demands investigation*, ACLU of Arizona (Jan. 15, 2013), <http://www.acluaz.org/issues/search-and-seizure/2014-01/4418>.

³¹ Settlement agreement, *Sanchez, et al v. U.S. Border Patrol*, et al, No. CV12-5378-RJB (Sept. 20, 2013), <https://aclu-wa.org/sites/default/files/attachments/2013-09-23--Fully%20Executed%20Settlement%20Agreement.pdf>; see also Press Release, ACLU of Washington State, “Settlement reins in Border Patrol Stops on the Olympic Peninsula” (Sep. 24, 2013), <https://aclu-wa.org/news/settlement-reins-border-patrol-stops-olympic-peninsula>.

³² Alvin Levin and Jeff Plungis, *Pilots Say Go Slow on Commercial Drones After Ditching*, BLOOMBERG POLITICS (Jan. 29, 2014), <http://www.bloomberg.com/news/2014-01-29-pilots-say-go-slow-on-commercial-drones-after-ditching.html>; *Sanchez* settlement agreement, *supra* note 30.

³³ Tom Peter, *Drones on the US border: Are they worth the price?*, CHRISTIAN SCIENCE MONITOR (Feb. 5 2014), <http://www.csmonitor.com/USA/2014/0205/Drones-on-the-US-border-Are-they-worth-the-price>.

³⁴ Privacy Impact Assessment for the Aircraft Systems, Dept. of Homeland Security (Sept. 9, 2013), <http://www.dhs.gov/sites/default/files/publications/privacy-pia-cbp-aircraft-systems-20130926.pdf>.

³⁵ Craig Whitlock and Craig Timberg, *Border-patrol drones being borrowed by other agencies more often than previously known*, WASHINGTON POST (Jan. 14, 2014), http://www.washingtonpost.com/world/national-security/border-patrol-drones-being-borrowed-by-other-agencies-more-often-than-previously-known/2014/01/14/5f987af0-7d49-11e3-9556-4a4bf7bcbdb8_story.html.

³⁶ CBP’s Use of Unmanned Aircraft Systems in the Nation’s Border Security, Dept. of Homeland Security Inspector General (May 2012), http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-85_May12.pdf.

³⁷ Americans for Immigrant Justice, *The Hieleras: A Report on Human & Civil Rights Abuses Committed by U.S. CBP* (Aug. 7, 2013), <http://aijustice.org/the-hieleras-a-report-on-human-civil-rights-abuses-committed-by-u-s-customs-border-protection-2/>.

³⁸ FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA, WOMEN’S REFUGEE COMMISSION (Oct. 2012), <http://womensrefugeecommission.org/forced-from-home-press-kit>.