

# JUSTICE DERAILED

What Raids on New York's  
Trains and Buses Reveal  
about Border Patrol's Interior  
Enforcement Practices

NOVEMBER 2011

**NYU SCHOOL OF LAW**  
IMMIGRANT RIGHTS CLINIC



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November 2011



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### **ABOUT THE NEW YORK CIVIL LIBERTIES UNION**

The New York Civil Liberties Union (NYCLU) is one of the nation's foremost defenders of civil liberties and civil rights. Founded in 1951 as the New York affiliate of the American Civil Liberties Union, we are a not-for-profit, nonpartisan organization with eight offices and nearly 50,000 members across the state. The mission of the NYCLU is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, and the right to privacy, equality and due process of law for all New Yorkers. For more information, please visit [www.nyclu.org](http://www.nyclu.org).



### **ABOUT FAMILIES FOR FREEDOM**

Families for Freedom is a New York-based multi-ethnic defense network by and for immigrants facing deportation. Founded in September 2002, Families for Freedom is a membership-based organization with approximately 100 members, made up of immigrants who are in or have been in immigration removal proceedings, their families and loved ones, and individuals at risk of deportation. Families for Freedom's mission is to educate and organize families and communities affected by deportation. It uses community education and mobilization, legal advocacy, and media work to forge collective campaigns and build support and awareness of the issues facing immigrant communities.



### **ABOUT THE IMMIGRANT RIGHTS CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW**

The Immigrant Rights Clinic at New York University School of Law is a leading institution in both local and national struggles for immigrant rights. Its students engage in direct legal representation of immigrants and community organizations in litigation at the agency, federal court, and where necessary Supreme Court level, and in immigrant rights campaigns at the local, state, and national level.



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## EXECUTIVE SUMMARY

This report is the first-ever in-depth examination of the Border Patrol's transportation raids in upstate New York. It paints a disturbing picture of an agency resorting to aggressive policing tactics in order to increase arrest rates, without regard for the costs and consequences of its practices on New Yorkers' rights and freedoms. The report extends beyond transportation raids to other Border Patrol practices as well, raising serious concerns about an agency that appears to be driven by the belief that the regular rules of the Constitution do not apply to it.

American democracy was founded on the idea that people possess certain inalienable rights, among them the right to privacy and the right to move freely about the country. Throughout this nation's history, Americans have never been required to carry identification papers proving their citizenship. "Show me your papers" is a statement posed to people living under oppressive regimes, not those residing in the world's oldest democracy.

Anyone who has traveled on trains and buses through upstate New York in recent years has cause to question the federal government's fealty to these core democratic values. Throughout central and western New York, armed Border Patrol agents routinely board trains and buses nowhere near the border to question passengers about their citizenship. They force certain people to produce documents proving their citizenship or immigration status. Passengers who cannot produce documentation to an agent's satisfaction are subjected to arrest, detention and potential deportation.

These "transportation raids" occur many miles from the Canadian border or any point of entry into the United States. They do little to protect the border, but they threaten constitutional protections that apply to citizens and non-citizens alike, invite racial profiling, tear apart families and burden taxpayers with the cost of detaining individuals who were arrested while innocently going about their business.

The transportation raids also serve as a window into the practices of an agency that, although charged with policing the border, abuses its authority through its unprecedented reach into the interior of the United States and the use of aggressive search and seizure procedures that do not comport with standards and expectations for domestic policing or interior immigration enforcement. While the full extent of the Border Patrol's interior enforcement practices remains unknown, community groups have documented abuses of power that extend beyond the transportation system and into our state's towns and villages. These concerns include complaints of Border Patrol agents wrongfully stopping, questioning and arresting individuals, including United States citizens, and engaging in improper enforcement practices in close collaboration with state and local police.

This report is the first in-depth examination of transportation raids by Border Patrol agents in upstate New York, particularly in the Rochester Station within the Border Patrol's Buffalo sector. Through a Freedom of Information Act request, which is still being litigated, the au-



thors of this report obtained a complete dataset of all transportation arrests in Rochester Station from 2006 to 2009 and detailed information on a random sample of 200 of those arrests. Analysis of the documents obtained through the FOIA litigation and other publicly available documents confirm that Rochester Station's interior transportation raids represent a shift from the Border Patrol's mission of policing the border. Furthermore, the evidence suggests an established pattern of misconduct by Border Patrol agents in the course of transportation raids. Key preliminary findings from this data include the following:

- Despite the Border Patrol's mission of policing the border, transportation raids do not target recent border-crossers. From 2006 to 2009, less than 1 percent of transportation raid arrests were made at entry, and only 1 percent were made within 72 hours of entry. In contrast, 76 percent of those arrested on transportation raids in Rochester had been in the United States for more than a year, and 12 percent of these individuals had been present for more than 10 years.
- Interior transportation raid arrests represent the majority of the Rochester Station's arrests despite the fact that they occur far from any point-of-entry into the United States. Although the agency long sought to block release<sup>1</sup> of precise yearly data, we now know that transportation arrests constituted almost two-thirds of all arrests in Rochester between 2007 and 2009.
- Agents widely violate established arrest procedures in the course of transportation raids. In 77 percent of all transportation raid arrests between 2006 and 2009, Rochester Station officers violated the two-officer rule, which requires that someone *other than* the arresting officer, whose judgment may be clouded by numerous factors, examine the person who was arrested and determine whether to commence removal proceedings or exercise prosecutorial discretion. In addition to violating the agency's own regulations, such violations implicate significant due process rights and Fourth Amendment requirements.
- Despite the immense human and financial costs of overzealous detention, data culled from the sample of Rochester transportation raid arrests reveal that more than 73 percent of individuals arrested were then placed in a detention facility rather than released while awaiting the adjudication of their case. The data further indicates that were it not for a lack of bed space, agents would have detained an even higher percentage of transportation raid arrestees.
- Transportation raids lead to the arrests mostly of Latin Americans, men, and individuals with a "medium" or "black" complexion. The records do not reveal who was subject to additional intrusive questioning or pulled off a train but not placed in removal proceedings, but they confirm anecdotal reports that arresting officers focus on Latin Americans and persons of color in their enforcement operations.

The report concludes with a set of recommendations to address the problems outlined in it:

- CBP should end its practice of raids on domestic trains and buses.
- To the extent that CBP continues to engage in interior enforcement operations, it should ensure that it does so only in situations involving specific suspicion of recent illegal border crossing, with proper constitutional and procedural protections in place.
- CBP should discontinue any use of arrest-based performance measures.
- CBP should re-evaluate its policy of nearly universal detention of individuals.
- State and local police should refrain from enforcing federal immigration laws, including by engaging in interior enforcement operations with Border Patrol agents and requesting translation assistance from Border Patrol.
- The governor and attorney general of New York should monitor CBP's interior operations to ensure that the rights of New York residents are protected.
- Congress and DHS should improve oversight and accountability with respect to transportation raids.

In sum, transportation raids by Rochester Station agents demonstrate unduly punitive and overzealous policing in an operational realm securely outside of the Border Patrol's border-policing mission. Through an analysis of previously unreleased data, this report sheds light on the Border Patrol's "show me your papers, please" approach to immigration enforcement and serves as an impetus for more transparency and closer scrutiny of CBP practices. The report also serves as a warning sign for the need to examine Border Patrol practices beyond buses and trains, and particularly practices that raise concerns regarding Fourth Amendment violations and racial profiling. The report calls on the CBP to conform its practices to democratic principles and legal and regulatory standards, and to curb its incursion into the country's interior.

## INTRODUCTION

For several years armed Border Patrol agents have routinely boarded domestic trains and buses in New York, including those operated by Amtrak and Greyhound, to question passengers about their citizenship, and arrest and detain people, including individuals lawfully present in the United States, who are not carrying proof of their lawful status. They board trains and buses without reasonable suspicion of unlawful activity.

In the Rochester area alone, Border Patrol agents arrested 2,788 train and bus passengers from October 2005 through September 2009. These arrests happened miles from the border, which transects Lake Ontario, or the nearest point of entry. The vast majority of individuals arrested had lived in the United States for more than a year.

This “show me your papers” practice has no place in the United States, where residents have long cherished the right to privacy and the freedom to travel freely about the country without having to prove their citizenship to government agents. Indeed, such tactics are more commonly associated with police states than robust democracies.

This report is the first-ever in-depth examination of the Border Patrol’s transportation raids in upstate New York. It analyzes data, obtained through Freedom of Information Act (FOIA) requests, from the Border Patrol’s Rochester Station and Buffalo sector to shed light on the practice and impact of transportation raids. The data paints a disturbing picture of an agency resorting to mission creep in order to increase arrest rates, without regard for the costs and consequences of its practices, including to its own mission to protect the border.

While the data obtained through the FOIA litigation and through public observations of Border Patrol activities provide a detailed account of the agency’s practices on trains and buses in New York, the concerns raised regarding these practices do not end at our state’s transportation systems. They extend to other Border Patrol tactics that raise similar concerns about an agency driven by the belief that the regular rules of the Constitution do not apply to it.

Section I of the report provides an overview of the Border Patrol’s transportation raid strategy and the emerging public alarm over such raids. Section II presents and analyzes the new evidence regarding the actual practice and impact of transportation raids. Section III discusses how transportation raids are likely the result of pressure to increase arrest rates, and how transportation raids raise significant constitutional concerns. Section IV examines the concerns raised about Customs and Border Protection (CBP) practices beyond the transportation context, including complaints regarding Border Patrol agents wrongfully stopping and arresting individuals, including United States citizens, and engaging in enforcement practices in close collaboration with state and local police, harming police-community relations. The full extent of these operations is unknown, raising the need for a more thorough examination of Border Patrol practices outside of the transportation context. Section V concludes with policy recommendations aimed at reining in the mission-creep and abuses that result from the Border Patrol’s interior enforcement practices.

## I. OVERVIEW: ROCHESTER STATION AND TRANSPORTATION RAIDS

The Homeland Security Act of 2002<sup>2</sup> divided the Immigration and Naturalization Service (INS) into three components within a newly created Department of Homeland Security (DHS). Immigration and Customs Enforcement (ICE) is responsible for interior enforcement of immigration laws and U.S. Citizenship and Immigration Services (USCIS) administers the immigration service functions of the federal government. Meanwhile, Customs and Border Protection is meant to handle border security functions and assume responsibility for managing, controlling and screening the nation's borders at and between the ports of entry.<sup>3</sup>

Within CBP, the U.S. Border Patrol is tasked with detecting and preventing the illegal entry of persons and contraband across the border *between* the ports of entry.<sup>4</sup> The Border Patrol asserts that its priority mission is to prevent terrorists and terrorist weapons, including weapons of mass destruction, from entering the United States. Additionally, the Border Patrol has a mission of preventing undocumented immigrants, smugglers, and narcotics and other contraband from crossing the border between the ports of entry. The Border Patrol had a budget of \$3.5 billion in fiscal year 2009 to establish and maintain "operational control" of the U.S. border.<sup>5</sup>

In upstate New York, the Border Patrol has deployed a particularly aggressive presence far from the border with Canada. This is especially the case in Rochester, a city located relatively far from the nearest border crossings. The Rochester Station, within the Border Patrol's Buffalo sector,<sup>6</sup> was opened in 2004 as a maritime patrol station coinciding with the launch of a ferry service between Rochester and Toronto, Canada.<sup>7</sup> The station was intended to police cross-border entry into the United States via the ferry. By January 2006, however, the ferry service floundered and closed permanently.<sup>8</sup> Although the Border Patrol officers no longer had a point-of-entry to police, the Rochester Station remained open and, in fact, continued to increase its staffing, from seven agents in May 2008 to 27 agents by January 2011.<sup>9</sup>

Around the time the ferry permanently closed, reports started to emerge indicating that the Border Patrol's Rochester Station was stepping up the use of transportation raids.<sup>10</sup> Numerous newspaper articles and reports document the Border Patrol's practices and indicate that transportation raids in the Buffalo sector account for the bulk of CBP arrests near the northern border.<sup>11</sup> Area residents report that Border Patrol officers maintain a nearly constant presence at Rochester's bus and train stations. Rochester Station alone is reported to have had more arrests than any of the other 55 stations along the northern border.<sup>12</sup> In the Rochester area, Border Patrol agents arrested 2,788 train and bus passengers from October 2005 through September 2009.<sup>13</sup> Between 2007 and 2009 transportation arrests constituted nearly two-thirds of the arrests made by the Rochester Station.

The Border Patrol's incursion into the interior is raising serious concerns, particularly in communities most directly affected by these practices.<sup>14</sup> Local university officials in charge of international student programs have observed that foreign students are increasingly being

The transportation raids present a very real danger to international students at upstate universities. Numerous students have been removed from buses and trains and detained by the Border Patrol even though they were lawfully present. Consider these three cases recently reported in *The Chronicle of Higher Education*:

- A University of Rochester undergraduate from Pakistan was riding an Adirondack Trailways bus to Albany. Border Patrol agents boarded the bus and questioned him about his citizenship status. The student did not have his immigration paperwork with him, believing that his student ID was sufficient for the brief trip within the state. The agents arrested the student. After being detained for two weeks, he appeared before a judge and proved that he was lawfully in the United States with an asylum application pending.
- A University of Rochester doctoral student was traveling to an academic conference at Cornell University when Border Patrol agents boarded his bus. The student was detained for hours at a police station even though his documentation confirmed that he was in the country legally. Apparently, the agent didn't understand the student's paperwork. The student missed the conference.
- A student at the State University of New York at Potsdam's Crane School of Music was removed from an Adirondack Trailways bus because he lacked sufficient documentation. The student, who was from China, was held for a few hours and released. A few days later, agents visited the college and arrested the student. He was held for three weeks at a detention facility several hours from campus until his legal status was confirmed. The detention disrupted his education and he had to leave school.

stopped and questioned by Border Patrol agents while travelling locally and domestically. Transportation raids have become enough of an issue that in the past few years, universities located near the Canadian border have issued travel advisories to their international students, recommending that they now carry proof of their right to be in the United States whenever they travel, no matter how far they intend to travel or regardless of whether they will cross a border.<sup>15</sup>

For a broad category of students, scholars, visitors and other non-citizens, however, even having one's papers in hand provides no guarantee against being wrongfully arrested and detained during a transportation raid. In numerous incidents, individuals have been wrongfully arrested and detained by Border Patrol agents on trains and buses. Some of these individuals were in the midst of the lengthy but routine process of changing their immigration status and had complied with all the rules.<sup>16</sup> Others were arrested and detained because Border Patrol agents refused to heed federal regulations that state that while a person's visa may have expired, their permission to remain in the country may still be valid.<sup>17</sup> In one case, an individual

whose application for a visa extension had already been granted by United States Citizenship and Immigration Services (USCIS) was nonetheless arrested and detained for several days because Border Patrol agents declined to confirm the status of his case.<sup>18</sup>

Another frequently expressed concern is that Border Patrol agents appear to single out passengers on the basis of race and probe passengers of color more carefully than other passengers during questioning.<sup>19</sup> Passengers of color who have told Border Patrol agents that they are United States citizens have been asked to prove their citizenship.<sup>20</sup> In other instances, agents simply assume that passengers of color are not citizens and start their questioning by asking “What country are you a citizen of?” or demanding that passengers “produce [their] documents,” although citizens of the United States are not required to carry proof of citizenship.<sup>21</sup> Border Patrol agents, for example, told a Syracuse University professor of color, who is a citizen and has been repeatedly questioned on Greyhound, that he has to carry his “papers” at all times and that his Syracuse identification card was not sufficient.<sup>22</sup>

Despite mounting public concern, CBP’s testimony to Congress on northern border security makes no mention of its expansion into the interior and CBP’s website and publications provide little explanation of the motivations for or actual costs and impact of this practice.

### **Latino citizens face a consistent pattern of harassment by CBP**

Silvio Torres-Saillant couldn’t board a Greyhound bus in 2007 without armed Border Patrol agents confronting him.

Torres-Saillant, an English professor at Syracuse University and a United States citizen, was singled out by agents on numerous occasions that year.

One incident occurred in the spring as Torres-Saillant was waiting to board a bus to New York City at the Regional Transportation Center in Syracuse. A Border Patrol agent asked him to produce his “documents.” Torres-Saillant, who is Latino, handed the agent his Syracuse University ID card. The agent became angry when the college professor didn’t show him additional identification.

“Since I was traveling on ground transportation within the same state, I did not see the need to carry documents that established my legal status in this country,” Torres-Saillant said.

Clearly assuming that Torres-Saillant was not a citizen, the agent told him that he had to carry his papers at all times. When he saw Torres-Saillant reach into his wallet for additional documentation, the agent walked away and started questioning others. All but one of the individuals who Torres-Saillant saw being questioned that day was a person of color.

Angered by the Border Patrol’s dehumanizing treatment of Latino passengers, Torres-Saillant has stopped riding Greyhound buses.

## II. WHAT THE EVIDENCE REVEALS

Through a Freedom of Information Act request, which is still being litigated,<sup>23</sup> the authors of this report obtained a complete dataset of all transportation arrests in Rochester Station from 2006 to 2009 and detailed information on a random sample of 200 of those arrests. Analysis of these records along with other publicly available documents confirm that Rochester Station's transportation raids represent a marked shift from the Border Patrol's actual mission of policing the border. Furthermore, the evidence suggests an established pattern of misconduct by Border Patrol agents in the course of transportation raids.

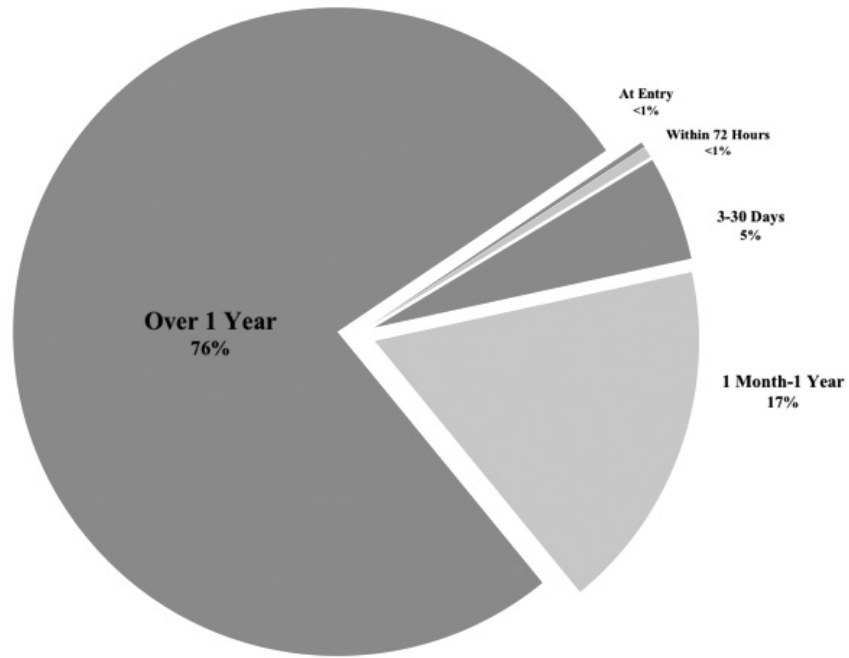
### A. Despite CBP's mission of policing the border, transportation raids do not target recent border crossers.

CBP's public statements suggest that transportation raids target those who have recently crossed the border in connection with suspected terrorism and smuggling operations.<sup>24</sup> Indeed, in a written statement to news reporters, CBP headquarters asserted that transportation raids are "performed in direct support of immediate border-enforcement efforts and as a means of preventing smuggling organizations from exploiting existing transportation hubs to travel to the interior of the United States."<sup>25</sup>

The data shows that transportation raids, in fact, are not related to policing the actual border. Only a small percentage of individuals arrested by Border Patrol agents on trains and buses in Rochester were recent border crossers:

- From 2006 to 2009, the vast majority of those arrested—76 percent (2,092 out of 2,743 total arrests)—had been in the country for more than one year. Over this four-year period, this figure never dropped below 74 percent and peaked at 81 percent in 2007.

### Rochester Station Transportation Raid Arrests (2006–2009) By Time Between Entry and Apprehension\*

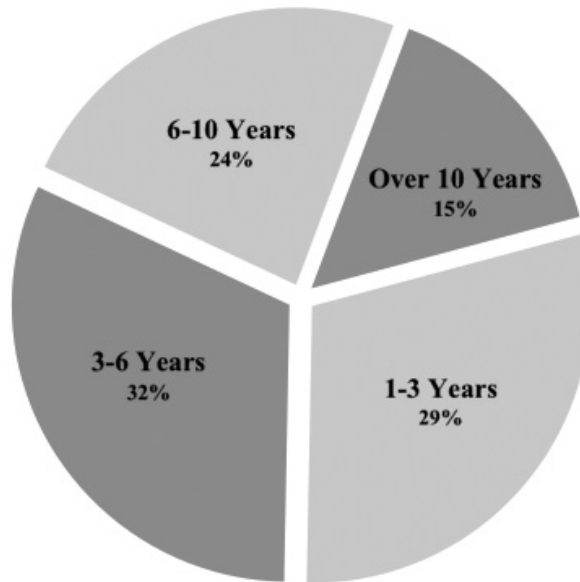


\*These percentages do not reflect 14 individuals whose records did not include the time between their entry and apprehension.

- Among those who had been in the country for more than a year prior to being arrested on a transportation raid, 71 percent had been in the United States for more than three years. Specifically, 32 percent of these individuals had lived in the United States for three to six years, 32 percent had lived here for between six to 10 years and 15 percent had lived here for more than 10 years.



### Length of Time in the U. S. of Individuals Arrested Over One Year After Entry (2006-2009)



\*Data includes only individuals whose date of entry was provided.

- Less than 1 percent of those arrested had entered the United States within the last 72 hours. Only seven individuals (out of 2,743 total arrests) were apprehended at entry and 15 were arrested within 72 hours of entry. The proportion of individuals arrested who were recent border crossers remained constantly low over the four years reported, hovering around 1 percent.

## Rochester Station Transportation Raid Arrests By Time Between Entry and Apprehension

	2006	2007	2008	2009	Total	Percent*
<b>At Entry</b>	1	0	2	4	7	< 1%
<b>Within 72 Hours</b>	1	10	2	2	15	< 1%
<b>3-30 Days</b>	20	31	54	38	143	5%
<b>1 Month – 1 Year</b>	70	108	194	107	479	17%
<b>Over 1 Year</b>	285	617	711	479	2092	76%
<b>Total Arrests*</b>	377	766	966	634	2743	

\* These totals/percentages do not reflect 14 individuals whose records did not include the time between their entry and apprehension.

- Individuals arrested between three and 30 days of entry comprised about 5 percent of total arrests from 2006 to 2009, while individuals arrested between one month and a year of entry comprised slightly more than 17 percent of total arrests. The distribution of individuals arrested in this middle range also remained fairly steady across the four years reported.

These numbers cast serious doubt on whether CBP’s transportation raids do anything to actually protect the border.

### **B. Transportation raid arrests represent a large share of the Border Patrol’s Rochester Station arrests.**

After the closure of the ferry between Rochester and Toronto, Canada, Rochester Station Border Patrol agents began stepping up the use of transportation raids. Despite the fact that they occur far from any point-of-entry into the United States, transportation raid arrests have come to play an outsize role in the Border Patrol’s northern border activity.

After two-and-a-half years of first denying that it kept statistics and then seeking to prevent their disclosure, CBP was required by District Court Judge Scheindlin to reveal hard data on the share of CBP arrests occurring on trains and buses. The data is staggering. It shows that transportation arrests constitute almost two-thirds of all arrests in Rochester between 2007 and 2009.

	Rochester			Buffalo Sector	Northern Border
	Transportation Arrests	Total Arrests	Percent	Total Arrests	Total Arrests
2006	383	911	42%	1517	6599
2007	776	1223	63%	2191	6380
2008	986	1523	65%	3339	7925
2009	647	1040	62%	2672	6806

- From 2006 to 2007, Rochester Station transportation raid arrests more than doubled, from 383 arrests to 776 arrests. Transportation raid arrests peaked in 2008 at 986 arrests. There were 647 arrests in 2009. Transportation arrests continued to make up more than 60 percent of arrests in Rochester in the years for which data is available.
- The transportation raids from Rochester Station alone account for a significant portion of *total* Buffalo sector arrests—29 percent from 2006 to 2009. The percentage of total Buffalo sector arrests represented by Rochester Station transportation raid arrests peaked at 35 percent in 2008.
- Transportation raid arrests in Rochester similarly bolstered total reported northern border arrests, making up 12.4 percent of northern border arrests in 2008 and 10 percent on average from 2006 through 2009.

### C. Agents consistently violate established procedural protections in the course of transportation raids.

The evidence demonstrates that, in addition to making unjustified, warrantless arrests, CBP fails to observe minimal procedural safeguards during transportation raids. For any warrantless immigration arrest, federal regulations impose a procedural safeguard—“the two-officer rule”—which is analogous to protections in the criminal field. The two-officer rule requires that someone *other than* the arresting officer, whose judgment may be clouded by numerous factors—such as the excitement of the arrest, their interest in moving forward with the case, and pressure to increase arrest statistics—examine the person who was arrested and determine whether to commence removal proceedings or exercise prosecutorial discretion.<sup>26</sup> The only exception to this “two-officer rule” applies to situations when no other qualified officer is available and waiting for another officer would lead to an unnecessary delay.<sup>27</sup> Analogously, in the criminal law context, the U.S. Supreme Court has held that the Fourth Amendment re-

quires that a neutral magistrate review a warrantless arrest and make a determination that probable cause exists in order to detain a person prior to her arrest.<sup>28</sup> While the arresting officer is allowed to make an on-the-scene determination that probable cause exists to arrest a suspect, once in custody, the suspect is constitutionally entitled to have a neutral magistrate or in the immigration context, a neutral second officer, review that determination.<sup>29</sup>

- The data reveals systemic non-compliance with arrest procedures as required under the two-officer rule. In 77 percent (2150/2792) of all reported transportation raid arrests, Rochester Station’s agents violated the two-officer rule. In 2006, officers violated the rule nearly 88 percent (336/383) of the time. The rate of violations fluctuated year-by-year between 2006 and 2009, but never dropped below 70 percent of all arrests annually.

	<b>Arrests in which Arresting and Preparing Officers were the Same</b>	<b>Total Arrests</b>	<b>Percent</b>
<b>2006</b>	336	383	<b>88%</b>
<b>2007</b>	661	776	<b>85%</b>
<b>2008</b>	697	986	<b>71%</b>
<b>2009</b>	456	647	<b>70%</b>
<b>Total</b>	<b>2150</b>	<b>2792</b>	<b>77%</b>

Violations of the two-officer rule may constitute Fourth Amendment violations and, in some cases, may be grounds for suppression of evidence gathered as a result of the arrest and termination of removal proceedings.<sup>30</sup> Additional data is required to evaluate officer compliance with arrest procedures on the whole, but systemic violation of the two-officer rule raises serious constitutional concerns and indicates a strong need for a closer examination of CBP’s field practices.

#### **D. A staggering proportion of transportation raid arrestees are detained.**

Prior to 2006, under the policy known as “catch and release,” undocumented migrants apprehended along the border were released into the United States on their own recognizance if they were nationals of countries other than Mexico.<sup>31</sup> In response to criticism that few recent border crossers actually returned for their immigration hearings,<sup>32</sup> on August 23, 2006, then-Secretary of Homeland Security Michael Chertoff announced an end to the practice.<sup>33</sup> Chertoff hailed this policy change as “a breakthrough in deterring illegal immigration” and a corner-

stone of immigration enforcement efforts.<sup>34</sup> On February 28, 2007, Chertoff reported the following results to the Senate Judiciary Committee: “In July 2005, we were releasing up to 80 percent of non-Mexican illegal aliens because we did not have the bed space to hold them. As of August 2006, all removable aliens caught at the border are detained until returned to their home countries.”<sup>35</sup> This result required a significant expansion of detention capacity, as “catch and release” was in part motivated by the lack of available bed space to house all illegal border crossers along the southern border.

Consistent with, and likely precipitated by this policy change, the data in our sample reveals that nearly all individuals arrested during transportation raids are detained by CBP without being screened for risk of flight, threat to the community or other considerations. Officers from the Rochester Station detain individuals regardless of whether they are recent entrants apprehended at the border or have resided in the United States for years.

- Seventy-four percent of individuals arrested were detained. Male arrestees are typically detained in the Buffalo Federal Detention Center in Batavia, NY, while women are sent to local prisons and county jails.

	<b>Arrests Resulting in Detention (in sample set*)</b>	<b>Total Arrests (in sample set)</b>	<b>Percent</b>
<b>2006</b>	21	50	<b>41%</b>
<b>2007</b>	38	50	<b>76%</b>
<b>2008</b>	45	50	<b>90%</b>
<b>2009</b>	43	50	<b>86%</b>
<b>Total</b>	<b>147</b>	<b>200</b>	<b>74%</b>

\*These data represent only 200 randomly selected observations from the larger dataset.

- The data further indicates that the actual rate at which CBP agents deemed an individual to merit detention is even higher. Were it not for a lack of bed space, agents would have detained an even larger percentage of transportation raid arrestees. This situation occurred most frequently in FY 2006, when 50 percent of all arrestees were released on their own recognizance due to a lack of bed space. In subsequent years, the rate at which individuals were released on their own recognizance due to a lack of bed space was far lower. In FY 2007 this occurred in 4 percent of cases, and no instances were reported in FY 2008 and FY 2009.<sup>36</sup> When those two groups are joined, the data indicated that the percentage of all arrestees who were detained or *who would*

have been detained if not for a lack of available bed space was 87 percent over all four years, 92 percent in FY 2006, 80 percent in FY 2007, 90 percent in FY 2008 and 86 percent in FY 2009.

	<b>Arrests Resulting in Detainment</b> (in sample set*)	<b>Arrests that Would Have Resulted in Detainment if Space Were Available</b> (in sample set)	<b>Total Arrests</b> (in sample set)	<b>Percent Resulting or that Would Have Resulted in Detainment if Space Were Available</b>
<b>2006</b>	21	25	50	<b>92%</b>
<b>2007</b>	38	2	50	<b>80%</b>
<b>2008</b>	45	0	50	<b>90%</b>
<b>2009</b>	43	0	50	<b>86%</b>
<b>Total</b>	<b>147</b>	<b>27</b>	<b>200</b>	<b>87%</b>

\* These data are from a random sample of 200 arrest records from a larger data set.

- In 70 percent of cases, individuals who were arrested and detained were required to post a bond in order to be released while awaiting an immigration hearing. Bond amounts ranged from \$1,500 to \$20,000, but in more than 88 percent of cases in which bond was allowed, those detained were required to post bonds of \$5,000 to \$10,000 (with one individual being required to post a \$20,000 bond). In 30 percent of cases in which the individual was detained, no bond was allowed.
- There was insufficient data to determine how many of the individuals arrested and detained were able to post bond. However, because transportation raids target a population in transit between points with the United States, it is unlikely that individuals arrested are carrying large sums of cash. It may take them considerable time to contact family members who then must go to a local immigration office to post bond. It is likely that many individuals must wait at least several days before their release, if they are able to post the bond.<sup>37</sup>

These overzealous detention practices impose immense human and financial costs. Most of the individuals detained by Rochester Station agents—about 66 percent of total detained arrestees for whom detention location was indicated—were detained in federal immigration detention facilities, most frequently in the nearby Buffalo Federal Detention Center in Batavia, NY. The remaining 34 percent of individuals detained, for whom detention location was indicated, were held at local county jails. The average cost of maintaining an individual in a federal detention facility is approximately \$122 a day.<sup>38</sup> Taxpayers may pay even higher costs for arrestees housed in county jails because contracts for outsourcing detention are negotiated on a case-by-case basis.<sup>39</sup> In addition to the expense to taxpayers, overzealous detention practices tear apart families and uproot communities. When people are unnecessarily detained, children lose parents, families lose breadwinners and neighborhoods lose valued residents.

## E. Transportation raids lead to the arrests mostly of Latin Americans, men, and individuals with a “medium or black” complexion

The records obtained through the FOIA request reveal basic demographic information about the individuals arrested in the Rochester Station. The records do not reveal who was subject to additional intrusive questioning or pulled off a train but not placed in removal proceedings, but they confirm anecdotal reports that arresting officers focus on Latin Americans and persons of color in their enforcement operations.

- The arrests included individuals from 130 nations, but 73 percent of arrestees came from Latin America, 11 percent from Asia, and 9 percent from sub-Saharan Africa and Oceania. Canadians represented only 0.4 percent of those arrested.

Arrests	Country of Origin	Percent
2044	Latin America	73.2%
306	Asia	11.0%
246	Sub-Saharan Africa/Oceania	8.8%
141	Europe	5.1%
44	Middle East	1.6%
10	Canada	0.4%

\* Data includes only individuals whose country of origin was provided.

- CBP grouped the arrestees according to 10 complexion categories. Of the 2,776 arrests that captured skin complexion, the vast majority were categorized as having a medium or black complexion.

Arrests	Complexion	Percent
1976	Medium	71.2%
357	Black	12.9%
178	Light	6.4%
98	Light Brown	3.5%
54	Dark	2.0%
51	Medium Brown	1.8%
33	Dark Brown	1.2%
24	Fair	0.9%
4	Olive	0.1%
1	Yellow	0.0%

\* Data includes only individuals whose complexion was provided.

- The vast majority of arrestees were male.

<b>Arrests</b>	<b>Gender</b>	<b>Percent</b>
2152	Male	77.1%
640	Female	22.9%



### III. DISCUSSION

#### A. The prevalence of transportation raids is likely attributable to pressure to increase northern border arrest rates.

The prevalence of transportation raids by Border Patrol agents is likely attributable to the sharp spike in funding and personnel for the northern border in the aftermath of the Sept. 11 terrorist attacks and the accompanying pressure to increase arrest rates in order to justify prior and future budget increases.

After the Sept. 11 attacks, the federal government announced an increased emphasis on preventing the entry of terrorists and weapons of mass destruction.<sup>40</sup> At the end of fiscal year 2004, the first full year that the DHS existed as an agency, about 10,500 agents patrolled the U.S. land borders. This number increased to more than 20,000 agents by the end of fiscal year 2010.<sup>41</sup> CBP reported to the Government Accountability Office that \$3.6 billion was appropriated for border security efforts between the ports of entry in 2010, and as a result, the Border Patrol is more heavily staffed now than at any time in its 86-year history.<sup>42</sup>

The Sept. 11 attacks also raised concerns that terrorists may attempt to infiltrate the United States along the expansive and sparsely-guarded northern border.<sup>43</sup> Congress heard testimony about northern border operations and CBP came under sharp pressure from lawmakers to step up operations along the northern border.<sup>44</sup> The USA PATRIOT Act (“Patriot Act”) specifically mandated tripling the number of Border Patrol agents and increasing the monitoring technology along the northern border.<sup>45</sup> In 2004, Congress passed additional legislation to increase staffing along the northern border, aiming to station 20 percent of new recruits there.<sup>46</sup> The Border Patrol subsequently tripled the number of northern border agents, from 340 in fiscal year 2001 to 1,008 in fiscal year 2005.<sup>47</sup> The escalation in the number of northern border agents continued well after the Patriot Act’s mandate was met: Of the 20,558 active Border Patrol agents in fiscal year 2010, 2,263 (11 percent) patrolled the northern border.<sup>48</sup>

From 2001 to 2005, however, northern border apprehensions declined from 12,338 to 7,343. Buffalo sector apprehensions dropped from 1,434 to 400 in the same time period.<sup>49</sup> Attempting to explain the drop, DHS officials maintained that their increased deployments had a deterrent effect on potential border crossers.<sup>50</sup> However, a 2006 report by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University doubted this claim, questioning whether enough Border Patrol agents could be deployed at any one time along the massive border to be a deterrent.<sup>51</sup> CBP was under intense pressure to return quantifiable results—increased apprehensions.

In 2003, the Buffalo sector signaled the importance of arrest statistics by requiring its officers to report apprehension rates on a daily basis.<sup>52</sup> This emphasis at a local level is not surprising (even though CBP long denied that it kept any statistics of arrests by the Rochester Station and once it admitted to such statistics sought to prevent their release to the public). Apprehension

rates have long been used as a measure of the Border Patrol's performance.<sup>53</sup> In a recent report to "enable Congress and the public to assess the performance of the agency as it relates to CBP's mission," CBP references apprehension rates among its "Fiscal Year Highlights," "Border Enforcement Successes," and the "reportable performance measures" to support its strategic plan.<sup>54</sup> Apprehension rates even factor into the agency's own self-auditing formula, as CBP compares actual apprehension rates with the "targets" set out in its strategic plan.<sup>55</sup>

Statements from Border Patrol agents further suggest that the Border Patrol has internalized a philosophy that more arrests indicate better performance. A detention officer at Federal Detention Center in Batavia reportedly told a transportation raid arrestee that CBP had been arresting people simply to meet quotas.<sup>56</sup> A former Border Patrol agent in California, Tony Plattel, told reporters that constant demands to meet monthly arrest quotas led agents to cruise streets, bus stops, and even medical clinics looking for undocumented immigrants. The quota was eight apprehensions per day, and if agents did not meet that goal, they were pressured to arrest more individuals the next day or face having their shifts changed. According to Plattel, he was fired for interfering with the quota system—he drove six dehydrated undocumented immigrants back to Border Patrol headquarters despite orders to wait until he arrested more people to fill his van.<sup>57</sup>

Against this backdrop, it becomes clearer why CBP is devoting disproportionate resources and personnel to transportation raids: to boost arrest numbers. In fact, Border Patrol agents in upstate New York are known to refer to transportation raids as "immigration Dumpster-diving" and acknowledge that those arrested have not crossed the border recently.<sup>58</sup>

As the data shows, Rochester Station transportation raid arrests have increased significantly since 2006 and constitute an appreciably larger part of Border Patrol arrests in the region than they did several years ago. The proportion of total Border Patrol arrests in the region represented by transportation raid arrests increased 60 percent from 2006 to 2009.

Despite the disproportionate effort devoted to transportation raids, CBP's reporting to Congress makes no mention of its raids on domestic trains and buses. It does not distinguish arrests made during these raids from arrests of people attempting to illegally enter the country. The agency's 2010 report to Congress provides extensive description and analysis of CBP's operations, but says nothing about interior enforcement in general, or transportation raids in particular. This omission is perplexing since interior arrests account for such a high percentage of total CBP arrests. The disconnect between CBP's mission to police the border and its expansion of interior operations strongly suggests that pressure to increase arrests is distorting the agency's priorities.<sup>59</sup> Equally disturbing is the agency's unwillingness—until compelled by months of litigation—to produce documents that evidence this distortion.<sup>60</sup>

Consider two cases, which clearly demonstrate that CBP's interior arrests have little connection to border security and are intended to merely inflate arrest rates:

- In 2006, a man who was stopped and questioned by a Border Patrol agent at the Greyhound bus station in Rochester confided to the agent that he was the father of a three-

month-old baby, a U.S. citizen who was in poor health and had recently undergone several surgeries. Upon being arrested, the man expressed his concern that his wife and their ill baby were also traveling through Rochester, were unfamiliar with the area and would be unsure how to proceed without him if he were detained. The agents arrested and detained the man regardless, and subsequently arrested the man's wife, and their sick child, upon arrival at the station. The mother and father, neither recent border crossers, were placed into removal proceedings.<sup>61</sup>

- In 2010, a doctor from South Asia who was lawfully in the United States was traveling by bus from the mid-west to New York City for interviews with residency programs. Border Patrol agents boarded his bus at the Greyhound station in Rochester and questioned and arrested him. The doctor had arrived in the U.S. on a valid visa. He had timely applied for an extension of his visa, which had been granted the day before his arrest. After being removed from the bus, the doctor was taken to an office where he tried to show his immigration receipt showing that he was lawfully in the United States. The agents weren't interested. In fact, they didn't even bother to check his status. The doctor was then taken to the federal detention center in Batavia. He was released three days later and dropped off at the Greyhound bus station without his luggage or his passport. With the help of volunteer legal assistance, the doctor retrieved his belongings. The removal proceedings against him were terminated, but he was deeply traumatized by the experience, which completely disrupted his plans and negatively affected his residency interviews.<sup>62</sup>

## **B. Transportation raids raise serious constitutional concerns.**

In 1928, Supreme Court Justice Louis D. Brandeis wrote that the "right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men."<sup>63</sup> Supreme Court Justice William O. Douglas expanded on that point when he declared in 1952 that such a right is "indeed the beginning of all freedom."<sup>64</sup> Americans agree, and expect to be able to travel freely in the United States without having their right to be let alone violated by armed Border Patrol agents.

In defending its stop, question, search, and arrest practices on domestic trains and buses, CBP cites to its statutory authority to operate within a reasonable distance of the border,<sup>65</sup> and federal regulations that define "reasonable distance" as being within 100 miles of the border.<sup>66</sup> (In New York State, approximately 97 percent of the population lives within 100 miles of the border).<sup>67</sup> However, in setting these regulations, "Congress did not say that all searches within 100 miles of the border were reasonable."<sup>68</sup> This 100-mile zone is not a Constitution-free zone. While at the border, its functional equivalent, or permanent border checkpoints Border Patrol agents are authorized to conduct routine searches without probable cause or a warrant,<sup>69</sup> elsewhere Border Patrol agents are held to a higher constitutional standard.<sup>70</sup>

When CBP boards domestic trains and buses, the agency is not operating at the border or its functional equivalent,<sup>71</sup> but rather as a roving patrol.<sup>72</sup> Roving border patrols are governed

by the same Fourth Amendment standards as stop, question, search and arrest activities by regular police officers.<sup>73</sup> The U.S. Supreme Court has rejected arguments made by Border Patrol in the past that when it operates within 100 miles of the border, the regular rules of the Fourth Amendment do not apply.<sup>74</sup>

Under current practice in upstate New York, Border Patrol agents board trains and buses during scheduled stops to ask passengers about their immigration status, as well as for proof of their citizenship or lawful status in the United States. In these situations, CBP argues, they do not need to have reasonable suspicion about an individual rider to ask a question because the encounter is consensual, and riders are free to ignore or not respond to the questioning.<sup>75</sup> Indeed, nearly 95 percent of sample arrest records examined by the authors contained boilerplate language stating that the arresting officer had initiated “consensual, nonintrusive” contact or engaged in a “consensual conversation” with the arrestee.<sup>76</sup>

What Border Patrol fails to recognize is that when an armed agent questions passengers on a train or bus, sometimes in the middle of the night with a flashlight glaring at the rider’s face, few individuals would feel that they have the right to refuse to answer the agent’s questions. These encounters, which CBP describes as consensual in order to circumvent constitutional protections, all too often feel more like coerced consents as the setting for the questioning would make few passengers believe that they have the ability to refuse to answer questions. Indeed, passengers and community leaders have echoed this sentiment that the Border Patrol agents’ questioning is coercive in nature and refusing to answer is not a realistic option.<sup>77</sup>

Moreover, there is the underlying question of whether Border Patrol officers should be engaged in enforcement actions on domestic trains and buses in the first place. Do we want to live in a country where armed officers approach Americans engaged in no wrongdoing and ask them to produce papers to prove that they are indeed Americans? Since New York City falls entirely within 100 miles of the border, should armed Border Patrol agents ride the subway asking passengers questions about their citizenship and detaining individuals who cannot prove their status? Customs and Border Protection claims this authority, yet most Americans would find it objectionable.

## IV. BORDER PATROL PRACTICES BEYOND TRAINS AND BUSES

The data obtained through the FOIA litigation and through public observations of Border Patrol activities provide a detailed account of the agency's practices on trains and buses in New York. Yet concerns regarding Border Patrol's practices extend into our state's towns, villages, farms, streets and highways. Moreover, serious concerns have been raised about state and local police engaging in interior immigration enforcement operations along with border patrol agents:

- In 2009, a United States citizen who was born in Mexico was stopped in his car by Border Patrol agents who demanded to see his driver's license. He produced his New York license, but the Border Patrol agents refused to believe that it was real, accusing him of being in the United States illegally. He responded that he was a naturalized citizen, but the Border Patrol agents did not believe him and asked him to get out of his car. They then proceeded to handcuff him. His family members, who were also in the car, pleaded for Border Patrol agents not to arrest him and said that they could offer proof of his citizenship. The Border Patrol agents ignored their pleas and took the man to the Border Patrol station, where he was fingerprinted and photographed. Finally his wife arrived with a copy of his US passport and naturalization certificate. He was released without charges.<sup>78</sup>
- In 2010, Peter Mares, a U.S. citizen of Mexican descent, was providing translation services during a traffic stop by the Sodus Police Department of a Spanish-speaking individual. Peter provided the translation services as a courtesy. The Sodus Police Department called Border Patrol for assistance, and upon arrival, Border Patrol agents began to interrogate Peter and asked him to produce identification. Shocked by the fact that he was being treated as a suspect by Border Patrol, and knowing that as a United States citizen he was not required to carry identification, Peter asked why a United States citizen needed to show ID? In response, the Border Patrol agent became agitated and handcuffed Peter. Border Patrol agents then interrogated Peter about his citizenship. Throughout the entire interrogation Peter was in handcuffs. After approximately 45 minutes, Peter was released without charges.<sup>79</sup>
- In 2008, Border Patrol agents arrested a man after he was stopped for speeding while rushing to deliver his wife's breast milk to their very ill and premature newborn child at a hospital in Syracuse. The man had entered the country on a valid visa. His wife was a physician with a visa to serve in areas with a shortage of doctors. As a condition of her visa, the man's wife had to return to work shortly after giving birth. The man regularly transported his wife's breast milk from her workplace to their baby in the hospital. When he was arrested, the man was awaiting the adjudication of his extension of status application. He was detained for three days and only released after a member of Congress intervened.<sup>80</sup>



Photo credit John Ghertner

- In October 2011 in Sodus, four farm workers were approached by a state trooper while they were sitting on the front steps of one of their homes. The men were drinking beer after returning home from work. The state trooper walked up to the men and told them that they could not drink outside. One of the workers asked the trooper why he couldn't drink a beer on his own property? At that point, a Border Patrol agent emerged from the state trooper vehicle and asked each of the men "Are you legal here?" The agent ordered them to produce their immigration documents. The men produced the relevant documents, and the trooper and the Border Patrol agent left.<sup>81</sup>
- In 2011, state troopers and Border Patrol agents began patrolling a trailer park outside of Sodus, where many farm workers lived. The state troopers and Border Patrol agents drive together from street to street in the park. According to one resident, "We cover up our windows and we don't dare to go outside unless we have to."<sup>82</sup>
- Community residents have also complained about Border Patrol agents stationed outside of churches and stores that cater to Latino populations in their region.



Photo credit John Ghertner.

The reports about Border Patrol activities in towns and villages in upstate New York raise concerns of Border Patrol agents arresting individuals, including United States citizens, without probable cause, and subjecting residents to selective enforcement based on their race or ethnicity. The Supreme Court has repeatedly stated that the normal rules of the Constitution apply to the interior enforcement activities of Border Patrol agents. Upstate New York is not a Constitution-free zone, and the federal government must ensure that CBP practices within 100 miles of the border comport with fundamental constitutional and statutory protections.

## V. CONCLUSION AND RECOMMENDATIONS

The information analyzed in this report raises serious concerns regarding the true motivations for, and consequences of, the Border Patrol's interior enforcement practices. Customs and Border Protection officials assert that the stopping, questioning and arresting of individuals within the interior of the United States directly support their border protection mission. The evidence reveals, however, that in addition to taking place far from the border, these operations do not target recent border crossers. In addition, the evidence raises serious constitutional concerns and shows widespread violations of fundamental procedural protections in the execution of arrests.

The stark contrast between CBP's mission of policing the border and its expanding interior operations strongly suggests that CBP's priorities are being distorted by pressure to increase arrest rates. The evidence set forth in this report suggests a serious problem and a disturbing national trend, but the public's ability to fully gauge the problem is limited by CBP's refusal to disclose all relevant records or allow interviews of CBP employees. Litigation to obtain access to additional records is ongoing. The authors of this report hope to provide an updated analysis once those records are obtained.

The policy recommendations below would address the problems outlined in this report. These recommendations are guided by a belief that CBP's programs should support and advance its mission of border protection, that border enforcement should conform with constitutional requirements and federal statutes and regulations, and that CBP should serve—not harm—the communities where it operates.

- **CBP should end its practice of raids on domestic trains and buses.**

As the evidence in this report demonstrates, transportation raids do not lead to the apprehension of recent border crossers. Transportation raids are an inefficient use of the federal government's limited resources and do little, if anything, to further CBP's mission of border protection. In addition, transportation raids raise the specter of a police state in the communities in which they are implemented and result in significant privacy intrusions for citizens and non-citizens alike. These factors, combined with the evidence of procedural violations and concerns regarding racial profiling in the course of transportation raids, counsels against the continued use of transportation raids by Border Patrol agents.

- **To the extent that CBP continues to engage in interior enforcement operations, it should ensure that it does so only in situations involving specific suspicion of recent illegal border crossing, and that proper constitutional and procedural protections are in place.**

In light of the concerns this report and other public accounts raise about Border Patrol operations, to the extent that CBP continues these practices, it should ensure that such activities



take place only in situations involving specific suspicion of recent illegal border crossing, and that proper guidelines and protections be put in place and followed by Border Patrol agents.

Clear guidance should be issued to Border Patrol agents that the objective of interior operations is to support the agency's border protection mission and prevent the unauthorized entry of dangerous persons and contraband. Thus, agents should not arbitrarily stop, question or arrest individuals without reasonable suspicion or probable cause that the individual has recently crossed the border illegally. Furthermore, violations of procedural protections such as the two-officer rule and the consent requirement should be adequately investigated and addressed.

While CBP has refused to release its training materials on racial and ethnic profiling, accounts of its operations raise serious concerns that Border Patrol agents resort to racial and ethnic profiling techniques to determine who to stop, question or arrest. Such accounts indicate that even if CBP policy expressly forbids racial and ethnic profiling, additional guidance and training of Border Patrol officers is necessary to ensure appropriate compliance.

- **CBP should discontinue the use of arrest-based performance measures.**

As evidenced by CBP's own publications, arrest rates have long been used as a measure of the agency's performance. Despite the fact that counsel for CBP insisted that the agency does not measure arrest rates,<sup>83</sup> it was later revealed in the course of litigation that, in fact, it tracked arrest statistics on a daily basis. Not surprisingly, reliance on such measures creates adverse incentives to increase arrest numbers by any means. CBP should make clear that Border Patrol stations and agents receive no additional performance credit for arrests of individuals who are not recent border crossers and that its resources are focused on furthering the agency's expressed mission of preventing the unauthorized entry of dangerous persons and contraband.

- **State and local police should refrain from enforcing federal immigration laws, including by engaging in interior enforcement operations with Border Patrol agents and requesting translation assistance from Border Patrol**

Public safety depends on community members working cooperatively with law enforcement officials to fight crime. To truly have safe communities, police officials and New York residents must work together. Yet when state and local law enforcement officers act, in effect, like immigration enforcement agents by closely collaborating with Border Patrol agents engaged in interior enforcement operations, immigrant communities become fearful that any kind of interaction with the police will put themselves and their family members at risk for detention and deportation. Millions of immigrant New Yorkers, including hundreds of thousands of undocumented immigrants, will refrain from contacting the police when they have been a victim of a crime, or when they have witnessed a crime. If community members don't trust law enforcement enough to alert them of crime occurring in their community, then law enforcement officers are not able to adequately police our communities and maintain safety. Therefore, state and local police should refrain from enforcing federal immigration laws, including by

engaging in interior enforcement operations with Border Patrol agents and requesting translation assistance from Border Patrol.

- **CBP should re-evaluate its policy of nearly universal detention of individuals arrested.**

CBP's policy of detaining the vast majority of individuals arrested in the course of transportation raids imposes immense human and financial costs. In addition to the cost to taxpayers of detaining people, CBP's overzealous detention policy imposes a significant hardship on the individuals detained and their family members and community ties in the United States. CBP should assess an individual's risk of flight, danger to the community, and other policy and humanitarian considerations before detaining an individual, and should only detain individuals when there is serious risk of flight or danger to the community.

- **The governor and attorney general of New York should monitor CBP's interior operations to ensure that the rights of New York residents are protected.**

The cumulative impact of CBP's interior enforcement operations is felt not only by those individuals arrested but by all citizens and non-citizens who live in the areas where these operations take place. For example, observers in Rochester have noted that Border Patrol operations have diminished the city's long-standing reputation as a welcoming place for international students, scholars and visitors. The recent growth in the Border Patrol's stops and arrests in public areas and at domestic transportation stations in New York creates a tangible chilling effect for the state's residents and state authorities should take action to ensure that CBP's incursion into interior communities does not violate New Yorkers' rights.

- **Congress and DHS should improve oversight and accountability with respect to transportation raids.**

The data on transportation raid arrests at Rochester Station provides strong evidence of pervasive problems with CBP's interior operations in upstate New York, and news reports and individual accounts from other parts of the country are strongly suggestive of a national trend. Due to incomplete access to relevant records and decision-makers, the public's ability to fully assess the scope of the problems presented by CBP's operations is severely limited. Based upon the evidence set forth in this report, Congress or the DHS Office of the Inspector General should undertake a broader investigation of CBP's practices and ensure that adequate corrective measures are implemented.

## VI. APPENDIX

The data analyzed in this report was acquired in connection with a Freedom of Information Act (FOIA) request filed by New York University's Immigrant Rights Clinic on behalf of Families for Freedom and three individuals who had been arrested by CBP on trains and buses. Litigation over this matter remains ongoing in *Families for Freedom v. Customs and Border Protection*, 10 Civ. 2705 (SAS) before Judge Shira Scheindlin in the Southern District of New York. The FOIA request sought data to provide the public with a clearer understanding of the rising incidence of Border Patrol stops and arrests on domestic trains and buses in upstate New York, including (1) arrest records (with fields that reflect complexion, country of citizenship, length of time in the country, and criminal history), (2) expectations, quotas or arrest goals, and (3) other information concerning how transportation raids are performed.

Through this litigation, CBP agreed to generate and deliver (1) an Excel spreadsheet containing data regarding all 2,792 Rochester Station transportation raid arrests from 2006 to 2009 ("CBP Spreadsheet"), and (2) a random sample of 200 redacted I-213 records drawn from the total transportation raid arrests from 2006 to 2009 ("Sample Set Data"). CBP was also required, through the Court's many orders, to produce statistics, memoranda and other documents related to transportation arrests.

### A. Description of the Data

#### 1. Spreadsheet Data on All Rochester Station Transportation Raid Arrests (2006 – 2009)

The CBP Spreadsheet contained information on each of 2,792 Rochester Station transportation raid arrests reported for the years 2006 to 2009. This total consists of 383 arrests in 2006, 776 arrests in 2007, 986 arrests in 2008, and 647 arrests in 2009. CBP extracted 15 categories of data from the I-213 arrest records for all transportation raid arrests in Rochester Station, and produced this data in the CBP Spreadsheet. The categories provided were:

1. Place of entry, estimated date of entry and nearest municipality to enter
2. Arrest date and time
3. Citizenship
4. Period of time in the United States
5. Complexion
6. Gender
7. Occupation
8. Method of arrest
9. Arresting Officer
10. ArsAgt2 (other agents present)
11. ArsAgt3 (other agents present)

12. Preparing Officer of the Form I-213
13. Status at entry
14. Status when found
15. Place of arrest

## 2. Full I-213 Arrest Records for a Sample Set of 200 Arrests

Full I-213 arrest forms, with identifying information redacted, were produced for a random sample set of 200 out of the 2,792 arrests, representing 50 arrests randomly selected from each of the four years reported. The Clinic agreed to generate a random sample that would identify 200 I-213 forms to be delivered by counsel for CBP. To assist in generating the random sample, we enlisted the help of John R. B. Palmer, an attorney and Ph.D. candidate in Population and Public Policy at Princeton University's Woodrow Wilson School of Public and International Affairs. Mr. Palmer generated a random sample using a random number generator. Each arrest was assigned a numerical identifier and 50 identifiers were drawn without replacement from each of the four years of data respectively. After the random sample was generated, CBP produced the corresponding Form I-213 arrest records.

In addition to various fields in which BP officers filled in specific categories of information, the Form I-213s contain a narrative portion in which BP officers described the circumstances of the arrest, the officer's encounter with the individual arrested, and the subsequent disposition of the case.

The I-213s and corresponding narratives were reviewed for relevant data, which we then recorded in an Excel spreadsheet. Data categories included:

1. The date of arrest and reported date of entry to the United States
2. Whether the individual entered the United States by crossing a land border, and whether the individual specifically crossed the U.S. Canada border
3. Whether the individual entered the United States as a minor
4. Whether minors were present at the arrest
5. Officer's use of boilerplate language to indicate consent
6. Whether the individual was detained
7. If released, the reasoning given for the individual's release
8. If detained, the amount of bond set and the location of detention
9. Whether the individual was issued a Notice to Appear, or was removed immediately as a "bag and baggage" case
10. Whether the individual expressed a fear of return to their native country
11. Whether the individual refused to answer questions, or remained silent throughout questioning
12. Whether the individual indicated potential eligibility for relief or the existence of a pending application for lawful status

This information was tallied and used as a source of additional statistical data. In addition certain narratives were used as qualitative examples of BP officer conduct during arrests.

## **B. Methods of Analysis**

The majority of the statistics presented in this report come from analysis of the CBP Spreadsheet. Some statistics presented, however, particularly those pertaining to detention rates, come from analysis of the Sample Set Arrest Records, because the CBP Spreadsheet provides less detail than the actual arrest records, which include a narrative of the arrest provided by the arresting officer. In addition to helping us generate the random sample of 200 arrests described above, John Palmer assisted in overall analysis of the data provided by the government. This section briefly describes how we obtained the statistics presented in this report.

### **1. Time in U.S. Prior to Arrest**

Mr. Palmer determined the time elapsed between entry and arrest using two different methods, each of which utilized distinct categories of data from the CBP spreadsheet on all transportation raid arrests. Thus, the results produced by one category of data could be verified by the results produced by the alternate category of data.

The first category of data consisted of estimates of time elapsed between entry and arrest, which is a separate field in the I-213 and which CBP provided in a separate column in the CBP spreadsheet. For each arrest, the Spreadsheet indicates whether the arrestee was arrested at entry, within 72 hours of entry, four to 30 days after entry, one month to one year after entry, or more than one year after entry. To use these data, we had to exclude 49 of the 2,792 arrests due to missing values.

The second category of data consisted of the actual dates of entry and arrest, which are separate fields in the Spreadsheet and which Mr. Palmer used to make an independent calculation of time elapsed between entry and arrest. To use these data, we had to exclude 313 of the 2,792 arrests due to missing values. We categorized these results using the same time-categories as with the first estimates, such as “within 72 hours” after entry and “over one year” after entry, etc. We made two modifications to these categories, however: Instead of the category “4-30 days,” we used the category “3-30 days” so that there would not be a gap between this category and the 72 hour category. We also merged the “at entry” and “within 72 hours” categories such that we counted anyone arrested at entry or up to 72 hours from entry as “within 72 hours.”

Both analyses produced nearly identical results. Small differences in the results of the two analyses were due to missing date-of-entry values in the spreadsheet which required exclusion of 313 arrests from the second method of analysis, thus making the results of the first method slightly more accurate. Therefore, for the purposes of the discussion of the time elapsed between entry and arrest for less than one year, and to determine the proportion of

those arrested over one year after entry, this report refers to the numerical results of the first analysis. However, the time-elapsed option entered by CBP groups together all individuals who were arrested over one year after entry, without indicating specifically how many years had elapsed between entry and arrest. Thus, we relied on the second method of analysis to examine, for those arrested over one year after entry, how many were arrested one to three years, three to six years, six to 10 years, and more than 10 years after entry.

## 2. Violations of Two-Officer Rule

In order to determine the frequency of violations of the two-officer rule, we analyzed the incidence of arrests in which the arresting officer is the same as the officer that interviews the arrestee and prepares the I-213. To do this, we used information drawn from the spreadsheet data in order to identify instances in which the arresting officer is the same as the preparing officer, that is, the officer who conducts the interview. For each of the 2,792 arrests, the spreadsheet data provided by the government lists the arresting officer(s) and the preparing officer in separate columns. To preserve the anonymity of the officers, the Spreadsheet Data does not contain their names. Instead, the government assigned each officer a number, such as “Officer 1,” or “Officer 15.” Based on this coding by the government, where the same numerical identifier is listed both as an arresting officer and a preparing officer for a single arrest, we have assumed that the arresting officer and the preparing officer were the same person.

In order to perform this analysis across all 2,792 entries in the I-213 data, we first created a new variable which took the value 1 in cases where the preparing officer was also listed as one of the arresting officers, and 0 otherwise. We then calculated the proportion of arrests for which this new variable took the value 1 to determine the incidence of violation of the two-officer rule.

## 3. Rates of Detention and Bond Amounts

Information regarding the rates at which CBP detained individuals arrested during transportation raids were determined by culling data from the narrative portions of the sample set of 200 I-213 arrest records. Each narrative stated whether an individual was detained or released after the arrest. If the individual was released, the narrative indicated whether the release was based on a lack of bed space or another reason, such as humanitarian considerations. If the individual was detained, the narrative indicated whether the individual was allowed bond and, if allowed bond, at what amount bond was set. To arrive at the statistics presented in this report, we entered this data into an Excel spreadsheet and tallied the number of individuals released versus detained, the number of individuals released for lack of bed space, and information relating to bond.

#### 4. Boilerplate Language Regarding Consent

The narrative portions of the sample set of I-213 arrest records also contained the BP officer's description of circumstances surrounding the initiation of questioning. To determine the frequency of boilerplate language regarding consent, we tallied the instances in which the narrative stated that the officer initiated "consensual" or "non-intrusive" conversation, and calculated the proportion of arrest records that repeated this boilerplate language.

The data and analysis underlying each of the statistics presented in this report are on file with the authors.

## ENDNOTES

- 1 In litigation, CBP denied the existence of documents responsive to plaintiffs' request for this data for more than a year before finally producing it.
- 2 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).
- 3 Department of Homeland Security, Department Subcomponents and Agencies, <http://www.dhs.gov/xabout/structure/> (last visited July 6, 2011).
- 4 Government Accountability Office, Report to Congressional Requesters, *Border Patrol: Checkpoints Contribute to Border Patrol's Mission, but More Consistent Data Collection and Performance Measurement Could Improve Effectiveness* 1 (Aug. 2009), available at [http://azgovernor.gov/documents/BorderSecurity/Border-PatrolCheckpoints\\_Report\\_2009.pdf](http://azgovernor.gov/documents/BorderSecurity/Border-PatrolCheckpoints_Report_2009.pdf) (last visited July 6, 2011) [hereinafter "GAO Report, Border Patrol Checkpoints, August 2009"].
- 5 *Id.* at 5.
- 6 The U.S. border is divided into 20 sectors. The northern border, spanning over 4,000 miles, consists of the Buffalo sector, as well as the Blaine, Spokane, Havre, Grand Forks, Detroit, Swanton, and Houlton Sectors. See U.S. Customs and Border Protection, Office of Border Patrol – Sectors Map, [http://www.cbp.gov/linkhandler/cgov/careers/customs\\_careers/border\\_careers/bp\\_agent/sectors\\_map.ctt/Sectors\\_Map.pdf](http://www.cbp.gov/linkhandler/cgov/careers/customs_careers/border_careers/bp_agent/sectors_map.ctt/Sectors_Map.pdf) (last visited July 6, 2011).
- 7 Nina Bernstein, *Border Sweeps in North Reach Miles Into U.S.*, N.Y. TIMES, Aug. 29, 2010, available at <http://www.nytimes.com/2010/08/30/nyregion/30border.html> (last visited June 14, 2011).
- 8 Michelle York, *Rochester Finds It Is Losing a Ferry Service*, N.Y. TIMES, Jan. 16, 2006, available at <http://www.nytimes.com/2006/01/16/nyregion/16ferry.html> (last visited July 3, 2011).
- 9 Colin Wodard, *Far From Border, U.S. Detains Foreign Students*, CHRONICLE OF HIGHER EDUCATION, Jan. 9, 2011, available at <http://chronicle.com/article/Far-From-Canada-Agressive/125880> (last visited July 4, 2011).
- 10 See Darryl McGrath, *Strangers on a Train*, METROLAND, Vol. 29, Issue 30, July 27, 2006, available at [http://www.metroland.net/back\\_issues/vol29\\_no30/features.html](http://www.metroland.net/back_issues/vol29_no30/features.html) (last visited July 4, 2011).
- 11 See, e.g., Nina Bernstein, *Border Sweeps in North Reach Miles Into U.S.*, N.Y. TIMES, Aug. 29, 2010, available at <http://www.nytimes.com/2010/08/30/nyregion/30border.html> (last visited June 14, 2011); Ken Dilanian & Anna Gorman, *A Home They Don't Know*, L.A. TIMES, June 28, 2010; Emily Bazar, *Some Travelers Criticize Border Patrol Inspection Methods*, USA TODAY, Nov. 2, 2009, available at [http://www.usatoday.com/news/nation/2008-09-30-border-patrol-inside\\_N.htm](http://www.usatoday.com/news/nation/2008-09-30-border-patrol-inside_N.htm) (last visited July 6, 2011); Jennifer Lee, *A Protest Over Bus and Train Citizenship Checks*, NY TIMES [City Room Blog], Apr. 2, 2008, available at <http://cityroom.blogs.nytimes.com/2008/04/02/a-protest-over-bus-and-train-citizenship-checks> (last visited June 14, 2011). See also May 18, 2009 Letter to Prof. Nancy Morawetz from Ellen A. Dussourd, Director of International Student and Scholar Services at the University of Buffalo (describing several incidents involving the detention or arrest of international students by CBP officials and expressing concerns over CBP's enforcement activities) (on file with authors); Declaration of Patricia Rector, Coordinator of the Upstate New York Detention Task Force, at ¶ 4 (noting that "[t]here has been a dramatic increase in the number of transportation checks conducted by Border Patrol Agents and the number of persons apprehended in the Syracuse area since 2006.") (on file with authors).
- 12 Tim Martinez, Newhouse School of Public Communications, Syracuse University, *Caught in Transit: The Rochester Border Patrol Station*, <http://cmr.syr.edu/newhouse/video/article.html> (last visited June 14, 2011).
- 13 Nina Bernstein, *Border Sweeps in North Reach Miles Into U.S.*, N.Y. TIMES, Aug. 29, 2010, available at <http://www.nytimes.com/2010/08/30/nyregion/30border.html> (last visited June 14, 2011).
- 14 See, e.g., Lee, *supra* note 11; Martinez, *supra* note 12 (featuring a video documenting Rochester Border Patrol's transportation raids); see also Emily Bazar, *Border Patrol Expands Transportation Checks*, USA TODAY, Oct. 1, 2008, available at [http://www.usatoday.com/news/nation/2008-09-30-border-patrol-checks\\_N.htm](http://www.usatoday.com/news/nation/2008-09-30-border-patrol-checks_N.htm) (last visited June 14, 2011); Bazar, *supra* note 11; Nadja Drost, *Border Net Catches Few Terror Suspects*, TIMES



UNION, Apr. 19, 2009; John O'Brien, *Immigrant Group Wants Border Patrol Agents to Stop Detaining Travelers*, SYRACUSE CITY NEWS, July 5, 2008, available at <http://www.syracuse.com/city/index.ssf/2008/06/29-week/> (last visited July 6, 2011).

- 15 See Travel Advisory for International Students, Visiting Scholars and International Employees (April 26, 2010), available at <http://wings.buffalo.edu/intlservices/documents/TravelAdvisory-4-26-10.pdf> (last visited July 6, 2011); Bazar, *supra* note 11 (noting that students are being reminded to carry their documentation with them wherever they go, after several international students at the University of Rochester were questioned or detained by Border Patrol agents).
- 16 Wodard, *supra* note 9.
- 17 Federal regulations and a publication issued by United States Citizenship and Immigration Services (USCIS) provide that certain non-citizens who file a timely application to extend their stay in the United States are authorized to continue approved activities, including employment with the same employer, for up to 240 days while the extension application is being adjudicated. 8 C.F.R. § 274a.12(b)(20); USCIS Customer Guide, available at <http://www.uscis.gov/USCIS/Resources/C1en.pdf> (last visited July 4, 2011). A federal court also recently ruled that such an authorization necessarily includes the right to remain in the United States and to be free from arrest and detention absent some other justification. *El Badrawi v. U.S.*, No. 07-CV-1074, 2011 WL 1457186, at \*11 (D. Conn. Apr. 12, 2011). Similarly, individuals who apply for adjustment of status to permanent resident, asylum, withholding of removal or cancellation of removal are authorized to apply for employment authorization while their adjustment application is being adjudicated. 8 C.F.R. § 274a.12(c) (8); (10). Pursuant to the reasoning articulated in *El Badrawi*, such individuals should not be subject to arrest and detention for immigration purposes absent some other justification. See *El Badrawi*, at \*11.
- 18 August 2011 Letter to Prof. Nancy Morawetz (on file with authors).
- 19 The authors of this report requested that CBP release training materials relevant to racial profiling but CBP has refused to do so on grounds of attorney-client privilege. Litigation over whether these training materials have been wrongfully withheld remain on-going.
- 20 In one instance, for example, a citizen of Asian ancestry traveling on Greyhound was asked for identification after telling a Border Patrol agent that she was in fact a United States citizen. Upon producing her New York driver's license, the agent scrutinized her license and walked off the bus with it for several minutes before returning it to her. Declaration of Mollie McCabe, at ¶12, Dec. 14, 2009 (on file with authors).
- 21 Declaration of Silvio Torres-Saillant, at ¶¶ 5, 10, Dec. 18, 2009 (on file with authors).
- 22 *Id.* at ¶¶ 6-7.
- 23 On June 16, 2011, Judge Shira Scheindlin ordered that CBP release the annual totals for the Buffalo Sector Daily Reports, which contain apprehension statistics for 2004 to 2009 for the six Border Patrol stations within Buffalo sector. However, the court allowed CBP, on privilege grounds, to withhold two training memoranda related to racial profiling. *Families for Freedom v. U.S. Customs and Border Protection*, No. 10 Civ. 2750 (SAS), 2011 WL 2436707 (June 16, 2011). The government produced the data in September 2011. More recently, Judge Scheindlin found that CBP was improperly withholding documents by failing to acknowledge the existence of relevant documents.
- 24 In 2003, when CBP was reorganized as a division of the newly created Department of Homeland Security, it was explicitly charged with securing the nation's borders. In its strategic plan for 2009 – 2014, CBP laid out two explicit goals: (1) secure the borders to protect against the entry of dangerous people and goods and prevent unlawful trade and travel; and (2) ensure the efficient flow of legitimate trade and travel across the U.S. borders. U.S. Customs and Border Protection, *Secure Borders, Safe Travels, Legal Trade: U.S. Customs and Border Protection Fiscal Year 2009-2014 Strategic Plan* (July 2009), available at [http://www.cbp.gov/linkhandler/cgov/about/mission/strategic\\_plan\\_09\\_14.ctt/strategic\\_plan\\_09\\_14.pdf](http://www.cbp.gov/linkhandler/cgov/about/mission/strategic_plan_09_14.ctt/strategic_plan_09_14.pdf) (last visited July 6, 2011).
- 25 Wodard, *supra* note 9.
- 26 Under 8 C.F.R. § 287.3(a) “[a]n alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Act will be examined by an officer other than the arresting officer.” Further, 8 C.F.R. § 287.3 (b) states, “[i]f the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge for further inquiry.”

- 27 8 C.F.R. § 287.3 (a): “If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him or her, may examine the alien.”
- 28 *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (“When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.”)
- 29 *See Hung v United States*, 617 F.2d 201, 202 (10th Cir. 1980) (stating the Immigration officer who conducts the examination of the arrested immigrant is playing a role analogous to that of a magistrate in a criminal proceeding).
- 30 *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984); *Rajah v. Mukasay*, 544 F.3d 427, 447 (2d Cir. 2008); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006).
- 31 Press Release, U.S. Customs and Border Protection, DHS Secretary Announces End to ‘Catch and Release’ on Southern Border (Aug. 23, 2006), available at [http://www.cbp.gov/xp/cgov/admin/c1\\_archive/messages/end\\_catch\\_release.xml](http://www.cbp.gov/xp/cgov/admin/c1_archive/messages/end_catch_release.xml) (last visited July 6, 2011) [hereinafter “CBP Press Release, End to ‘Catch and Release’”]; Press Release, Department of Homeland Security, Statement of the Honorable Michael Chertoff, Secretary U.S. Department of Homeland Security Before the United States Senate Judiciary Committee (Feb. 28, 2007), available at [http://www.dhs.gov/xnews/testimony/testimony\\_1172853501273.shtm](http://www.dhs.gov/xnews/testimony/testimony_1172853501273.shtm) (last visited July 6, 2011) [hereinafter “DHS Press Release, Chertoff Statement to Senate Judiciary Committee”].
- 32 *See* Joanna J. Lydgate, *Assembly Line Justice: A Review of Operation Streamline*, 98 CAL. L. REV. 490, 488-91 (2010); *Chertoff Hails End of Let-Go Policy*, WASHINGTON TIMES, July 28, 2006, available at <http://www.washingtontimes.com/news/2006/jul/28/20060728-123022-6096r/?page=1> (last visited July 6, 2011).
- 33 CBP Press Release, End to ‘Catch and Release’, *supra* note 31; DHS Press Release, Chertoff Statement to Senate Judiciary Committee, *supra* note 31.
- 34 CBP Press Release, End to ‘Catch and Release’, *supra* note 31.
- 35 DHS Press Release, Chertoff Statement to Senate Judiciary Committee, *supra* note 31.
- 36 This situation occurred most frequently in FY 2006, when 50 percent of all arrestees were released on their own recognizance due to a lack of bed space. In subsequent years the rate at which individuals were released on their own recognizance due to a lack of bed space was far lower. For example, in FY 2007 this occurred in 2 percent of cases, and no instances were reported in FY 2008 and FY 2009.
- 37 According to officials at the Buffalo Federal Detention Center, bonds must be posted in person at a local immigration office.
- 38 Detention Watch Network, *About the U.S. Detention and Deportation System*, <http://www.detentionwatchnetwork.org/aboutdetention> (last visited July 4, 2011).
- 39 *Id.*; National Immigration Forum, *The Math of Immigration Detention*, July 7, 2009, available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf> (last visited July 6, 2011).
- 40 Chad C. Haddal, Specialist in Immigration Policy, Congressional Research Service, *Border Security: The Role of the U.S. Border Patrol 22* (Aug. 11, 2010), available at <http://www.fas.org/sgp/crs/homsec/RL32562.pdf> (last visited July 6, 2011).
- 41 Border Security: DHS Progress and Challenges in Securing the U.S. Southwest and Northern Borders: Hearing before the Comm. on Homeland Security and Governmental Affairs, U.S. Senate 1, 9 (Mar. 30, 2011) (testimony of Richard M. Stana, Homeland Security and Justice Issues, Government Accountability Office), available at <http://www.gao.gov/new.items/d11508t.pdf> (last visited July 6, 2011) [hereinafter “Testimony of Richard M. Stana, U.S. Senate, March 2011”].
- 42 Testimony of Richard M. Stana, U.S. Senate, March 2011, *supra* note 41, at 9.
- 43 The northern border is defined as the area between the United States and Canada, running from Washington State through Maine. CBP Strategic Plan 2009-2014, *supra* note 24, at 9. The 9/11 Commission’s report noted that prior to the terrorist attacks, the northern border received little attention “[d]espite examples of terrorists entering from Canada, [and] awareness of terrorist activity in Canada and its more lenient immigration laws.” Haddal, *supra* note 40, at 21.

- 44 See Challenges Facing the Department of Homeland Security in Balancing its Border Security and Trade Facilitation Missions: Hearing before the Subcomm. on Infrastructure and Border Security of the House Comm. on Homeland Security, 108th Cong., 1st Sess. 10 (June 16, 2003) (testimony of Richard M. Stana, Director, Homeland Security and Justice Issues, Government Accountability Office) *available at* <http://www.gao.gov/new.items/d03902t.pdf> (last visited July 5, 2011).
- 45 Haddal, *supra* note 40, at 22.
- 46 Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 § 5202, 118 Stat. 3638, 3734 (2004).
- 47 *Id.*
- 48 Testimony of Richard M. Stana, U.S. Senate, March 2011, *supra* note 41, at 9. 17,535 agents (85 percent) patrolled the southwest border, 246 (one percent) patrolled the southeast coastal border, and 514 agents (three percent) were dedicated to other locations. *Id.*
- 49 U.S. Border Patrol, Total Illegal Alien Apprehensions by Fiscal Year (Oct. 1st through Sept. 30th), [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/usbp\\_statistics/bp\\_apps\\_mexico\\_99\\_10.ctt/bp\\_apps\\_mexico\\_99\\_10.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/bp_apps_mexico_99_10.ctt/bp_apps_mexico_99_10.pdf) (last visited July 6, 2011).
- 50 See Testimony of Michael P. Jackson, Deputy Secretary, Department of Homeland Security Before the House Committee on Homeland Security, 110th Cong., 1<sup>st</sup> Sess., at 3 (Feb. 15, 2007) (stating that “vigorous CBP enforcement created a strong deterrence effect that led to a marked decrease in land apprehensions in FY 2006”).
- 51 TRAC Immigration, *Controlling the Borders* (2006), *available at* <http://trac.syr.edu/immigration/reports/141> (last visited July 6, 2011).
- 52 Dec. 16, 2010 Letter to Judge Shira A. Scheindlin from David Bober, Assistant U.S. Attorney (on file with authors). In response to FOIA requests, CBP at first denied the existence of these reports and then refused to release the documents. As described in *supra* note 23, District Judge Scheindlin ordered CBP to release these reports. The reports containing annual totals were produced in September 2011. Portions of the daily reports were produced on October 31, 2011.
- 53 Haddal, *supra* note 40, at 12.
- 54 U.S. Customs and Border Protection, *Performance and Accountability Report Fiscal Year 2009* 1, 6, 15, 70, 72, 78, 79 (Dec. 2009), *available at* [http://www.cbp.gov/linkhandler/cgov/newsroom/publications/admin/perform\\_rpt\\_2009.ctt/perform\\_rpt\\_2009.pdf](http://www.cbp.gov/linkhandler/cgov/newsroom/publications/admin/perform_rpt_2009.ctt/perform_rpt_2009.pdf) (last visited July 6, 2011) [hereinafter “CBP Performance and Accountability Report FY 2009”].
- 55 CBP Performance and Accountability Report FY 2009, *supra* note 54, at 70, 72, 78 & 79.
- 56 See Redacted Memorandum in Support of Motion to Suppress, filed in Immigration Court by Claudia Slovinsky (on file with author).
- 57 David Kelley, *Fired Border Patrol Agents Alleges Quota Pressure in Inland Empire*, L.A. Times, February 6, 2009, <http://articles.latimes.com/2009/feb/06/local/me-border-patrol-quota6> (last visited July 6, 2011).
- 58 Nadja Drost, *Border Net Catches Few Terror Suspects*, Times Union, Apr. 19, 2009.
- 59 Editorial, *On the Lake Shore Limited*, N.Y. TIMES, Sept. 1, 2010, *available at* <http://www.nytimes.com/2010/09/01/opinion/01wed2.html> (last visited July 5, 2011).
- 60 On September 30, 2011, Judge Shira Scheindlin ordered that CBP release several documents after months of litigation, stating “It appears that defendants [CBP] have produced as few documents as they could possibly produce to plaintiffs [Families for Freedom] without serious consequences. Even more troubling, they have *admitted to the existence* of as few documents as they could possibly get away with.” *Families for Freedom v. U.S. Customs and Border Protection*, No. 10 Civ. 2750 (SAS) (September 30, 2011) (emphasis in original).
- 61 Form I-213, dated February 3, 2006, produced as US 001605 – US 001608 (on file with authors).
- 62 Letter on file with the authors.
- 63 *Olmstead v. United States*, 277 U.S. 438, 478 (1928)

- 64 *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952).
- 65 8 U.S.C. § 1357(a)(3) (2006). This provision of the immigration laws provides that within a reasonable distance from the border, an immigration officer may, without a warrant, board and search railway cars, aircraft, or vehicles for the purpose of patrolling the border to prevent the illegal entry of individuals into the United States.
- 56 8 C.F.R. § 287.1(a)(2) (2010). This federal regulation interprets the term “reasonable distance” in 8 U.S.C. § 1357(a)(3) to mean “within 100 miles from any external boundary of the United States.”
- 67 “Constitution Free Zones: The Numbers,” American Civil Liberties Union, October 22, 2008, available at <http://www.aclu.org/technology-and-liberty/constitution-free-zone-numbers>.
- 68 *United States v. Barbera* 514 F.2d 294, n.16 (2d Cir. 1975).
- 69 *See, e.g., United States v. Singh*, 415 F.3d 288, 293 (2d Cir. 2005).
- 70 *Id.* at 294. *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (“Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of 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.”)
- 71 *See, e.g., United States v. Barbera* 514 F.2d 294, 296-99 (2d Cir. 1975) (finding that Border Patrol arrest on a bus was not at the functional equivalent of the border where a sizable city, and the nonstop travel of the bus therefrom, breaks the path to the border, and noting that despite proximity to the border, the entire city of Massena, NY is not the functional equivalent of the border); *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (holding that permanent checkpoints, treated as the functional equivalent of the border, must present minimal interference with legitimate traffic and be operated in a regularized manner that minimizes discretionary law enforcement activity).
- 72 The transportation raids described in this report can be characterized as roving patrols for two reasons: First, they are conducted far from the border, on domestic trains and buses that have not crossed an international border. Second, the population targeted by these raids are not recent entrants, and are in fact very rarely entrants from the northern border.
- 73 *See United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).
- 74 *See Id.* (rejecting Border Patrol’s argument that within 100 miles of the border it can stop vehicles at random without any suspicion.)
- 75 Questioning of passengers on a train or bus without individualized suspicion is permissible as long as “a reasonable person would have felt free to decline the officers’ requests or otherwise terminate the encounter.” *Florida v. Bostick*, 501 U.S. 429, 438 (1991).
- 76 Consensual encounters with border patrol agents can become detentions that trigger Fourth Amendment scrutiny at the point where the individual does not feel free to continue on his or her way or to disengage from the conversation with the border patrol officer. *See United States v. Tehrani*, 826 F. Supp. 789 (D. Vt. 1993) (finding a consensual encounter become a detention when defendant was asked to go with agents to police room at an airport). Factors which are relevant for analyzing whether an encounter is consensual include: the lack of threatening presence of several officers; lack of display of weapons; lack of physical contact; tone of voice; lack of prolonged retention of ID or personal belongings; and whether the officer makes a request to accompany him or her to a police room. *See Glover*, 957 F.2d 1004, 1008.
- 77 “Consent that is the product of official intimidation or harassment is no consent at all.” *Florida v. Bostick*, 501 U.S. 429, 438 (1991).
- 78 Records on file with the authors of the report.
- 79 Records on file with the authors of the report.
- 80 August 2011 Letter to Prof. Nancy Morawetz from Hilary T. Fraser (on file with authors).
- 81 Records on file with the authors of the report.
- 82 Records on file with the authors of the report.
- 83 Letter from David Bober to Nancy Morawetz, September 21, 2010, in connection with *Families for Freedom v. U.S. Customs and Border Protection, et al.*, 10 Civ. 2705 (SAS).





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