

Ticket to Profile: the Border Patrol's Transportation Checks
at the Spokane, WA Intermodal Center

Nancyrose Houston

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Angelina Snodgrass Godoy

Mary Kay Gugerty

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University of Washington

Abstract

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Nancyrose Houston

Chair of the Supervisory Committee:

Angelina Snodgrass Godoy

Department of Law, Societies, and Justice

School of International Studies

This thesis examines transportation checks, one of the United States Border Patrol's operational strategies in the 100-mile border zone. Transportation checks have been criticized as "show-me-your-papers" operations that rely on racial and ethnic profiling and violate constitutional rights. There has been little research on transportation checks, and none covering their increased frequency during the Trump administration. I use U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement's (ICE) own I-213 arrest data from 2013 to 2020 to examine transportation check arrests in the Northwest, most at the Spokane, WA Intermodal Center. I also examine Supreme Court precedent and policy around transportation checks and racial profiling at the border. The transportation check data from Spokane strengthens the case for constitutional violations and disproportionate targeting of people of color, particularly individuals of Latin American origin. It also demonstrates that transportation checks in Spokane overwhelmingly arrested long-term U.S. residents and people without criminal

history, despite CBP's literature characterizing them as targeting recent border crossers and security threats. Transportation checks have a high "miss rate" of people questioned versus arrested and operate with a dragnet approach that sweeps up many U.S. citizens, permanent residents, and others with legal status. This research concludes with policy recommendations to definitively end transportation checks, which have decreased after advocacy and legal challenges culminated in Greyhound's 2020 decision to refuse Border Patrol agents access to their buses.

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List of Abbreviations

ACLU - American Civil Liberties Union
APIS - Advanced Passenger Information System
CBP - U.S. Customs and Border Protection
DACA - Deferred Action for Childhood Admissions
DHS - U.S. Department of Homeland Security
DOJ - U.S. Department of Justice
FOIA - Freedom of Information Act
GAO - U.S. Government Accountability Office
ICE - U.S. Immigration and Customs Enforcement
INA - Immigration and Nationality Act
KWW - Keep Washington Working Act
LPR - Lawful Permanent Resident
NWIRP - Northwest Immigrant Rights Project
NYCLU - New York Civil Liberties Union
OFO - Office of Field Operations
TPS - Temporary Protected Status
USCIS - U.S. Citizenship and Immigration Services
UWCHR - University of Washington Center for Human Rights

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Introduction

You're seated on your bus waiting to depart the Spokane Intermodal Center, looking forward to a quiet evening ride to Seattle. You've just pulled out your book and begun to read when movement outside the bus catches your eye. Three men dressed in green uniforms are walking towards the bus. They all have badges and guns on their hips. You glance around the half-empty bus, wondering if someone dangerous is on board. The bus driver waves two of the men onto the bus, greeting one of them by name. One officer stands near the driver's seat surveying the bus while the other walks up the aisle past you towards the back of the bus. You see that his uniform says "U.S. Border Patrol." Your eyes follow him as he then walks back up the aisle towards you, asking each passenger, "Are you a U.S. citizen?" Everyone behind you says "yes." He reaches your row and you reply in the affirmative as well, but he barely glances at you. Two rows ahead, the agent asks a young man who looks Latino, "Are you a U.S. citizen?" He replies, "I'm a citizen of Mexico but I have DACA," handing the agent a small card. The agent looks down at it and at the young man again. "I'm going to have to ask you to come with me." The young man protests, "See right there, code C33. It means I have DACA – I'll even show you my license as well." You stare, unsure what to do. The agent says, "Those cards can be faked. I'm going to ask you to exit the bus for a few minutes."¹ The young man repeats, "I have DACA. I'm headed home for spring break," as the agent stands over him. Soon enough, he's off

¹ This narrative is meant to provide a first-person feel for what it might be like to be on a bus receiving a transportation check. The details of the incident are compiled from real cases, such as the detention of Sergio Vera, a young man with DACA, and the apprehension of Mohana Elshieky, who Border Patrol agents told that his "license and work permit could have easily been falsified and that they looked fake." See Suzanne Phan, "Father, son with DACA detained on Greyhound bus by Border Patrol in Spokane," *KOMO News*, January 11, 2018, <https://komonews.com/news/local/federal-way-father-and-son-with-daca-detained-in-spokane-on-greyhound-bus-by-border-patrol> (accessed May 12, 2023); Azmi Haroun, "The US government had to pay comedian Mohanad Elshieky \$35,000 after detaining and accusing him of having 'fake' papers. He's hoping more people take their cases to court," *Business Insider*, May 5, 2021, <https://www.businessinsider.com/mohanad-elshieky-immigrant-comedian-detained-greyhound-bus-accused-fake-papers-2021-4>.

the bus. You can see him out the window speaking with the third agent and the one who was previously waiting near the driver's seat. You're filled with dread as your eyes flit between their conversation and the first agent who is finishing his check of everyone aboard. He stops for longer than usual to talk to an older Asian woman. The passport she gives him appears to check out, though, because he hands it to her, finishes his rounds, and exits the bus.

Finally, the young man with DACA re-boards the bus. His eyes are rimmed with red and as he sits down, you see he's shaking slightly. The three agents walk back into the station. The bus pulls out of the station twenty-five minutes late, en route to Seattle. You don't sleep at all on the five hour ride home.

Scenes like this one were common at the Spokane Intermodal Center in Spokane, Washington from 2013 until February 2020. U.S. Customs and Border Protection (CBP) calls these operations, during which agents of the U.S. Border Patrol board buses or trains to look for people without lawful immigration status, "transportation check operations." These checks have come under intense scrutiny due to their reliance on racial and linguistic profiling and questionable constitutionality.² Federal statute allows them to occur anywhere within one hundred miles from the border, in the "100-mile border zone" where rights are limited. This expands the Supreme Court's unique and explicit acceptance of the Border Patrol's racial and ethnic profiling "near the border" into towns and cities across the United States, leading to a

² American Civil Liberties Union, "The Constitution in the 100-Mile Border Zone," accessed May 12, 2023, <https://www.aclu.org/other/constitution-100-mile-border-zone>; NYU School of Law Immigrant Rights Clinic, the New York Civil Liberties Union and Families for Freedom, *Justice Derailed: What Raids on New York's Trains and Buses Reveal about Border Patrol's Interior Enforcement Practices*, November 2011, accessed May 12, 2023, https://www.nyclu.org/sites/default/files/publications/NYCLU_justicederailedweb_0.pdf; NYU School of Law Immigrant Rights Clinic and Families for Freedom, *Uncovering USBP: Bonus Programs for United States Border Patrol Agents and the Arrest of Lawfully Present Individuals*, January 2013, accessed May 12, 2023, https://m.moam.info/uncovering-usbp-families-for-freedom_647a3dfc097c476c028ca0ff.html?utm_source=slidelegend.

dragnet effect that sweeps up citizens, permanent residents, and others based mostly on their racial and ethnic appearance. This thesis argues that these transportation checks limit people's freedom of movement, erode constitutional rights, and have profound consequences for those who are interrogated and/or arrested. These "show me your papers" policies send a message to people who are foreign-born that they are unwelcome in the United States, which proclaims itself a nation of immigrants. Through racial profiling, this message also extends to U.S. citizens who are perceived to be foreign-born because they do not fit into the false conceptualization of Americans as white.³

This analysis is an in-depth examination of the transportation checks conducted at the Spokane Intermodal Center between 2013 and 2020. The practice of transportation checks became a prominent topic in the news in 2018, both in Washington State and nationally. This media attention continued into 2021 in Washington State, with the settlement of a lawsuit by the Attorney General's Office against Greyhound. Despite the publicity, there has never been a comprehensive report on transportation check arrests in Washington State. This is largely due to the lack of transparency in CBP, the Border Patrol's parent agency. CBP publishes a summary of arrests in each sector each fiscal year, but these arrests are not categorized by locations and methods of arrest.⁴ This forces immigrant rights advocates to rely on aggregating individual accounts of arrests from community members in order to establish a pattern of abuse.

³ Thierry Devos and Mahzarin R. Banaji, "American = White?," *Journal of Personality and Social Psychology* 88, no. 3 (2005): 447–66, <https://doi.org/10.1037/0022-3514.88.3.447>; Sherrow O. Pinder, "Whiteness: The Definitive Conceptualization of an American Identity," in *The Politics of Race and Ethnicity in the United States: Americanization, De-Americanization, and Racialized Ethnic Groups*, ed. Sherrow O. Pinder (New York: Palgrave Macmillan US, 2010), 39–65, https://doi.org/10.1057/9780230106697_3.

⁴ For a 2020 example, see U.S. Customs and Border Protection, "United States Border Patrol Sector Profile - Fiscal Year 2020," <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Fiscal%20Year%202020%20Sector%20Profile%20%28508%29.pdf>.

This analysis relies on I-213s, a form filled out by Border Patrol agents, CBP officers, and Immigration and Customs Enforcement (ICE) for each so-called “deportable alien” they arrest, to establish both broad patterns and specific details of what happened during transportation checks at the Spokane Intermodal Center. These I-213s were acquired by a Freedom of Information Act (FOIA) request and subsequent lawsuit, as is often necessary for federal immigration enforcement agencies to release documents. The forms are difficult to obtain, but worth the effort: I-213s provide many details about the person arrested and the circumstances of the encounter that are not provided by CBP elsewhere. As such, they can shed light on practices and statistics that agencies would prefer to keep secret. The most recent research about transportation arrests using I-213s was based on 2006-2009 data from upstate New York. The resulting *Justice Derailed* report by the NYU School of Law Immigrant Rights Clinic, New York Civil Liberties Union, and Families for Freedom documented racial profiling and questioned how those arrests related to the mission of the Border Patrol, since very few arrests were of recent border crossers.⁵ My analysis builds on this report, as well as others from Washington State and Michigan that document the policies and practices of the Border Patrol near and far from the U.S.-Canada border.⁶

⁵ NYU School of Law, *Justice Derailed*.

⁶ ACLU Michigan, *The Border’s Long Shadow: How Border Patrol Uses Racial Profiling and Local and State Police to Instill Fear in Michigan’s Immigrant Communities*, March 25, 2021, accessed May 12, 2023, https://www.aclumich.org/sites/default/files/field_documents/100_mile_zone_report-updated.pdf; Fred T. Korematsu Center for Law and Equality and Human Rights Group, Forks, *Terror in Twilight: Border Patrol Involvement in Local Policing*, 2013, https://digitalcommons.law.seattleu.edu/korematsu_center/20; Sarah Curry, Kendra Anderson, Angelina Snodgrass Godoy, and Carolyn Pinedo Turnovsky, *The Growing Human Rights Crisis Along Washington’s Northern Border*, August 2012, One America and University of Washington Center for Human Rights, https://cbpabusestest2.files.wordpress.com/2018/11/northern_border_2012.pdf.

Research Purpose

The primary purpose of this report is to document as completely as possible the Border Patrol's transportation check arrests in Washington State, in order to flesh out the information shared with the public through the news media, advocacy organizations, and lawsuits. Many of these findings, organized into sections called "People" and "Process," will be unsurprising to advocates who heard stories of individuals arrested in Spokane or elsewhere. However, given the opacity of federal immigration enforcement, any information can be useful information in monitoring their abuses. The eighty-nine I-213s analyzed here give further insight into the patterns of enforcement in Spokane because of their comprehensiveness relative to previous coverage. They also have the advantage of using the words of the Border Patrol agents themselves to show deviation from policy and violation of rights. My hope is that this snapshot of the details of transportation checks can be used as further evidence against the practice, as well as leading to questions about the practices and policies of the immigration enforcement regime in general.

This report also compiles prior research and reporting around transportation checks, especially the changes that have occurred in the past ten years. This includes examining transportation check policies during the Obama and Trump Administrations, which are not publicized but have been acquired through various Freedom of Information Act (FOIA) requests. I also give a history of the positive changes that have been made through the work of American Civil Liberties Union (ACLU), activist organizations, and the Washington State Attorney General's Office, specifically their pressure on Greyhound Lines. I include context around Greyhound's 2020 change of their policy regarding permission for Border Patrol agents to board their buses. This context reveals Greyhound's insincerity and history of anti-immigrant policies,

while also celebrating their eventual policy change, which has largely stopped transportation checks for the time being.

Finally, this analysis also considers legal questions around transportation checks. Reports about the 100-mile border zone and warrantless transportation checks often stress their violation of Fourth Amendment rights, especially through rampant racial and ethnic profiling. However, the section titled “Implications of Findings” will examine how the Supreme Court has sanctioned selective law enforcement based on racial and ethnic appearance, especially in the nation’s extended border zone. The Department of Justice (DOJ) and Department of Homeland Security’s (DHS) nondiscrimination policies appear to go farther in prohibiting racial and ethnic profiling than the Supreme Court, but make little to no practical difference.⁷ I will conclude by examining the effectiveness and efficiency of transportation checks in terms of fulfilling the Border Patrol’s mission on the northern border. How many people are impacted by transportation checks each year at the Spokane Intermodal Center? Do transportation checks fulfill a national security interest, and if so, does this outweigh their negative consequences?

What are CBP and the Border Patrol?

This research will focus on the actions of the U.S. Border Patrol, which is one branch of U.S. Customs and Border Protection (CBP), the agency primarily responsible for “protecting the nation’s international borders.”⁸ The Border Patrol and its officers, known as agents, are the primary focus of this analysis. However, it is necessary to understand the overall structure of Border Patrol’s parent agency, CBP, to fathom the vastness of this agency and the oversight

⁷ I will refer to this occasionally as “racial profiling” for succinctness, although in many cases this is actually ethnic profiling, since Latinx and Hispanic identities are considered an ethnicity. In addition, the definition of racial profiling is typically interpreted as including race, ethnicity, religion or national origin.

⁸ Hillel Smith, *U.S. Customs and Border Protection’s Powers and Limitations: A Primer*, accessed May 12, 2023, <https://crsreports.congress.gov/product/pdf/LSB/LSB10559>

responsibilities involved. This analysis will refer to “CBP” when outlining policies that refer to the entire agency, and “the Border Patrol” or “Border Patrol agents” when referring specifically to actions of this smaller agency.

CBP includes various different branches that fulfill specialized functions. Besides agents of the Border Patrol, CBP includes customs officers, agricultural specialists, import specialists, and other roles. Border Patrol Agents are specifically charged with patrolling the areas *between* ports of entry, whereas customs officers work for the Office of Field Operations (OFO) at official entry points, including airports. Border Patrol agents can be differentiated from the blue-uniformed employees of the other offices by their green uniforms, a relic of the time before they were merged with customs officers into CBP in 2003.⁹ The Border Patrol’s priority mission is “preventing terrorists and terrorists [sic] weapons, including weapons of mass destruction, from entering the United States,” while their website lists their primary mission as “protect[ing] our Nation by reducing the likelihood that dangerous people and capabilities enter the United States between the ports of entry.”¹⁰

CBP is in turn one branch of the U.S. Department of Homeland Security (DHS), which is the third largest Cabinet department in terms of personnel.¹¹ DHS is charged with a dizzying array of responsibilities: anti-terrorism, border security, immigration and customs, cyber security, and disaster prevention and management. As seen in Figure 1, U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS) are the other two agencies within DHS that deal with immigration matters, with ICE and CBP providing similar

⁹ Garrett Graff, “The Green Monster: How the Border Patrol became America’s most out-of-control law enforcement agency,” *Politico*, November 2017, <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220/>.

¹⁰ “Border Patrol Overview,” U.S. Customs and Border Protection, last modified May 9, 2023, <https://www.cbp.gov/border-security/along-us-borders/overview#:~:text=The%20primary%20mission%20of%20the%20the%20ports%20of%20entry>.

¹¹ “Priorities,” Department of Homeland Security, last modified February 3, 2023, <https://www.dhs.gov/priorities>.

and sometimes overlapping roles of enforcement of immigration and customs laws. ICE primarily operates in the interior of the United States, while CBP is responsible for international borders.¹²

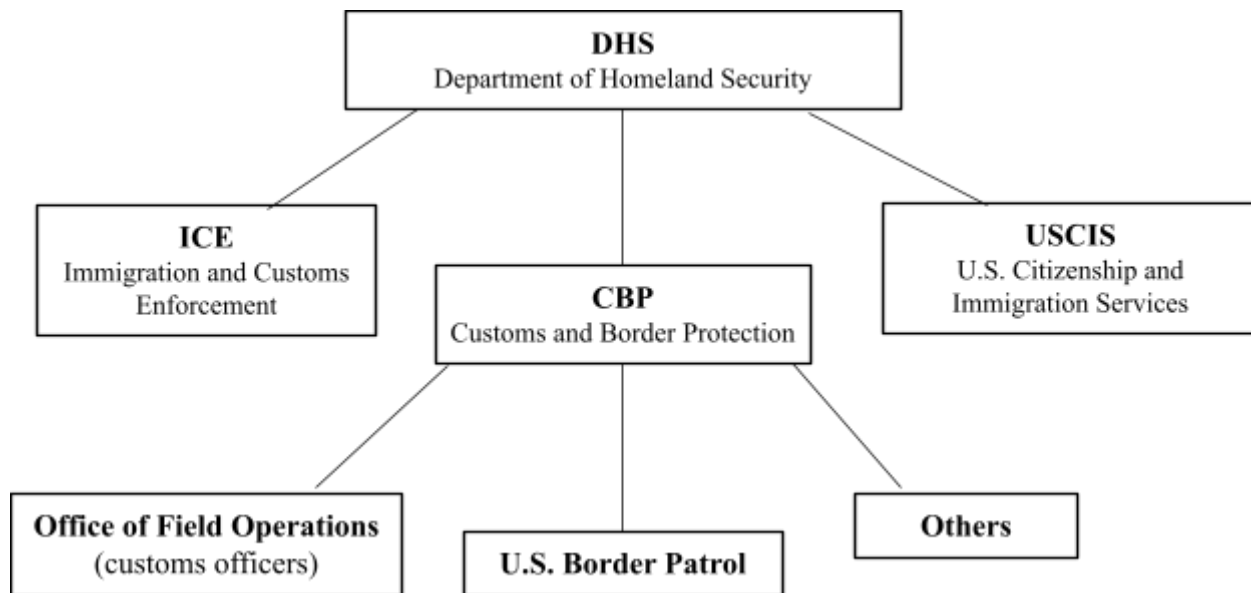


Figure 1: Partial organizational chart for the immigration-related agencies within DHS and the mentioned offices within CBP.

CBP is the largest law enforcement agency in the nation, employing nearly 60,000 people.¹³ The Border Patrol itself employed a total of 19,740 agents in fiscal year 2020.¹⁴ The Border Patrol’s history has been one of rapid growth, which many blame for rampant corruption and abuse within its ranks.¹⁵ The Border Patrol doubled in size between 1992 and 1999, from

¹² Smith, *U.S. Customs and Border Protection’s Powers and Limitations*.

¹³ Graff, “The Green Monster.”

¹⁴ “U.S. Border Patrol Fiscal Year Staffing Statistics (FY 1992 - FY 2020)”, U.S. Customs and Border Protection, accessed May 12, 2023, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%20%28FY%201992%20-%20FY%202020%29%20%28508%29.pdf>

¹⁵ David Jancsics, “Law Enforcement Corruption along the U.S. Borders,” *Security Journal* 34, no. 1 (March 2021): 26–46, <https://doi.org/10.1057/s41284-019-00203-8>; Graff, “The Green Monster.”

around 4,000 to over 8,000 agents.¹⁶ This was a time of a “hitherto unmatched level of official and public concern about the U.S. government’s ability...to police the U.S.-Mexico boundary,” during which Democrats and Republicans competed to show more active interest in unauthorized immigration.¹⁷ The agency then saw another period of rapid growth after the 9/11 terrorist attacks caused an increasing interest in national security and border security. DHS was created in 2003 in a post-9/11 reorganization of many national security and immigration agencies, and according to the DHS secretary at the time, Congress and the Bush administration “just wanted to give me unlimited amounts of money.”¹⁸ The Border Patrol employed 9,821 agents in 2001, with this number more than doubling by 2008 to over 20,000 agents as a result of this infusion of money and increased focus on border security.¹⁹ As seen in Figure 2, numbers peaked in 2011 at 21,444 Border Patrol agents, and later began dipping back down to rates that have since remained steady at around 19,500.

¹⁶ “U.S. Border Patrol Fiscal Year Staffing Statistics”, U.S. Customs and Border Protection.

¹⁷ Joseph Nevins, *Operation Gatekeeper and Beyond: The War on “Illegals” and the Remaking of the U.S.-Mexico Boundary*, 2nd ed (New York: Routledge, 2010), 4.

¹⁸ Graff, “The Green Monster.”

¹⁹ Graff, “The Green Monster.”

United States Border Patrol

Border Patrol Agent Nationwide Staffing by Fiscal Year

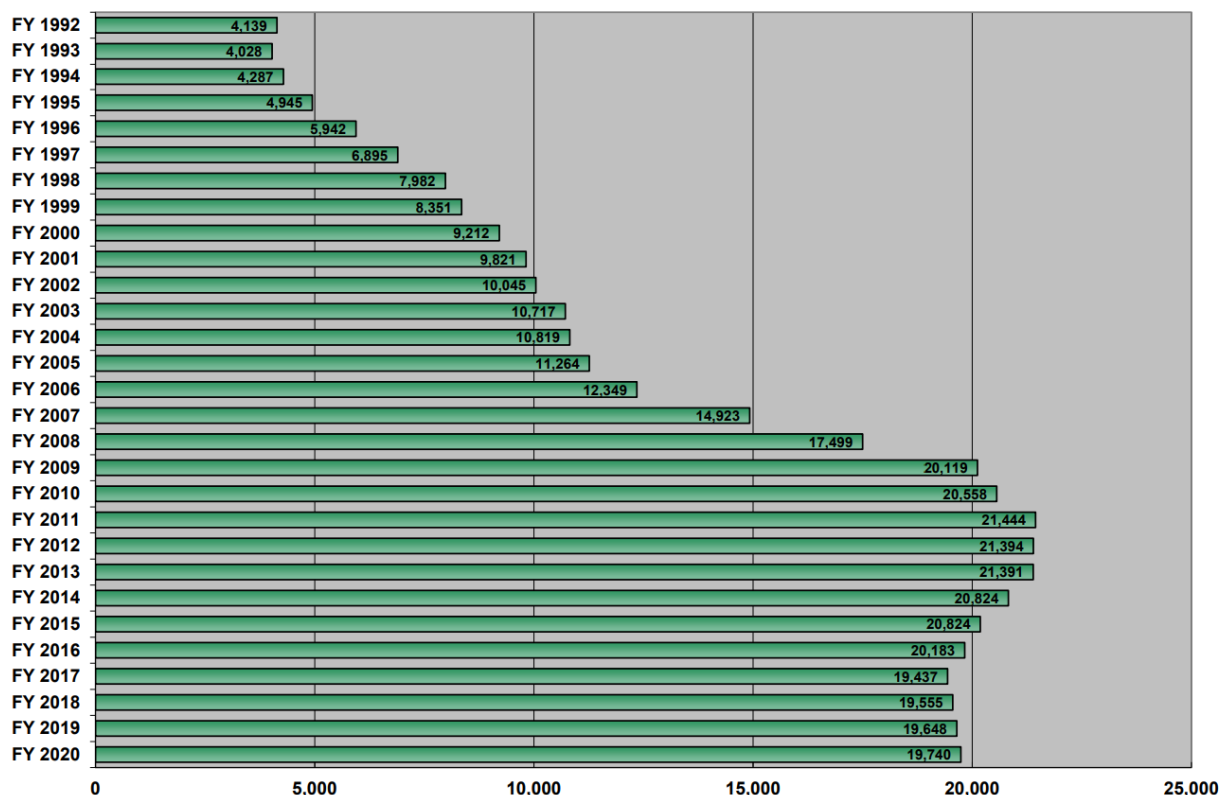


Figure 2: Border Patrol staffing 1992-2020.²⁰

Increases in Border Patrol agents have been even more dramatic at the northern border than the southern border, because numbers in the north were much lower to start. Between 2001 and 2020, total agents have almost exactly doubled. During that same period, the number of agents on the northern border increased from 340 to 2,019, a 5.9-fold increase.²¹ And in the Spokane Sector, the sector of focus in this analysis, agents increased even more than the northern border as a whole, growing 6.5 times larger from 2001 to 2020.²²

²⁰ “U.S. Border Patrol Fiscal Year Staffing Statistics”, U.S. Customs and Border Protection.

²¹ “U.S. Border Patrol Fiscal Year Staffing Statistics”, U.S. Customs and Border Protection.

²² “U.S. Border Patrol Fiscal Year Staffing Statistics”, U.S. Customs and Border Protection.

Although much of the Border Patrol's activity occurs directly at the border, especially the southern border, the agency also claims the authority through federal statute to operate in the interior of the United States within one hundred miles of land and sea borders. This "100-mile zone" is controversial, as seen below.

CBP's "100-Mile Zone"

Conducting arrests far from the border may appear as more the purview of ICE, the agency that enforces immigration laws in the interior of the country, than that of the Border Patrol. However, the Border Patrol claims an authority to conduct searches within one hundred miles of any land or sea border of the United States. This claim comes from a 1946 statutory change in Section 287(a)(3) of the Immigration and Nationality Act (INA), which gives immigration officers the power (without a warrant) "to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle...within a reasonable distance from any external boundary of the United States."²³ This "reasonable distance" was further defined in 1953 by the Justice Department as "within 100 air miles from any external boundary of the United States," and published in the Federal Register in 1957.²⁴ The ACLU has noted that this choice to define "a reasonable distance" as one hundred air miles (equivalent to 115 statute, or land, miles) was made without any documented justification by the Justice Department, and "with little deliberation or review," including no "meaningful debate or scrutiny in Congress."²⁵ Additionally, the Border Patrol only had 1,100

²³ *Immigration and Nationality Act*, 8 U.S.C. § 1357(a)(3); American Civil Liberties Union, "Customs and Border Protection's (CBP's) 100-Mile Rule," accessed May 12, 2023, <https://www.aclu.org/other/aclu-factsheet-customs-and-border-protections-100-mile-zone?redirect=immigrants-right/s/aclu-fact-sheet-customs-and-border-protections-100-mile-zone>.

²⁴ ACLU, "CBP's 100-Mile Rule," *Code of Federal Regulations*, 8 C.F.R. § 287.1(a)(2); *Field Officers: Powers and Duties*, 22 Fed. Reg., 236, 9808-09 (Dec. 6, 1957).

²⁵ ACLU, "CBP's 100-Mile Rule."

agents nationwide at the time, while today, it employs nearly 20,000.²⁶ This means a vastly higher capacity to stop people far from the border, and more potential for the constitutional gray area that comes with these stops. This is exacerbated by lack of oversight of Border Patrol agents and nonexistent or faulty systems for accountability within CBP and DHS when abuses happen.²⁷

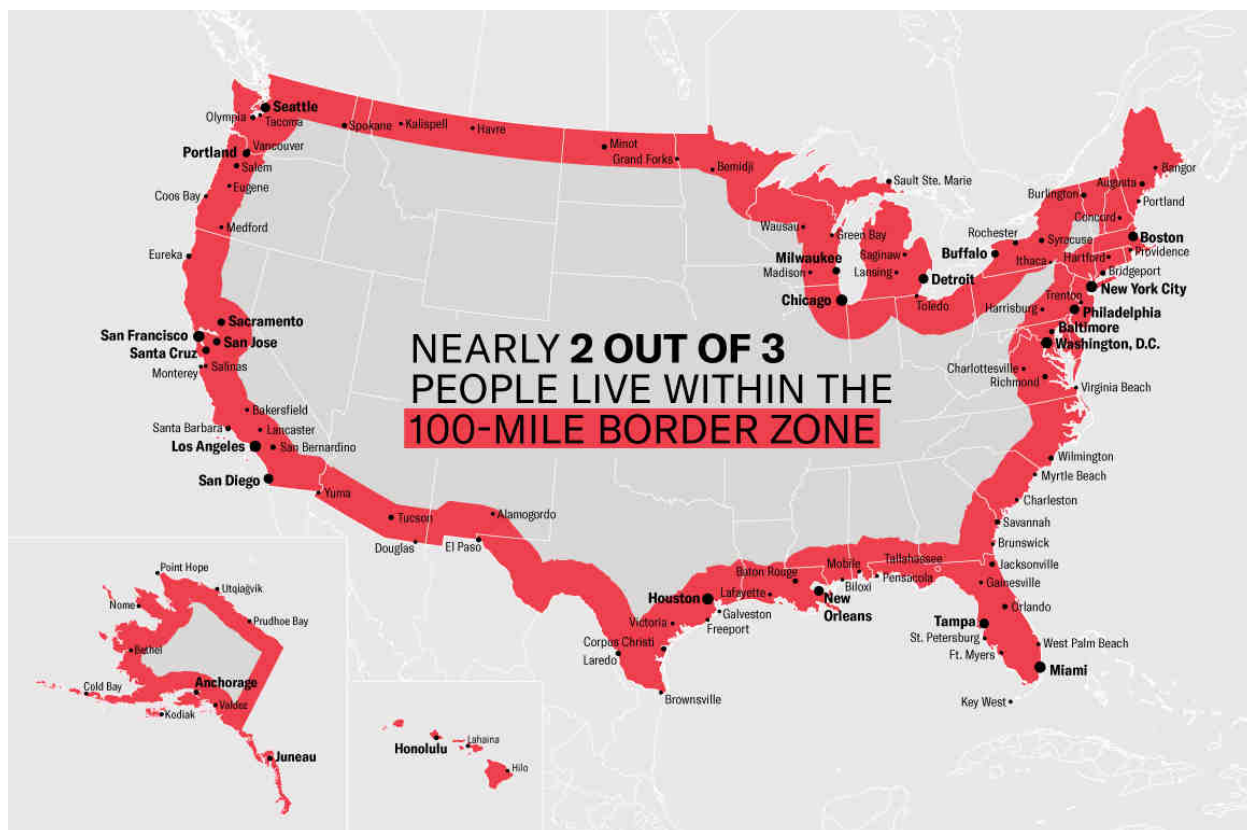


Figure 3: Map from the ACLU showing the 100-mile border zone and major cities and towns within. Note the location of Spokane, Washington in the upper left.²⁸

The 100-mile zone has come under scrutiny again and again in law and advocacy. Many critics say that CBP acts like this area is a “constitution-free zone.”²⁹ Two-thirds of the United

²⁶ American Civil Liberties Union, “The Constitution in the 100-Mile Border Zone,” accessed May 12, 2023, <https://www.aclu.org/other/constitution-100-mile-border-zone>; “U.S. Border Patrol Fiscal Year Staffing Statistics”, U.S. Customs and Border Protection.

²⁷ ACLU, “100-Mile Border Zone.”

²⁸ Adriana Piñon, “Your Rights in the Border Zone,” February 13, 2018, <https://www.aclu.org/news/immigrants-rights/your-rights-border-zone#:~:text=An%20immigration%20officer%20cannot%20arrest%20you%20without%20%E2%80%9Cprobable,Your%20silence%20alone%20meets%20neither%20of%20these%20standards.>

²⁹ ACLU, “CBP’s 100-Mile Rule.”

States' population live in this 100-mile zone, making them subject to warrantless searches by CBP despite the Fourth Amendment's protection against "unreasonable searches and seizures."³⁰ As Figure 3 shows, CBP includes Lake Michigan as an international border although it falls entirely within the United States. Several states, including Florida and many Eastern states, fall entirely within the zone. Nine of the ten largest metropolitan areas in the U.S. are in this 100-mile zone, including New York City, Los Angeles, and Chicago.³¹ About three-quarters of Washington State is within the zone, including most of the state's population. Some politicians have also expressed criticism of the 100-mile zone; Washington State Senator Patty Murray, along with senators from Vermont and Illinois, co-sponsored a bill in 2018 and 2019 called the Border Zone Reasonableness Restoration Act. This bill proposes a reduction of the "reasonable distance" from one hundred to twenty-five miles.³² The same bill was co-sponsored in the House of Representatives by Representatives Pramila Jayapal and Adam Smith of Washington State, as well as other representatives from border states. Neither the Senate or House versions of the bill made it out of their committees.

The Border Patrol's immigration enforcement in the interior of the United States consists mainly of three strategies: 1) interior immigration checkpoints (either fixed or temporary), 2) roving patrols (either in vehicles or on foot), and 3) transportation checks. There are more than 110 interior immigration checkpoints, mostly located within twenty-five to one hundred miles of the southern border, with clusters in the Northeast as well.³³ Border Patrol agents stop all cars at these checkpoints, referring some for secondary inspection for undocumented immigrants or

³⁰ ACLU, "CBP's 100-Mile Rule."

³¹ ACLU, "100-Mile Border Zone."

³² U.S. Congress, Senate, Border Zone Reasonableness Restoration Act of 2019, SR 2180, 116th Cong., 1st sess., introduced in Senate July, 18, 2019, <https://www.congress.gov/bill/116th-congress/senate-bill/2180/text>.

³³ U.S. Government Accountability Office, *Border Patrol: Actions Needed to Improve Checkpoint Oversight and Data*, GAO-22-104568 (Washington, DC, 2022), accessed May 12, 2023, <https://www.gao.gov/products/gao-22-104568>.

drugs. Roving patrols involve agents in vehicles or on foot who stop and question people who they suspect are in the United States without documents or involved in smuggling operations.

One of the most common criticisms of the 100-mile zone is the Border Patrol's use of racial profiling within this area, including in their choices of who to refer to secondary checkpoint inspections or who to stop during roving patrols. Both citizens and noncitizens have their civil liberties violated in the 100-mile zone, but this diminishing of rights falls hardest on people of color, regardless of citizenship. The Border Patrol claims vehemently to not use racial profiling, and DHS has various policies prohibiting the consideration of race and ethnicity "in all but the most exceptional circumstances."³⁴ However, judicial precedent has largely allowed the Border Patrol to use race and ethnicity as part of their assessment of reasonable suspicion, with few exceptions.³⁵ These Fourth Amendment and equal protections questions will be taken up in the "Implications of Findings" section.

What is a transportation check?

Transportation checks are one of Border Patrol's three main interior enforcement mechanisms, along with checkpoints and roving patrols. They are often referred to as transportation sweeps by immigrant rights advocates, likely to emphasize the negativity associated with the term "sweep." I will occasionally use both of these terms. Transportation checks are conducted without judicial warrants. They are also almost always "suspicionless," or conducted without any specific suspicion or reason to believe that any particular individual(s) aboard the bus have violated immigration law or any other laws.³⁶ Because these checks do not

³⁴ Hillel Smith and Kelsey Santamaria, "Searches and Seizures at the Border and the Fourth Amendment," accessed May 12, 2023, https://crsreports.congress.gov/product/pdf/R/R46601#_Toc56424676

³⁵ Smith and Santamaria, "Searches and Seizures."

³⁶ State of Washington v. Greyhound Lines, "Complaint for Injunctive, Declaratory, and Other Equitable Relief," April 12, 2020, https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/

use warrants, the Border Patrol must have consent from the bus or train operators to board. This detail will be explored more in the next section, “Greyhound and Transportation Checks.”

The Border Patrol’s authority for transportation checks is established in the aforementioned INA sections that allow immigration officers “to board and search for aliens...any railway car, aircraft, conveyance, or vehicle” within the defined reasonable distance.³⁷ According to a Border Patrol brochure about transportation checks, transportation checks take place “at a variety of public transportation access points including airports, seaports, rail, and bus stations.”³⁸ It is not “anything goes” within these conveyances and transportation hubs, however. Border Patrol agents conducting transportation checks are supposed to follow certain guidelines outlined in CBP’s policies and their handbook, most of which have been imposed because of legal precedent. The central guideline is that because these checks are warrantless, the initial conversation must be “consensual.” This will be discussed in much more detail throughout this analysis, since there are various indications in my data and in individuals’ accounts of bus checks that suggest that they are often not consensual, or not perceived that way by passengers.

The Border Patrol trains their agents about consensual encounters in this way: “You must not do or say anything that would cause a reasonable person to believe he wasn’t free to end the encounter (without reasonable suspicion).”³⁹ Border Patrol training materials acquired through FOIA requests by the ACLU of Maine explicitly state that agents cannot block the aisle or exit

Greyhound%20Complaint.pdf

³⁷ 8 U.S.C. § 1357(a)(3)

³⁸ U.S. Customs and Border Protection, *U.S. Border Patrol Transportation Check Operations Brochure*, CBP-0687-0518, (Washington, DC) accessed May 12, 2023, <https://www.cbp.gov/sites/default/files/assets/documents/2018-May/USBP%20Transportation%20Check%20Brochure.pdf>.

³⁹ “CBP Training Documents 1.b,” ACLU Maine, accessed May 12, 2023, https://www.aclumaine.org/sites/default/files/1.b._ecf_no._27-1_revised_per_8_may_2019_order_0.pdf.

doors.⁴⁰ The training materials also state, “Any passenger who refuses to answer questions or who chooses to exit the bus must be allowed to do so,” however, Border Patrol agents are “not required to advise passengers of their right to refuse to cooperate.”⁴¹

Standards for deciding whether to take the “consensual encounter” to the next level (still without a warrant) rest on a standard called “reasonable suspicion.” Reasonable suspicion is a burden slightly lower than probable cause. It “requires specific, articulable facts (and not a mere hunch) that reasonably warrant suspicion of illegal activity.”⁴² If the agent does not develop suspicion after the initial encounter, they should end the encounter and move on to questioning the next person, as outlined in Figure 4. If the initial encounter leads the agent to have reasonable suspicion, they “should conduct an investigative detention to resolve the agent’s suspicion that the person is unlawfully present in the United States or involved in unlawful activity.”⁴³ During this investigative detention, Border Patrol agents usually make the individual exit the bus while running a check of their name through federal immigration enforcement databases. If the agents determine probable cause from this records check, “The BPA [Border Patrol agent] should arrest the person, based on probable cause that the person has committed an immigration violation or a criminal offense within the agent’s enforcement authority.”⁴⁴

⁴⁰ “CBP Training Documents 1.b,” ACLU Maine.

⁴¹ “CBP Training Documents 1.b,” ACLU Maine.

⁴² Smith, *U.S. Customs and Border Protection’s Powers and Limitations*.

⁴³ *State of Washington v. Greyhound Lines*, “Complaint,” 41.

⁴⁴ *State of Washington v. Greyhound Lines*, “Complaint,” 41.

transportation check brochure claims that, “Illegal aliens and smugglers may use public transportation to depart the immediate border area, to evade arrest/detention, and *travel into the interior of the U.S.*”⁴⁸ (emphasis added).

Although the Border Patrol’s descriptions of transportation checks often include “illegal aliens,” as seen in the above quotes, they also emphasize targeting criminal organizations that use bus and train stations as hubs for their criminal activities. A memo during the Obama administration describes transportation checks as helping to “establish a substantial probability of apprehension, thus further deterring transnational criminal organizations who might otherwise attempt to circumvent linewatch and traffic check operations.”⁴⁹ Another training slide claims that transportation checks “are predicated on specific information and intelligence” to prevent “Transnational Criminal Organizations the ability to exploit transit nodes.”⁵⁰ However, as will be seen in the “Findings” and “Effectiveness vs. Harm” sections, there is little evidence that these checks interrupt transnational criminal organizations, at least in the Spokane Sector.⁵¹

Transportation checks gained media prominence when they increased in number and visibility during the Trump administration. However, the practice had been happening much earlier, at least since 2002. The *Nation* magazine ran a feature article strongly critiquing Border Patrol raids on Amtrak trains in the tiny town of Havre, Montana in 2005.⁵² Bus raids in 2007 made the local news in rural Twin Falls, Idaho.⁵³ As early as 2009 the Immigration Raids

⁴⁸ U.S. CBP, *U.S. Border Patrol Transportation Check Operations Brochure*.

⁴⁹ “CBP Training Documents 1.b,” ACLU Maine, 3.

⁵⁰ “CBP Training Documents 1.b,” ACLU Maine, 2.

⁵¹ These I-213s do not contain any indication of criminal organizations intercepted in Spokane transportation checks, and an extensive search of local media releases about “significant arrests” from the Spokane Sector also reveals nothing.

⁵² Sasha Abramsky, “Terror on the Inner Border,” *The Nation*, September, 8, 2005, <https://www.thenation.com/article/archive/terror-inner-border/> (accessed May 12, 2023).

⁵³ Cass Friedman, “Targeting illegal immigrants: Immigration sweeps fuel debate about racial profiling,” *McClatchy - Tribune Business News*, December 2, 2007, <https://www.proquest.com/wire-feeds/targeting-illegal-immigrants-immigration-sweeps/docview/463497430/se-2> (accessed May 12, 2023).

Response Network was urging people not to ride Greyhound because of arrests that had been going on at the San Bernardino, California Greyhound station for a year.⁵⁴ There, Greyhound workers were even accused of assisting the Border Patrol by closing off the boarding area until all the recently arrived passengers had been checked.⁵⁵

The practice of transportation check arrests was first studied extensively at the Rochester Border Patrol Station in New York State, where the scale of transportation raids surpassed other locations on the northern border. A report called *Justice Derailed* revealed that 2,788 passengers were arrested on trains and buses in Rochester between October 2005 and September 2009.⁵⁶ The report raised alarms about patterns of racial profiling, including illegal apprehensions and detentions of citizens and those with legal status in the United States. Professors and international college students were among them. This 2011 report relied on a FOIA request and lawsuit to obtain a complete dataset of Rochester Station's transportation arrests. It was also preceded by an August 29, 2010 *New York Times* article which was the first mainstream national media spotlight on transportation checks and used much of the same FOIA documentation. It described the checks as "little-publicized," questioned the racial profiling component, and compared them to Arizona's notorious SB 1070: "the patrol's practices evoke the same fears as a new immigration law in Arizona – that anyone, anytime, can be interrogated without cause."⁵⁷

⁵⁴ Stephen Wall, "Migrants say feds use racial profiling on Greyhound buses," *The Sun*, December 17, 2009, <https://www.sbsun.com/2009/12/17/migrants-say-feds-use-racial-profiling-on-greyhound-buses/> (accessed May 12, 2023).

⁵⁵ Seth Hoy, "Greyhound Lines, Inc. Accused of Racially Profiling Latino Passengers," *Immigration Impact*, December 18, 2009, <https://immigrationimpact.com/2009/12/18/greyhound-lines-inc-accused-of-racially-profiling-latino-passengers/#.XlWCNChKjKl> (accessed May 12, 2023).

⁵⁶ NYU School of Law, *Justice Derailed*.

⁵⁷ Nina Bernstein, "Border Sweeps in North Reach Miles Into U.S.," *New York Times*, August 29, 2010. <https://www.nytimes.com/2010/08/30/nyregion/30border.html> (accessed May 12, 2023).

Transportation checks were restricted during the Obama administration based on an August 17, 2010 memo from Border Patrol Chief Michael J. Fisher.⁵⁸ The memo distinguished between transportation hubs in the Primary Operational Domain (POD) of each Border Patrol sector, “where a station sends its routine, daily patrols,” and transportation hubs outside of this POD.⁵⁹ It is unclear what part of each sector is defined as the POD, as this information is not shown in any maps available to the public, but the memo seems to indicate that they are in “immediate border areas.”⁶⁰ Fisher’s directives required that transportation operations “outside the POD of the initiating sector, operations that may be construed as interior enforcement, and/or operations for which media interest is likely” now required approval from both the Border Patrol sector and headquarters in Washington, D.C.⁶¹ Operations “outside of the POD must also be targeted to mitigate threats and be driven by intelligence” and “should include *targeted activity* related to arresting and identifying smugglers and/or individuals who pose a threat.”⁶² (emphasis added) In addition, all transportation check operations, even those within the POD, would require “Operations Orders” to document “that this critical work is tied directly to improving border security while denying the use of legitimate infrastructure by smuggling operations.”⁶³

These rules together sound like they should severely limit transportation checks like those in Spokane, which are not “targeted to mitigate threats” and could be outside of the POD and “construed as interior enforcement” because they occur almost one hundred miles from the border. However, I-213s show us that these checks continued to occur in Spokane between 2013 and 2017. Because of the lack of arrest statistics that are disaggregated by method of

⁵⁸ “CBP Training Documents 1.b,” ACLU Maine, 3-4.

⁵⁹ See *Muniz-Muniz v. U.S. Border Patrol*, Case No. 3:09 CV 2865 (N.D. Ohio Oct. 19, 2012) for definition of a POD.

⁶⁰ “CBP Training Documents 1.b,” ACLU Maine, 3.

⁶¹ “CBP Training Documents 1.b,” ACLU Maine, 4.

⁶² “CBP Training Documents 1.b,” ACLU Maine, 4.

⁶³ “CBP Training Documents 1.b,” ACLU Maine, 4.

apprehension or I-213 data from Spokane prior to 2010, it is difficult to ascertain whether or how much transportation checks decreased after the August 2010 memo as a result of the Obama administration's restrictions. We can, however, tell that transportation check arrests occurred on a smaller scale from 2013 to 2017 than after the restrictions were ended. Total arrests from 2018 are unknown, but in 2019, the transportation check arrests in Spokane were double the average yearly arrest rate from 2013 to 2017.

It is also unclear how stringent Border Patrol supervisors in Spokane and Washington, D.C. were with the requirements that transportation checks be "driven by intelligence." Most of the I-213 narratives from 2013 through 2017 included a vague statement that "actionable intelligence" from the Office of Border Patrol Intelligence Liaison Branch that "cross border activity within the Pacific Northwest Corridor...may result in a subject using public transportation to further his/her entry into the United States." This statement, shown in Figure 5, seems to be the only "intelligence" used to justify the transportation checks at the Spokane Intermodal Center, and it does not appear targeted to "smugglers and/or individuals who pose a threat."⁶⁴ These I-213s give no indication that the threats were specific to Spokane, and it is unclear how many days the headquarters' approval to conduct checks in Spokane lasted. However, the checks certainly swept up multiple people with no criminal history; fifteen of the twenty-one I-213s from 2013 to 2017 were for people who had never been arrested for a crime in the U.S. None of them had recently crossed the border. (Six of these arrests were after Trump's inauguration but before his administration superseded the restrictions of the 2010 memo.)

⁶⁴ "CBP Training Documents 1.b," ACLU Maine, 4.

Actionable intelligence provided by the Office of Border Patrol Intelligence Liaison Branch, indicated the possibility of cross border activity within the Pacific Northwest Corridor. It was determined that this cross-border activity may result in a subject using public transportation to further his/her illegal entry into the United States. As a result on February 13, 2017, Supervisory Border Patrol Agents (b) (6), (b) (7)(C) SBPA (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) Border Patrol Agent (b) (6), (b) (7)(C) and I were deployed to perform transportation check duties at the Spokane, Washington Bus Station.

Figure 5: I-213 showing “actionable intelligence” statement about “cross border activity within the Pacific Northwest Corridor.”

While the restrictions under the Obama administration were of uncertain success in terms of limiting transportation checks to “individuals who pose a threat,” any semblance of limitation was erased under Trump. Immigrant rights advocates across the country agree based on firsthand accounts that transportation check arrests increased during the Trump administration, especially after Border Patrol Chief Ronald Vitiello issued a new memo on April 20, 2017 that reversed the directives of the one from 2010.⁶⁵ The memo explicitly stated that operations orders for transportation checks were no longer required unless “conducted jointly with other agencies or are outside of the sector’s typical area of operation,” a term which is broader than the POD, although undefined.⁶⁶ Along with the operations orders went the requirements for transportation checks to be targeted towards threats and driven by intelligence, since these requirements were linked to the POD, which was “no longer a necessary calculation.”⁶⁷ In addition, the memo rescinded the requirements for permission from Washington, D.C. headquarters.⁶⁸ These directives dramatically loosened oversight of transportation checks in areas farther from the immediate border, such as Spokane. They allowed field supervisors to order transportation checks without needing any kind of justification.

⁶⁵ “Transportation Check Operations August 17, 2010,” U.S. Customs and Border Protection, accessed May 12, 2023, <https://www.cbp.gov/sites/default/files/assets/documents/2022-Jan/Transportation%20Check%20Operations%20August%2017%2C%202010.pdf>, 6-7.

⁶⁶ “Transportation Check Operations August 17, 2010,” CBP, 7.

⁶⁷ “Transportation Check Operations August 17, 2010,” CBP, 6.

⁶⁸ “Transportation Check Operations August 17, 2010,” CBP, 6.

FOIA records show us that this change was greeted with elation by some supervisors, including one Border Patrol supervisor (title unknown because of redactions) in Maine, who wrote to agents in November 2017, “We are all set to begin bus checks in Bangor... This is an excellent opportunity, the likes of which we have not seen in a decade. Let’s work together to be as productive as possible while preserving this momentum to increase our ability to enforce the law.”⁶⁹ The agent signed their email “Happy hunting, stay safe, and have fun!”⁷⁰

Greyhound and Transportation Checks

In 2018, advocates working to stop transportation checks came together around a shared goal of putting pressure on Greyhound Lines, which is the largest intercity bus service in North America. This campaign against Greyhound’s practices is important to understand because it created the pressure which eventually largely halted transportation checks across the country. Targeting corporations like Greyhound is strategic, especially when the government will not be moved on an issue. Greyhound also plays a specific role in the fight against transportation checks in Washington State and at the Spokane Intermodal Center, this research’s area of inquiry.

Greyhound Lines has a history of anti-immigrant policies. In 2005, immigrant rights groups became aware of Greyhound’s “Transportation of Illegal Aliens” policy that threatened to fire employees who sold tickets to undocumented individuals.⁷¹ The policy told employees to look out for certain signs that may indicate that people are undocumented: including traveling “in large groups, moving in single file, traveling with little or no luggage” or having a guide that

⁶⁹ “CBP Training Documents 3.b,” ACLU Maine, accessed May 12, 2023, https://www.aclumaine.org/sites/default/files/3.b._ecf_no._27-3_revised_per_8_may_2019_order.pdf, 10.

⁷⁰ “CBP Training Documents 3.b,” ACLU Maine, 10.

⁷¹ “More Headlines from September 23, 2005,” *Democracy Now*, September 23, 2005, https://www.democracynow.org/2005/9/23/headlines/iraqi_officials_cut_off_relations_with_british_in_basra/load_more (accessed May 12, 2023).

holds multiple people's tickets.⁷² These policies were ripe for racial profiling, and also inappropriately asked Greyhound employees to be enforcers of immigration laws.⁷³ Criticism of Greyhound's practice of letting Border Patrol agents board their buses began in 2009, when the Immigration Raids Response Network encouraged Latinos not to ride Greyhound due to arrests at the San Bernardino Greyhound Station.⁷⁴ In an article about the incident, a San Bernardino resident was quoted saying, "This is private property. Greyhound has the right to tell them to leave."⁷⁵ Greyhound did not respond to that claim in the article, but this question of whether Greyhound could refuse to allow Border Patrol searches would continue to be relevant for the next ten years.

Media coverage of arrests on Greyhound buses grew as these arrests increased during Donald Trump's presidency, with various videos of Border Patrol agents on buses going viral. In March 2018, various state ACLU affiliates wrote to Greyhound Lines' President and CEO Dave Leach and Senior Legal Officer Tricia Martinez outlining the reports of Border Patrol arrests on Greyhound buses in seven states, including Washington. They argued that while the Fourth Amendment allows law enforcement into "areas of a business that are open to the general public," it requires a warrant or consent to enter nonpublic areas of businesses.⁷⁶ Since the Border Patrol does not use warrants for transportation checks, the ACLU claimed that Greyhound drivers had the right to refuse the checks, because the bus is a private area where non-ticketed members of the public cannot go.⁷⁷ They urged Greyhound, who previously had asserted that they were required to allow the Border Patrol on their buses, to "change its practices

⁷² Democracy Now, "More Headlines."

⁷³ Hoy, "Greyhound Lines."

⁷⁴ Hoy, "Greyhound Lines."

⁷⁵ Wall, "Migrants say feds..."

⁷⁶ "ACLU Affiliate Letter to Greyhound," ACLU Maine, March 21, 2018, https://www.aclumaine.org/sites/default/files/aclu_affiliate_letter_to_greyhound_-_final.pdf (accessed May 12, 2023.)

⁷⁷ "ACLU Affiliate Letter to Greyhound," ACLU Maine.

and policies to refuse CBP consent to board its buses without a warrant, except when legally required at the physical border or its equivalent.”⁷⁸

However, Greyhound did not stop this practice. Instead, during 2018 and 2019, they doubled down on their claims that they were required to allow Border Patrol agents to perform transportation checks. They often vacillated on their position, changing it to suit the group they were communicating with. In June 2018, Greyhound wrote in a blog post that they were required to allow Border Patrol agents to board buses when they asked permission, but then in October 2018 stated that “CBP officers do not ask permission to board our buses.”⁷⁹ Meanwhile, supervisor Bill Kingsford at the Border Patrol Spokane Sector held the position that they “work with consent from Greyhound when we board their buses” at the Intermodal Center.⁸⁰

In another particularly egregious example of their dishonesty, Greyhound privately communicated to CBP their support for their immigration enforcement actions, while publicly stating their opposition. For example, in April 2018 Greyhound communicated with a DHS Legislative Fellow for Congressman Henry Cuellar in an attempt to set up a meeting between Greyhound executives and CBP. This legislative fellow then summed up the conversation in an email to someone at CBP: “Greyhound is committed to supporting CBP enforcement actions (inspections)” and that they “need CBP’s assistance dealing with the ACLU.”⁸¹ They also wrote that: “Greyhound enjoys an excellent relationship with the CBP HQ office and staff. They have been a strategic partner for many years,” referencing Greyhound’s work with CBP on the Advanced Passenger Information System (APIS), which are electronic lists of passengers used

⁷⁸ “ACLU Affiliate Letter to Greyhound,” ACLU Maine. Note that the link on the bottom of page 1 to Greyhound’s blog post in which they asserted that they were required to cooperate with Greyhound is broken.

⁷⁹ State of Washington v. Greyhound Lines, “Complaint,” 48. Note that the actual links to Greyhound web pages that are cited in the complaint are dead.

⁸⁰ Amy Martyn, “Spokane vs. the Border Patrol: How Immigration Agents Stake Out a City Bus Station,” *The Intercept*, December 10, 2019, <https://theintercept.com/2019/12/10/border-patrol-greyhound-buses-spokane/> (accessed May 12, 2023).

⁸¹ State of Washington v. Greyhound Lines, “Complaint,” 50.

when buses enter or exit the country.⁸² Yet two months later, in June 2018, Greyhound CEO David Leach wrote to Representative Joaquin Castro, “Greyhound does not... support these actions and we are very unhappy that our drivers and passengers are being stopped by armed federal officers conducting immigration raids on our buses.”⁸³ This position was repeated in several CBP website announcements in June and October 2018.⁸⁴

Amidst Greyhound’s continued misrepresentation of their policies and positions, the ACLU and advocates continued to put pressure on Greyhound from multiple avenues. They delivered a petition signed by over 200,000 people to Greyhound’s headquarters in October 2018.⁸⁵ The ACLU and the Northwest Immigrant Rights Project (NWIRP) filed lawsuits on behalf of two individuals who were racially profiled at the Spokane Intermodal Center.⁸⁶ Volunteers passed out Know Your Rights cards at bus stations in multiple states and residents of Spokane passed a local ordinance prohibiting the Border Patrol from entering the Intermodal Center.⁸⁷ The ACLU also encouraged state Attorney Generals to investigate the impacts and lawfulness of Greyhound’s actions in their states (which led to Washington State’s lawsuit).⁸⁸

Ultimately, what forced Greyhound’s hand was evidence of the Border Patrol’s own transportation check policy. On February 14, 2020, the *Associated Press* reported on a leaked

⁸² State of Washington v. Greyhound Lines, “Complaint,” 50; U.S. Department of Homeland Security, *CBP Bus APIS Document Guidance, Version 1.0*, (Washington, DC, October 2011), accessed May 12, 2023, https://www.cbp.gov/sites/default/files/documents/cbp_bus_apis_doc_1_3.pdf.

⁸³ State of Washington v. Greyhound Lines, “Complaint,” 43.

⁸⁴ State of Washington v. Greyhound Lines, “Complaint,” 46-48.

⁸⁵ “ACLU, Rep. Castro, and Others Deliver 200,000 Petitions Demanding Greyhound Stop Allowing Border Patrol Raids,” ACLU, October 19, 2018, <https://www.aclu.org/press-releases/aclu-rep-castro-and-others-deliver-200000-petitions-demanding-greyhound-stop-allowing>

⁸⁶ Andres Sosa Segura v. United States of America, “Complaint for Damages,” June 25, 2019, <https://www.aclu-wa.org/docs/complaint-damages-sosa>; Mohanad Elshieky v. United States of America, “Complaint for Damages,” February 14, 2020, <https://www.aclu-wa.org/docs/complaint-damages-mohanad-elshieky-v-united-states-america>

⁸⁷ Andrea Flores and Enoka Herat, “How the ACLU Organized to End Racial Profiling on Greyhound Buses,” ACLU, March 20, 2020, <https://www.aclu.org/news/immigrants-rights/how-the-aclu-organized-to-end-racial-profiling-on-greyhound-buses>.

⁸⁸ Flores and Herat, “How the ACLU.”

CBP memo dated January 28, 2020 from Border Patrol Chief Carla Provost.⁸⁹ This memo confirmed the position that Greyhound’s critics had taken: that either consent is needed from the company to enter non-public areas (such as actually boarding buses or waiting in employee-only areas) or a warrant is necessary. The memo stated that, “When transportation checks occur on a bus at non-checkpoint locations, the agent must demonstrate that he or she gained access to the bus with the consent of the company’s owner or one of the company’s employees.”⁹⁰ One week later, Greyhound announced that it would not allow Border Patrol agents to board their buses without a warrant, making the change that activists had been pushing for years.⁹¹

However, Greyhound continued to distance themselves from their previous willingness to participate in the Border Patrol’s transportation checks. Greyhound issued a statement that referred to the CBP memo as announcing a “policy change,” although as the *New York Times* noted, “it wasn’t clear that the agency [CBP] had in fact altered any of its policies.”⁹² Indeed, the requirement for consent to board had been the Border Patrol’s policy all along, as later discovered in the 2012 CBP Enforcement Law Course and 2017 training documents.⁹³ Greyhound further wrote that the “new” policy “aligns with our previously stated position, which is that we do not consent to warrantless searches,” despite their previous indications of support to CBP and prior refusal to institute a policy of forbidding the searches.⁹⁴ It appears that Greyhound ultimately chose to withdraw cooperation only when the leaked Border Patrol policy made the ACLU’s legal stance incontrovertible, not because they actually disagreed with the Border

⁸⁹ Gene Johnson, “AP Exclusive: Agency memo contradicts Greyhound on bus raids,” *AP News*, February 14, 2020, <https://apnews.com/article/wa-state-wire-az-state-wire-mi-state-wire-tx-state-wire-border-patrols-48960c783dd3f22af2ad320227e40b20> (accessed May 17, 2023)

⁹⁰ Johnson, “AP Exclusive.”

⁹¹ Johnny Diaz, “Greyhound to Stop Allowing Border Patrol Agents on Its Buses Without Warrants,” *New York Times*, February 22, 2020, <https://www.nytimes.com/2020/02/22/us/greyhound-border-patrol.html> (accessed May 12, 2023).

⁹² Diaz, “Greyhound to Stop...”

⁹³ “CBP Training Documents,” ACLU Maine; *State of Washington v. Greyhound Lines*, “Complaint.”

⁹⁴ Diaz, “Greyhound to Stop...”

Patrol's practices. Sustained public pressure made taking an opposing stance impossible once the memo had leaked. Greyhound was presumably afraid of revenue loss, as evidenced by this statement in the aforementioned April 2018 communication meant to set up a meeting between Greyhound and CBP: "They are a publicly traded company (FirstGroup) with shareholders. They are concerned how the negative press they are receiving will impact their business."⁹⁵

Meanwhile, the Washington State Attorney General had been preparing to file a lawsuit against Greyhound, after sending a letter to the company in January 2019 which outlined Greyhound's possible violations of Washington State law and remedies for these violations.⁹⁶ These changes were not made, so the lawsuit was filed on April 13, 2020 in Spokane Superior Court, alleging that Greyhound's actions at the Spokane Intermodal Center had violated the Washington Consumer Protection Act and the Washington Law Against Discrimination.⁹⁷ The suit pointed out that, in allowing Border Patrol agents aboard, Greyhound was not abiding by their own non-discrimination policies. For example, their web page titled "Your Rights & Rules on Board" stated that, "We're not concerned about your race, your color, what you believe or where you're from. We just want to get you safely to your destination," and that no person "shall be discriminated against on the basis of race, color, national origin, disability or any other characteristic protected by applicable law."⁹⁸

Greyhound denied the state's allegations, but the parties eventually filed a consent decree in September 2021.⁹⁹ This required Greyhound to pay \$2.2 million, which the state is dividing

⁹⁵ State of Washington v. Greyhound Lines, "Complaint," 50.

⁹⁶ Daniel Walters, "Washington's AG weighs in on immigration sweeps in Spokane," *Inlander*, February 28, 2019, <https://www.inlander.com/spokane/washingtons-ag-weighs-in-on-immigration-sweeps-in-spokane/Content?oid=16671020> (accessed May 12, 2023).

⁹⁷ State of Washington v. Greyhound Lines, "Complaint."

⁹⁸ "Your Rights & Rules on Board," Greyhound, accessed May 12, 2023, <https://www.greyhound.com/travel-info/your-rights-rules-on-board>.

⁹⁹ State of Washington v. Greyhound Lines, "Consent Decree," September 24, 2021, https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Greyhound%20Consent%20Decree_0.pdf.

between individuals impacted by the sweeps. An attorney at the Attorney General’s Office informed me that the office received 42 claims, some of which include multiple family members who were traveling together and were both impacted.¹⁰⁰ A sum of \$2,189,165 is being divided between these individuals; the slightly lower amount reflects deductions from administering the claims.¹⁰¹ Each claimant will receive a variable amount of restitution based on the severity of harm, “including, for example, the amount of time they were in detention and whether they were deported.”¹⁰²

Washington State also required Greyhound to make certain corporate reforms, such as ending the practice of allowing the Border Patrol into their private spaces, providing public placards stating this policy, warning passengers of the risks of searches online and in person, and implementing a complaint procedure and providing records of complaints to the state.¹⁰³ The “Your Rights & Rules on Board” webpage now contains warnings about immigration enforcement sweeps, know your rights information, legal resources, and links to file complaints against the Border Patrol at the DHS Office for Civil Rights and Civil Liberties.¹⁰⁴

While all of this pressure and litigation targeted Greyhound, the intention was that smaller regional bus companies would take the hint and avoid Greyhound’s fate. A few bus companies had already announced their policies against allowing the Border Patrol to conduct transportation checks, and Concord Coach Lines announced that they would not allow Border Patrol agents on board shortly after the Greyhound ruling.¹⁰⁵ However, Northeast-based Peter Pan Bus Lines announced that they would continue to allow the Border Patrol and all law

¹⁰⁰ Patricio Marquez, email message to author, February 24, 2023.

¹⁰¹ Patricio Marquez, email.

¹⁰² Patricio Marquez, email.

¹⁰³ State of Washington v. Greyhound Lines, “Consent Decree.”

¹⁰⁴ “Your Rights & Rules on Board,” Greyhound.

¹⁰⁵ “Peter Pan to Continue Allowing Immigration Checks on Buses,” *WBZ News*, March 3, 2020, <https://www.cbsnews.com/boston/news/peter-pan-bus-lines-immigration-checks/> (accessed May 12, 2023); Diaz, “Greyhound to Stop...”

enforcement agencies to board their buses.¹⁰⁶ There is no indication on their website today that their policy has since changed. In addition, Amtrak has not announced any policy change regarding Border Patrol transportation checks, implying that these checks still may be occurring on Amtrak trains. In addition, Amtrak’s website states that passengers must produce photo identification when “asked any time by Amtrak police or any law enforcement officer.”¹⁰⁷

Transportation Check Arrests in Spokane

Spokane is the second-largest city in Washington State, with a population of about 220,000. It is located on the eastern side of the state, near the Idaho border. It is around 108 highway miles from the Canadian border, but about ninety-two miles as the crow flies (see Figure 6), putting it barely inside the “reasonable distance” claimed by the Border Patrol.

¹⁰⁶ “Peter Pan...” *WBZ News*.

¹⁰⁷ “Passenger Identification,” Amtrak, accessed May 12, 2023, <https://www.amtrak.com/planning-booking/tickets-id-safety-security/passenger-identification.html>.

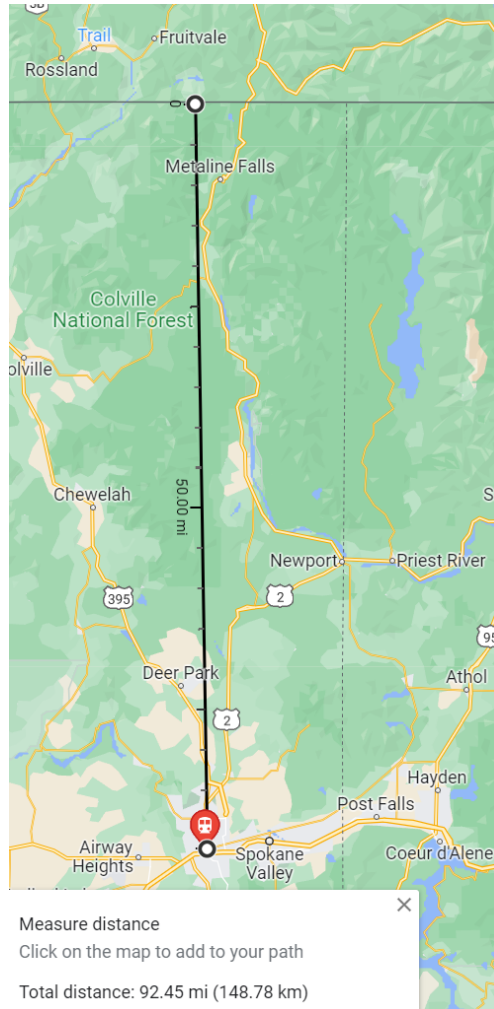


Figure 6: Map showing the distance (92 miles) between the Spokane Intermodal Center and the Canadian border.¹⁰⁸

The city of Spokane is located within the Spokane Border Patrol Sector, which covers 308 miles of the northern U.S. border, from the Cascade Mountains in Washington to Glacier National Park in Montana.¹⁰⁹ As seen in Figure 7, it abuts the Blaine Sector to the west in Washington, and the Havre Sector to the east, which covers most of Montana. The Spokane Sector includes seven border patrol stations, plus the headquarters, located in the city of

¹⁰⁸ Google Maps, “Distance from Spokane, WA Intermodal Center to a spot directly north on the Canadian border,” accessed May 12, 2023, <https://www.google.com/maps>.

¹⁰⁹ U.S. Customs and Border Protection, “Spokane Sector Washington,” last modified May 26, 2023, <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/spokane-sector>.

Spokane.¹¹⁰ Before the publicity about transportation check arrests, the Border Patrol in Spokane was no stranger to being criticized for their local actions. In 2012, news broke that Border Patrol agents were showing up at 911 calls in Spokane, sometimes unsolicited.¹¹¹ On other occasions, the city police were calling them for translation assistance,¹¹² a highly-criticized practice that still happens today in many border regions.¹¹³

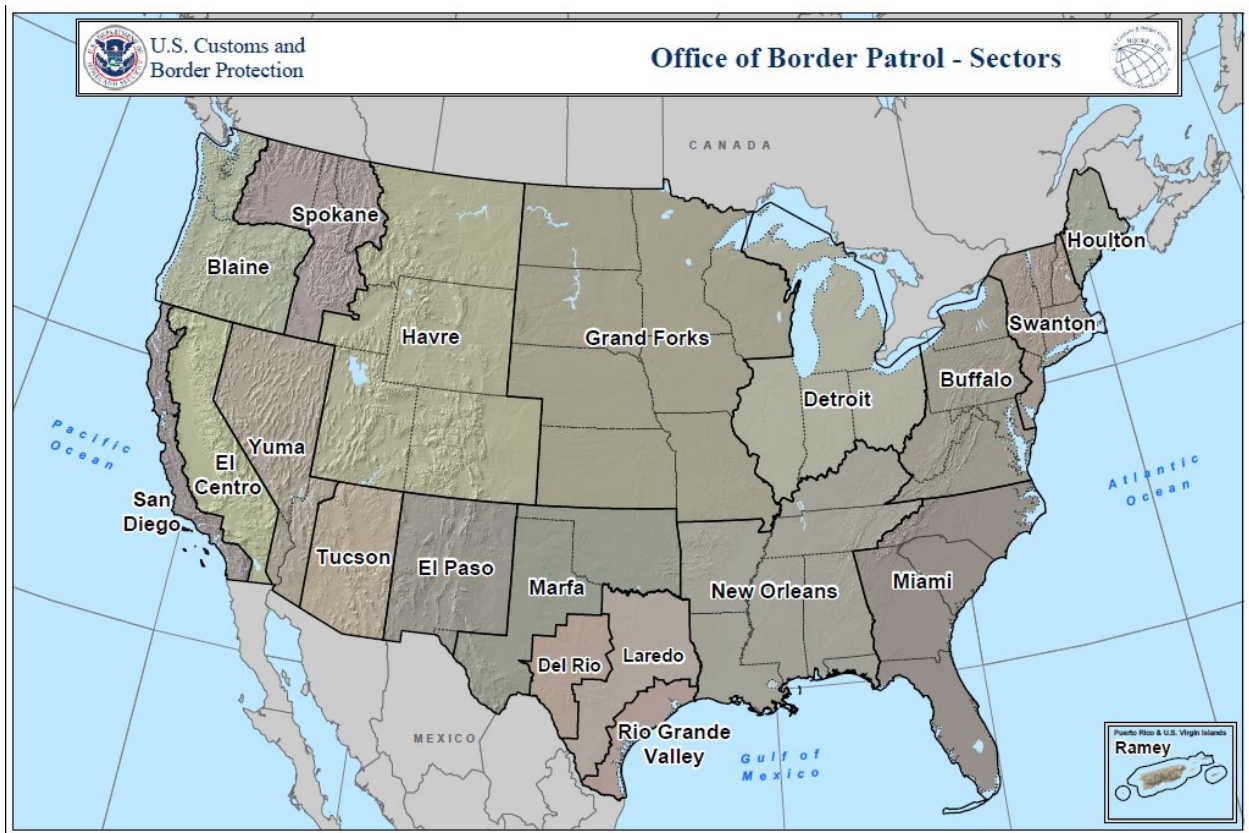


Figure 7: Map of Border Patrol sectors. The original link from the CBP website is gone and it is not completely up-to-date, but the Northwest section is correct.¹¹⁴

¹¹⁰ CBP, “Spokane Sector Washington.”

¹¹¹ Joe O’Sullivan, “A Little Help from Friends?,” *Inlander*, May 2, 2012, accessed May 12, 2023, <https://www.inlander.com/spokane/a-little-help-from-friends/Content?oid=2138034> (accessed May 12, 2023).

¹¹² Joe O’Sullivan, “CITY HALL EYEBALL: City using Border Patrol to save money,” *Inlander*, May 29, 2012, <https://www.inlander.com/Bloglander/archives/2012/05/29/city-hall-eyeball-city-using-border-patrol-to-save-money> (accessed May 12, 2023).

¹¹³ ACLU Michigan, *The Border’s Long Shadow*.

¹¹⁴ “CBP Sectors Map,” Wikimedia Commons, accessed May 12, 2023, https://commons.wikimedia.org/wiki/File:CBP_Sectors_Map.jpg.

Spokane is located along Interstate 90, and Spokane Sector agents note that “agents have traditionally worked in Spokane because it is the largest city between Seattle and Minneapolis, Minnesota and is a major hub in the Pacific Northwest of the United States.”¹¹⁵ The Spokane Intermodal Center, located at 221 West 1st Avenue, serves both Amtrak and various bus companies, including Greyhound Lines, Northwestern Stage Lines, and Jefferson Lines. The Intermodal Center building is owned by the city of Spokane, with space rented out to companies, including Greyhound. Bus routes leaving from Spokane include various destinations in Washington, Oregon, and Idaho that then connect with routes that take people farther afield. All of the routes in and out of the Intermodal Center are purely domestic.¹¹⁶ As seen in Figure 8, the Intermodal Center’s main entrance and parking area is off of Sprague Avenue. The opposite side of the station is where bus and train passengers embark and disembark, as seen by the parked buses and the train tracks. The bus boarding area is restricted to ticketed passengers who are boarding or exiting their bus, and accessed through doors marked “Restricted Area.”¹¹⁷ However, Greyhound employees were allowing Border Patrol agents into this non-public area. Greyhound even permitted Border Patrol agents to wait in employee-only areas, as seen in pictures acquired by the Washington State Attorney General’s Office in Figure 9. This allowed them to remain unseen and surprise people who had already boarded their buses.¹¹⁸

¹¹⁵ Daniel Walters, “Border Patrol is opening up an office in Spokane to be staffed by around 30 agents,” *Inlander*, May 8, 2018, <https://www.inlander.com/Bloglander/archives/2018/05/08/border-patrol-is-opening-up-an-office-in-spokane-to-be-staffed-by-around-30-agents> (accessed May 12, 2023).

¹¹⁶ State of Washington v. Greyhound Lines, “Complaint,” 1.

¹¹⁷ State of Washington v. Greyhound Lines, “Complaint,” 6.

¹¹⁸ State of Washington v. Greyhound Lines, “Complaint,” 6.

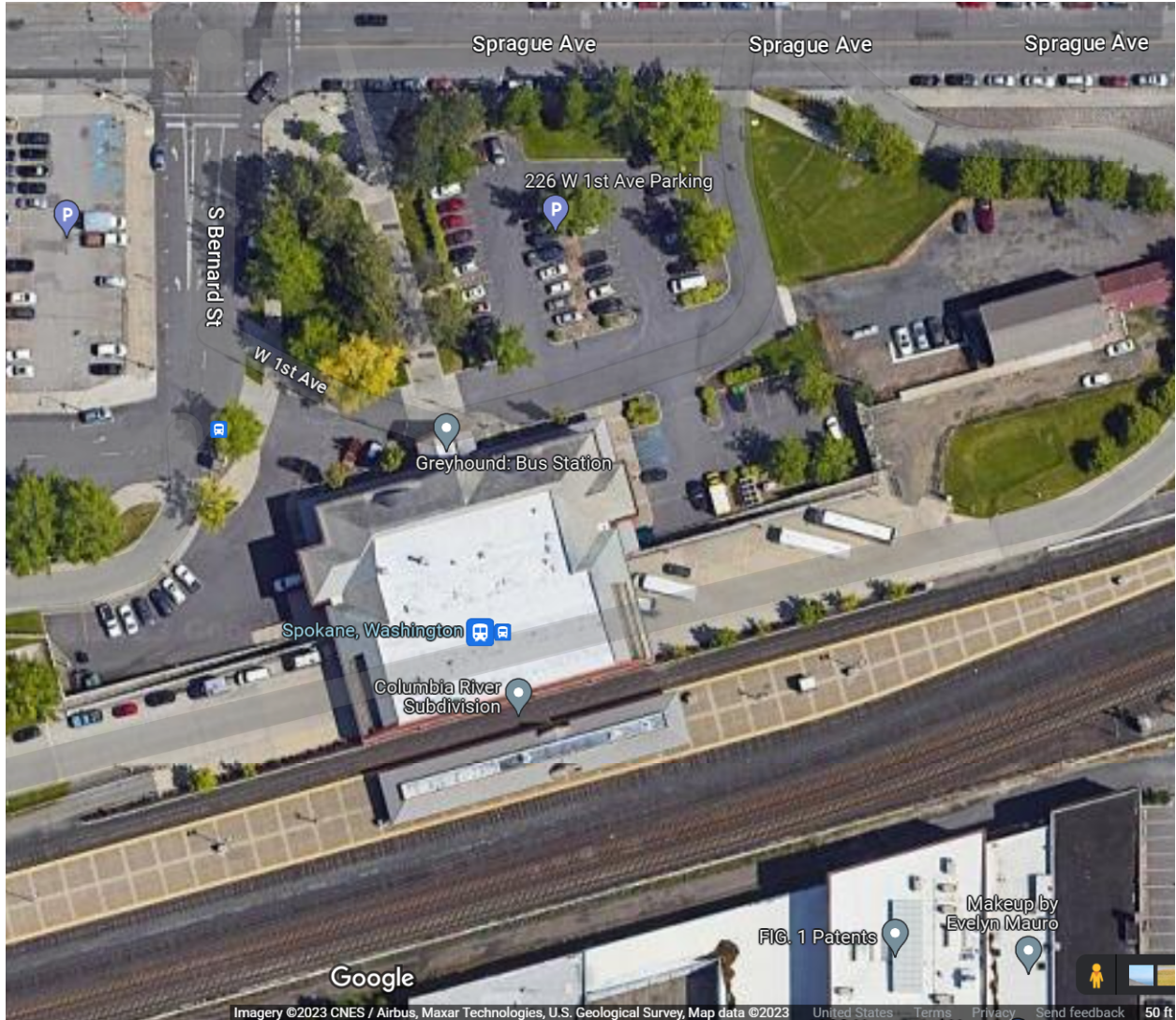


Figure 8: The Spokane Intermodal Center. The bus boarding area, to the right of the building, is for ticketed passengers only. Interstate 90 is only four blocks south.¹¹⁹

¹¹⁹ Google Maps, “Birds-eye view of the Spokane, WA Intermodal Center,” accessed May 12, 2023, <https://www.google.com/maps>.



Figure 9: Border Patrol agents waiting in Greyhound’s employee-only area until ready to check buses.¹²⁰

Media coverage of the Border Patrol arrests at the Spokane Intermodal Center began in late 2017 and ramped up throughout 2018. The first media outlet to shed light on the practice was the *Inlander*, which featured the story of Manel Perdomo, a disabled woman who was arrested in October 2017.¹²¹ They used this story to highlight the increase in activity at the Intermodal Center, acknowledging that it had been happening to a lesser extent for several years prior. KOMO News in Seattle ran a profile on the arrests of Sergio and Martin Vera, a son with Deferred Action for Childhood Arrivals (DACA) and his father who were detained in January 2018.¹²² Reports in 2018 by the *Inlander*, the *Spokesman-Review*, and local television station

¹²⁰ State of Washington v. Greyhound Lines, “Complaint,” 6.

¹²¹ Mitch Ryals, “Where’s Your Papers?,” *Inlander*, November 16, 2017, <https://www.inlander.com/news/wheres-your-papers-6649860> (accessed May 12, 2023).

¹²² Phan, “Father, son with DACA.”

KREM included coverage of the March 2018 national ACLU letter, which mentioned Spokane, and claims filed by the ACLU and the Northwest Immigrant Rights Project (NWIRP) on behalf of Andres Sosa in June 2018.¹²³ (The cases of a few of these individuals noted in the media will be featured in later sections.)

There was also coverage of local protests and city council actions, as some Spokane residents and local politicians fought back against the Border Patrol's practices in multiple venues. In August 2018, the Spokesman-Review profiled the arrest of a man who had been living in South Dakota for over a decade.¹²⁴ A protest was held ten days later at the Intermodal Center in opposition to these ongoing arrests, which various local news outlets reported as exceeding 200 by August 2018.¹²⁵ Resistance to the arrests began to center around the city's previous plan to locate a one-stop social services center at the Intermodal Center. The growing reports of the arrests there caused City Council President Ben Stuckart to oppose the location until the Border Patrol's access there was resolved.¹²⁶

This opposition became even stronger when the Border Patrol announced in a press release on May 8, 2018 that a new station would be opened in Spokane, sharing the office with the Spokane Sector Headquarters.¹²⁷ This station had been closed a decade earlier because of lack

¹²³ Mitch Ryals and Daniel Walters, "ACLU lawsuit: Latino man was profiled, then detained for showing a know-your-rights card to Border Patrol in Spokane," *Inlander*, June 20, 2018, <https://www.inlander.com/Bloglander/archives/2018/06/20/aclu-lawsuit-latino-man-was-profiled-then-detained-for-showing-a-know-your-rights-card-to-border-patrol-in-spokane> (accessed May 12, 2023).

¹²⁴ Chad Sokol, "Mexican man who spent a decade in South Dakota arrested at Spokane Intermodal Center," *The Spokesman-Review*, August 8, 2018, <https://www.spokesman.com/stories/2018/aug/08/mexican-man-who-spent-a-decade-in-south-dakota-arr/> (accessed May 12, 2023).

¹²⁵ "Planned Parenthood joins other community groups to protest ICE arrests," *KREM*, August 15, 2018, <https://www.krem.com/article/news/local/planned-parenthood-joins-other-community-groups-to-protest-ice-arrests/293-584497970> (accessed May 12, 2023).

¹²⁶ Daniel Walters, "Forget the Intermodal: City says the WorkSource building is perfect for social services site," *Inlander*, August 21, 2018, <https://www.inlander.com/news/forget-the-intermodal-city-says-the-worksource-building-is-perfect-for-social-services-site-11638187>.

¹²⁷ Walters, "Border Patrol."

of agents, but was being reopened in order to avoid “tak[ing] Border Patrol agents and assets away from other stations along the border to complete the local mission in Spokane.”¹²⁸ It was estimated at the time that the station would require thirty new agents and eight to ten new patrol cars, with an expectation that staff positions would be filled by the end of 2018.¹²⁹

The fact that the Border Patrol chose to increase, rather than decrease, their presence in Spokane strengthened city council members’ resolve to cancel the city’s plan to install the social services center. President Stuckart worried at a public safety meeting that the opening of the new office after the city expressed concerns to the Border Patrol was a sign that the agency was “actually moving to a more aggressive stance,” speculating that if “Border Patrol said they’re going to open an office with new agents...[bus arrests] will only become more prevalent.”¹³⁰ This proved to be correct. As seen in Figure 10, Border Patrol arrests in fiscal year 2019 at the Intermodal Center were double the average of 35 arrests per year in fiscal years 2013 through 2017.¹³¹

¹²⁸ Walters, “Border Patrol.”

¹²⁹ Will Campbell, “U.S. Border Patrol hiring 30 agents to support Spokane branch,” *The Spokesman-Review*, May 21, 2018, <https://www.spokesman.com/stories/2018/may/21/us-border-patrol-hiring-30-agents-to-support-spoka/> (accessed May 12, 2023).

¹³⁰ Walters, “Border Patrol.”

¹³¹ The count for arrests in 2019 is possibly actually for 2019, not FY 2019. See the footnote below for an explanation.

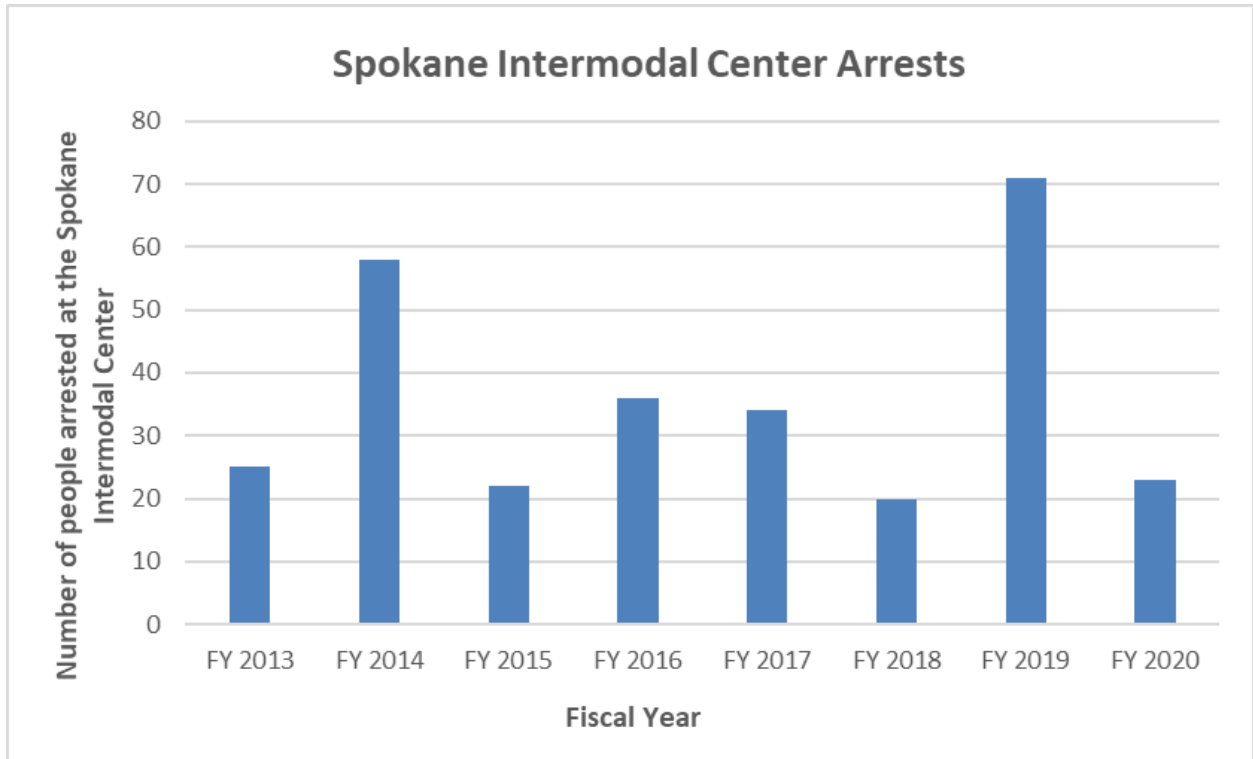


Figure 10: Graph of arrests at Spokane Intermodal Center, 2013-2020.¹³²

In their continued battle with the Border Patrol, the Spokane City Council passed two ordinances in October 2018 which defined the entire city-owned bus station as non-public, and declared non-public city property to be off-limits for immigration enforcement purposes, unless a warrant is obtained from Spokane’s mayor.¹³³ However, this ordinance was not successful in its attempt to limit the Border Patrol’s activity at the Intermodal Center, because the Border Patrol

¹³² Statistics on the exact number of Border Patrol arrests at the Spokane Intermodal Center are not available, since CBP does not disaggregate statistics by location or apprehension method. However, we can get a picture of arrest rates by combining statistics for 2013-2018 transportation check arrests released by CBP to the *Spokesman-Review* in 2018 with the number of people arrested in 2019 as reported by the *Intercept*. Note that the number of arrests for fiscal year 2018 is probably an underestimate, given that these numbers were reported by the *Spokesman-Review* in July 2018, only three-quarters of the way through the fiscal year. It is also unclear from the *Intercept* article whether the figure of seventy-one arrests is for the year 2019 or fiscal year 2019. However, we know from our data that there were at least forty-two individuals arrested in fiscal year 2019 (this number is an undercount because our dataset includes only a portion of the 2018 arrests) and at least fifty-six in 2019. There were also twenty-three people arrested in fiscal year 2020.

¹³³ Casey Decker, “Spokane, Border Patrol agents at odds over bus searches,” *KREM*, October 25, 2018, <https://www.krem.com/article/news/local/spokane-county/spokane-border-patrol-agents-at-odds-over-bus-searches/293-607943856> (accessed May 12, 2023).

claimed that, “The way the city ordinance is written will actually not stop us from performing our job at the Spokane Intermodal,” referencing the 100-mile zone laws.¹³⁴ It is unclear whether the City Council’s ordinance would have held up in court against the Border Patrol’s claims, but multiple lawyers thought the Border Patrol’s reasoning was false.¹³⁵ However, this was a moot point because then-mayor David Condon, a Trump supporter, agreed with the Border Patrol, and stated that he would not enforce the new policy.¹³⁶

In January 2019, Border Patrol agents pulled Mohanad Elshieky off a bus in Spokane, and while they did not arrest him, they did question him for a prolonged period outside the bus. Elshieky is a comedian and Libyan citizen who had been granted asylum in October 2018. This arrest gained wider coverage after Elshieky’s tweet about the incident was shared by Representative Alexandra Ocasio-Cortez. Various newspapers in Portland, Oregon, where Elshieky lived at the time, published stories on the incident, as well as newspapers in Washington State.¹³⁷ NWIRP and the ACLU filed claims against CBP on behalf of Elshieky in April 2019, occasioning more news coverage. Elshieky and the aforementioned Andres Sosa each later settled with CBP for \$35,000.¹³⁸

¹³⁴ Decker, “Spokane, Border Patrol.”

¹³⁵ Daniel Walters, “Spokane City Council passed a law to stop what just happened to Mohanad Elshieky. Border Patrol didn't care,” *Inlander*, January 28, 2019, <https://www.inlander.com/spokane/spokane-city-council-passed-a-law-to-stop-what-just-happened-to-mohanad-elshieky-border-patrol-didnt-care/Content?oid=16220841> (accessed May 12, 2023).

¹³⁶ Martyn, “Spokane vs. the Border Patrol.”

¹³⁷ Katie Shepherd, “Border Patrol Interrogated Portland Comedian Mohanad Elshieky At A Greyhound Station in Spokane: “They Kept Repeating the Word ‘Illegals’,” *Willamette Week*, January 27, 2019, <https://www.wweek.com/news/courts/2019/01/27/border-patrol-interrogated-portland-comedian-mohanad-elshieky-at-a-greyhound-station-in-spokane-they-kept-repeating-the-word-illegals/> (accessed May 12, 2023); Fedor Zarkhin, “Portland comedian stopped by border patrol says he felt dehumanized,” *The Oregonian*, January 28, 2019, <https://www.oregonlive.com/today/2019/01/portland-comedian-stopped-by-border-patrol-says-he-felt-dehumanized.html>.

¹³⁸ “U.S. Border Patrol Agrees to Two \$35,000 Settlements in Racial Profiling, Unlawful Detention Cases,” ACLU Washington, April 29, 2021, <https://aclu-wa.org/news/us-border-patrol-agrees-two-35000-settlements-racial-profiling-unlawful-detention-cases>.

Several national newspapers reported on the growing number of transportation sweeps at the northern border later in 2019. These articles summed up the ACLU's complaints, Greyhound's insistence that they could not refuse the Border Patrol's boardings, and each gave mention to the incidents in Spokane. *NBC News* published a long article in June 2019, which mentioned Elshieky.¹³⁹ In December 2019, the *Intercept* profiled Spokane as an example of the increase in immigration enforcement on Greyhound buses nationwide.¹⁴⁰ With this coverage, the Border Patrol's actions in Spokane made it onto the national stage, and would figure in many subsequent news articles covering CBP's memo about permission to board and Greyhound's policy change in 2020, as detailed in the previous section.

¹³⁹ Adiel Kaplan and Vanessa Swales, "Border Patrol searches have increased on Greyhound, other buses far from border," *NBC News*, June 5, 2019, <https://www.nbcnews.com/politics/immigration/border-patrol-searches-have-increased-greyhound-other-buses-far-b-order-n1012596> (accessed May 12, 2023).

¹⁴⁰ Martyn, "Spokane vs. the Border Patrol."

Methodology and Findings

Research Questions

With this context in mind, this study will use a set of eighty-nine I-213s from transportation checks (largely in Spokane) to explore questions around this CBP enforcement strategy. I-213 forms, formally titled “Record of Deportable/Inadmissible Alien,” are an important source of qualitative and quantitative data from agencies that are notoriously opaque with their data transparency. CBP releases apprehension statistics each year for their sectors, but they note total arrests without detail on the specifics such as “complexion,” country of origin, exact location, method of apprehension, or number of children. I-213s can provide this missing information. The I-213 form is completed by ICE and CBP agents for each person they arrest, and describes identifying information for the person, biometric information such as hair color, eye color, and complexion, date, place, and time of apprehension and of last entry into the U.S., and various other fields. Most of the first page of an I-213 form is shown in Figure 11. There is also a narrative section that usually continues onto one or more I-831 “Continuation Page” forms, which includes more information about the individual’s immigration history, possible criminal history, and the circumstances of the arrest.

Family Name (CAPS) (b)(6); (b)(7)(C)		First	Middle	Sex M	Hair BLK	Eyes BRO	Cmpkx MED
Country of Citizenship EL SALVADOR	Passport Number and Country of Issue (b)(7)(F); (b)(6); (b)	File Number (b)(7)(F); (b)(6); (b)		Height 62	Weight 145	Occupation LABORER	
U S Address (b)(6), (b)(7)(C) SEATTLE, WASHINGTON, 98146				Scars and Marks See Narrative			
Date, Place, Time, and Manner of Last Entry Unknown Date, PWA(AFOOT)			Passenger Boarded at (b)(7)(E)				
Number, Street, City, Province (State) and Country of Permanent Residence (b)(6), (b)(7)(C) METAPAN, EL SALVADOR				Method of Location/Apprehension TCB UNKNOWN			
Date of Birth (b)(6); (b)	Age: 37	Date of Action 11/23/2019	Location Code SPK/SPW				
City, Province (State) and Country of Birth METAPAN, SANTA ANA, EL SALVADOR		AR <input checked="" type="checkbox"/>	Form : (Type and No) Lifted <input type="checkbox"/> Not Lifted <input type="checkbox"/>				
NIV Issuing Post and NIV Number		Social Security Account Name					
Date Visa Issued		Social Security Number					
Immigration Record NEGATIVE				Criminal Record See Narrative			
Name , Address, and Nationality of Spouse (Maiden Name, if Appropriate)						Number and Nationality of Minor Children None	
Father's Name, Nationality, and Address, if Known				Mother's Present and Maiden Names, Nationality, and Address, if Known (b)(6), (b)(7)(C) NATIONALITY: EL SALVADOR			
Monies Due/Property in U S Not in Immediate Possession None Claimed		Fingerprinted? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Systems Checks		Charge Code Words(g) See Narrative		
Name and Address of (Last)(Current) U S Employer		Type of Employment	Salary	Employed from/to			

Figure 11: Example of a redacted first page of the I-213 form.

It is important to remember that although I-213s are useful research tools, they are also written by federal immigration enforcement agents. Not only do I-213s potentially document facts that were remembered incorrectly, but agents may stretch the truth or fabricate to protect themselves or their agency. For example, *The Intercept* documented the prevalence of mistakes or outright lies on I-213s, with immigration attorneys finding “regular instances of erroneous, fabricated, and downright bogus information” on these forms.¹⁴¹ Some of these may be true mistakes, based on “hurried clerical errors.”¹⁴² However, agents also have an incentive to portray themselves as following agency policies, asking the right questions, and obtaining the right evidence or adequate level of reasonable suspicion, even if this is not entirely true. For example, an agent may “reverse-engineer” a story for why they stopped someone to “give themselves

¹⁴¹ John Washington, “Bad Information: Border Patrol Arrest Reports are Full of Lies that Can Sabotage Asylum Claims,” *The Intercept*, August 11, 2019, <https://theintercept.com/2019/08/11/border-patrol-asylum-claim/> (accessed May 12, 2023).

¹⁴² Washington, “Bad Information.”

cover for detaining someone on the basis of racial profiling.”¹⁴³ This research seeks to use I-213s as a tool while retaining a healthy dose of skepticism about whether I-213s accurately portray the entire circumstances surrounding an arrest.

The information in these I-213s will be used to explore the following questions about the practices and impacts of the Border Patrol’s transportation check operations. These will be split into two main areas of inquiry: the people impacted by transportation checks and the processes used in these operations.

People:

- Who is impacted by transportation checks? Is the Border Patrol arresting recent border crossers or long-term residents?
- Are certain populations disproportionately targeted and/or impacted?
- Do transportation checks target individuals who pose a threat to the United States?
- How many people arrested in these transportation checks are subsequently detained?

Process:

- Where did transportation checks take place in Washington and surrounding states? Did they follow a particular schedule?
- What are the processes the Border Patrol is supposed to follow in transportation checks, and are they followed in these examples?
- What reasons for suspicion about certain individuals do Border Patrol agents document in the narrative sections of these I-213s?
- Are these encounters truly consensual? Are individuals afforded the choice to terminate the encounter by leaving the bus or remaining silent?

In the “Implications of Findings” section, the legal and policy context surrounding transportation checks will be considered and applied to some of the findings from the Spokane I-213s.

¹⁴³ Washington, “Bad Information.”

- What do Supreme Court precedent, legal scholarship, CBP policy, and the stories of people impacted by transportation checks tell us about:
 - the “consensual” nature of these checks?
 - racial profiling?
- Do transportation checks fulfill a national security interest? Are they effective and efficient in fulfilling their mission, and does this justify the harm they cause?

Methodology

This research uses I-213 data obtained by the University of Washington Center for Human Rights (UWCHR), a human rights research center established by the state legislature in 2009. The center coordinates multiple projects monitoring immigrant rights in Washington State, including the implementation of state laws protecting immigrants and human rights conditions in immigration detention. As part of these projects, UWCHR filed FOIA requests to ICE and CBP for all I-213 forms produced in Washington State from 2012 to 2017. ICE and CBP are notorious for evading FOIA requests,¹⁴⁴ and as often is the case, litigation was ultimately needed to obtain the requested documents. UWCHR sued ICE and CBP September 2018,¹⁴⁵ and settlement negotiations were done separately with each agency. The settlements led to UWCHR receiving all I-213s produced from January 1, 2019 to March 31, 2020 by ICE’s Seattle field office (which covers Washington, Oregon, and Alaska), and every twentieth I-213 produced by CBP’s Blaine and Spokane Sectors from January 1, 2012 to September 30, 2017.¹⁴⁶

The heavily redacted PDFs of 4,054 I-213s were received in installments by UWCHR between May 2020 to June 2021.¹⁴⁷ These forms were scraped and the data cleaned by the

¹⁴⁴ University of Washington Center for Human Rights, *Secret Police: Access to Information about Immigration Enforcement in the United States*, December 5, 2018, accessed May 12, 2023, <https://jsis.washington.edu/humanrights/wp-content/uploads/sites/22/2018/12/Secret-Police-UWCHR-IACHR-20181205.pdf>

¹⁴⁵ University of Washington/Center for Human Rights at University of Washington/Angelina Godoy v. DHS/ICE/CBP, “Complaint for Declaratory Relief for Violating FOIA,” September 21, 2018, <https://jsis.washington.edu/humanrights/wp-content/uploads/sites/22/2018/09/UWCHRvDHS-20180921.pdf>.

¹⁴⁶ Phil Neff, “I-213 descriptive analysis,” September 22, 2021, <https://uwchr.github.io/i-213-analysis/>.

¹⁴⁷ Neff, “I-213 descriptive analysis.”

Human Rights Data Analysis Group (HRDAG) to create a spreadsheet covering many of the fields on the I-213 form.¹⁴⁸

Names, dates of birth, addresses, photos, and identification numbers (e.g. FBI, Alien numbers) were redacted from the I-213s received. Elements of the narratives were redacted as well, including all names of CBP and ICE agents. Other elements such as criminal history were sometimes redacted, including some questionable or suspicious redactions (see the section on fear of persecution). When redacted portions appear in quotes throughout this research, they will be indicated by the letters X or Y.

In order to narrow down the 4,000-plus records to only those regarding transportation checks, I searched the spreadsheet for various terms including Intermodal, bus, train, Greyhound, Amtrak, Jefferson, Trailways, and passenger compartment. This was done in an iterative process, with additional terms found in known I-213s of interest being added until multiple new terms revealed no new I-213s. This process yielded about 130 I-213s with one or more of the above terms.

Next, I read the narrative of each I-213 to discard those that were not transportation check-related. For example, many of these mentioned the word “bus” in some other context, such as individuals “encountered at the Port of Entry Bus processing area,” individuals traveling by bus in the United States or Mexico, or individuals who (disturbingly) were arrested after “dropping the kids off at a school bus stop.” During this process, I also checked for duplicates, paying close attention to not discard the cases of different individuals who were arrested in the same circumstances on the same day. Some individuals had I-213s that were in both the datasets received from ICE and CBP, because the individual had been transferred from CBP to ICE custody. (This was rare, since the time periods released by CBP and ICE generally did not

¹⁴⁸ Neff, “I-213 descriptive analysis.”

overlap.) In these cases, their records were combined and they were counted as one individual, but both I-213s were kept because they occasionally had different redactions which were able to together reveal more information. This process produced eighty total I-213s regarding different individuals.

UWCHR had also received ten I-213s from Spokane bus arrests in a previous FOIA request of CBP.¹⁴⁹ These were all from arrests in 2017. Nine of these were distinct from the aforementioned eighty, so these were added into the dataset, for a total of eighty-nine I-213s. The relevant information from these nine I-213s was manually added to the spreadsheet.

Some summary statistics for the entire dataset are described below. As seen in Table 1, I-213s from ICE and during 2019 were predictably overrepresented, since UWCHR received all of the I-213s ICE produced in 2019 and early 2020 and only one out of every twenty produced by CBP in the earlier years. The ICE I-213s were all for people originally apprehended by CBP who were then transferred to ICE custody.

¹⁴⁹ University of Washington Center for Human Rights, “UWCHR Sheds Light on Border Patrol Immigration Checks on Greyhound Buses,” March 22, 2018, <https://jsis.washington.edu/humanrights/2018/03/22/uwchr-sheds-light-border-patrol-immigration-checks-buses/>.

Table 1: I-213s by Year and Releasing Agency¹⁵⁰

Year	CBP	ICE
2013	4	-
2014	3	-
2015	1	-
2016	2	-
2017	12	-
2018	7	-
2019	-	56
2020	-	4
Total	29	60

Once I had obtained my dataset of I-213s of interest, I manually checked each I-213 to add missing information into the spreadsheet. “Complexion” and “Sex” were two fields that were often missing from the scraped spreadsheet data. I was able to add this information where it was available, or to indicate that it was left blank, as was the case for a few of the individuals’ complexion data.

Finally, I read each I-213 at least twice and coded them, translating aspects of interest into variables for the purpose of comparison. This quantification sometimes ended up being unnecessary, for example, when it yielded only one example of use of force. However, it was useful because it gave me a general idea of how often something was happening (or being documented as happening), and it ensured that I had checked for certain characteristics of the arrest in every single I-213.

¹⁵⁰ The year of two of these I-213s was corrected. They were ICE I-213s from a later arrest in 2019, but referred to the individual’s prior apprehension by CBP at Spokane Intermodal Center in 2017 and 2018. To properly reflect the year that the apprehension of interest occurred, they were classified as 2017 and 2018.

The categories that I coded for are below. More specific methodology for some of these categories is available in Appendix 1.

“People” coding categories

- Length of time in the United States (see details in Appendix 1)
- Number of U.S. citizen minor children
- Criminal history?
- Detained following apprehension? (see details in Appendix 1)
- Held temporarily at Spokane County Jail?

“Process” coding categories

- Specific location of apprehension (city and terminal)
- Agents’ likely justification(s) for their reasonable suspicion, examples include:
 - Not being able to understand/speak English
 - Acting nervous
 - Stating that they are a citizen of another country
 - Admitting illegal entry or overstaying a visa
 - Passport with missing visa or stamp
 - Running or walking away
- On or off bus/train?
- Consent to board from the driver/conductor?
- Wording about consensual encounter, ability to embark/disembark?
- Any justification (vague or specific) for why transportation checks are taking place?
- Expressed fear of persecution?
- Use of force by agents?

Findings

The following findings from the eighty-nine I-213s have been divided into two sections: “People” and “Process.” These findings together suggest that transportation checks in the Northwest were more widespread than previously reported and point to serious problems with racial profiling and constitutional violations.

People

Who is being arrested in transportation check operations? How long have these individuals been living in the United States, and are they threats to the nation? These questions are central to debates about both transportation checks and other types of immigration enforcement operations. CBP and the Border Patrol portray transportation checks as interrupting criminal organizations and preventing people from “depart[ing] the immediate border area.”¹⁵¹ On the other hand, critics of transportation checks assert that some populations are disproportionately targeted by this practice through racial profiling. They state that many arrestees are long-time U.S. residents, not recent arrivals, and that many have children and community ties here. This section will shed light on who was arrested by the Border Patrol in Spokane based on the personal characteristics available in their I-213s. The section will first cover length of residence in the United States, followed by personal characteristics of those arrested such as skin tone (a proxy for race), country and region of origin, and sex. Next, I will assess the number of U.S. citizen children among people arrested. Finally, these findings will cover the prevalence of criminal history among those arrested, and the percentage of people who are sent to immigration detention following their arrest.

❖ The Border Patrol predominantly arrested people who had been in the United States for significant periods of time, not recent border crossers. More than half of individuals arrested in this dataset had lived in the United States for over six years, and almost three-quarters for over three years.

The CBP Enforcement Law Course handbook states the following about the purpose of transportation checks:

¹⁵¹ CBP, *U.S. Border Patrol Transportation Check Operations Brochure*.

The purpose of transportation checks is to find and arrest smugglers and illegal aliens *attempting to use public transportation to move from the border area to the interior of the United States*. Transportation checks conducted at key hubs complement linewatch, roving patrol and immigration checkpoint operations by *closing off another means of escape from the border area*.¹⁵² (emphasis added)

Despite this stated purpose, these I-213s show that the Border Patrol's transportation checks in Spokane predominantly impacted people who have been in the United States for a considerable time. A large majority of individuals arrested were longtime residents of the United States. As seen in Figure 12, seventy-two of eighty-two individuals (88%) had lived in the United States for one year or more, and 71% had been living in the country for three years or more. In addition, thirty-four people's (41%) time in the country exceeded ten years. In fact, among these, there were six people who had lived in the United States for over twenty years, including two men whose residency exceeded thirty-four years. Data for seven individuals was missing because there was no date of entry shown on their I-213s.

¹⁵² State of Washington v. Greyhound Lines, "Complaint," 38.

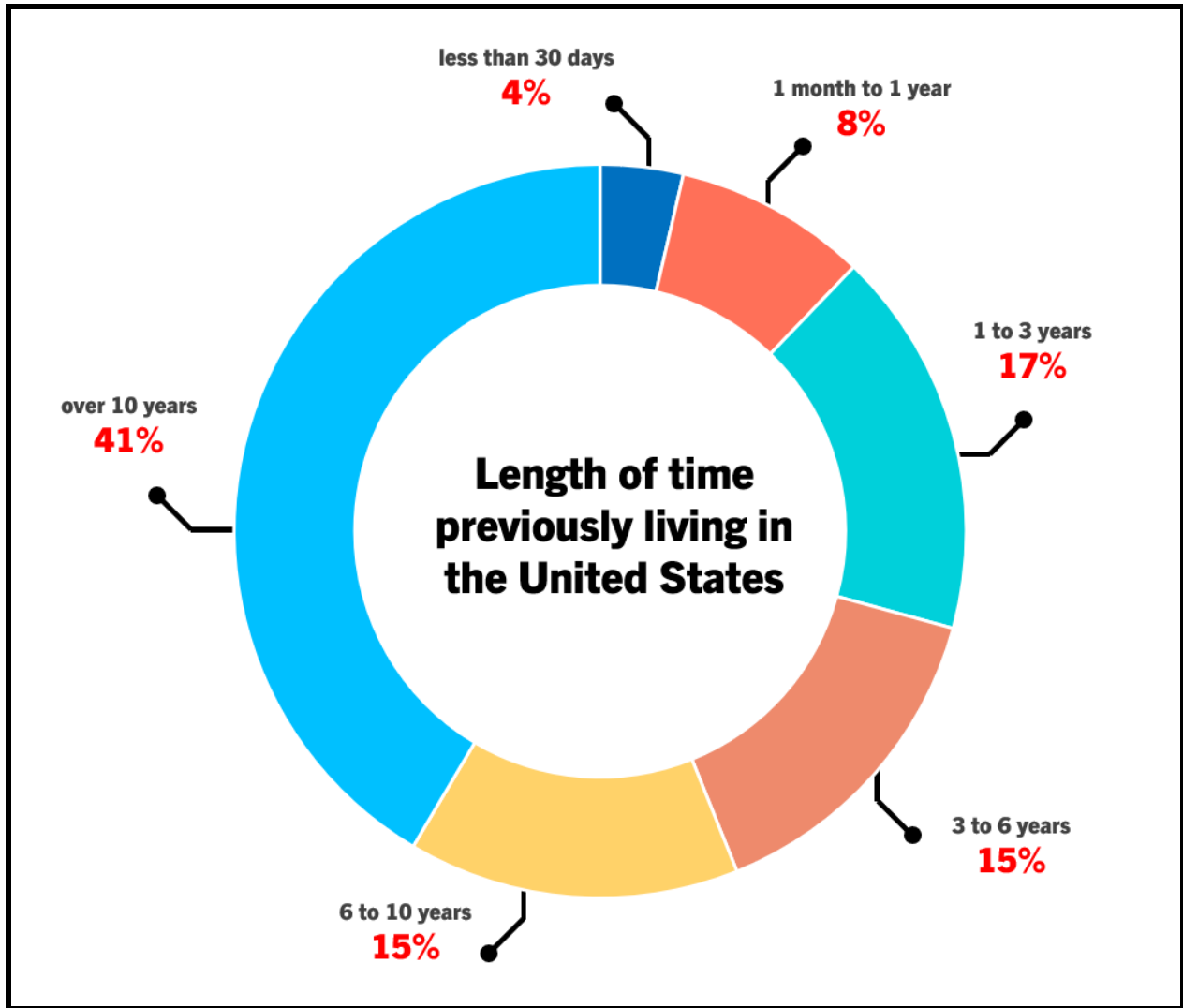


Figure 12: Chart showing “Length of time previously living in the United States.”¹⁵³

Only ten people (12%) had spent less than a year in the United States, and only three of them (4%) less than thirty days. Of note, the person who was arrested within 72 hours of entry was someone who “was reported as having deserted the X [a cruise ship]” in Seattle, not someone who was coming from the Canadian border near Spokane.

¹⁵³ See Appendix for detailed methodology.

These findings follow the pattern revealed by the NYCLU in their report on transportation checks at the Rochester Station. That report found that 76% of individuals had been in the United States for more than one year and 71% for more than three years.¹⁵⁴

❖ **Transportation checks arrested mostly people of Latin American origin (69%), people with “Medium” or “Black” complexion (88%), and men (91%).**

As seen in Figure 13, sixty-one out of eighty-nine people arrested (69%) were of Latin American origin. In contrast, only 13.7% of people in Washington State described themselves in the 2020 census as Hispanic or Latino.¹⁵⁵ In the 2010 census, this number was 11.2%.¹⁵⁶ In addition, the other regions of origin that are strongly represented in the arrests – Sub-Saharan Africa, North Africa and the Middle East, and Asia – are predominantly populated by people who are marked as visually “different” in the United States.

¹⁵⁴ NYU School of Law, *Justice Derailed*.

¹⁵⁵ America Counts Staff, “Washington State Grew by Almost 1 Million,” U.S. Census Bureau, August 25, 2021, <https://www.census.gov/library/stories/state-by-state/washington-population-change-between-census-decade.html>

¹⁵⁶ America Counts Staff, “Washington State.”

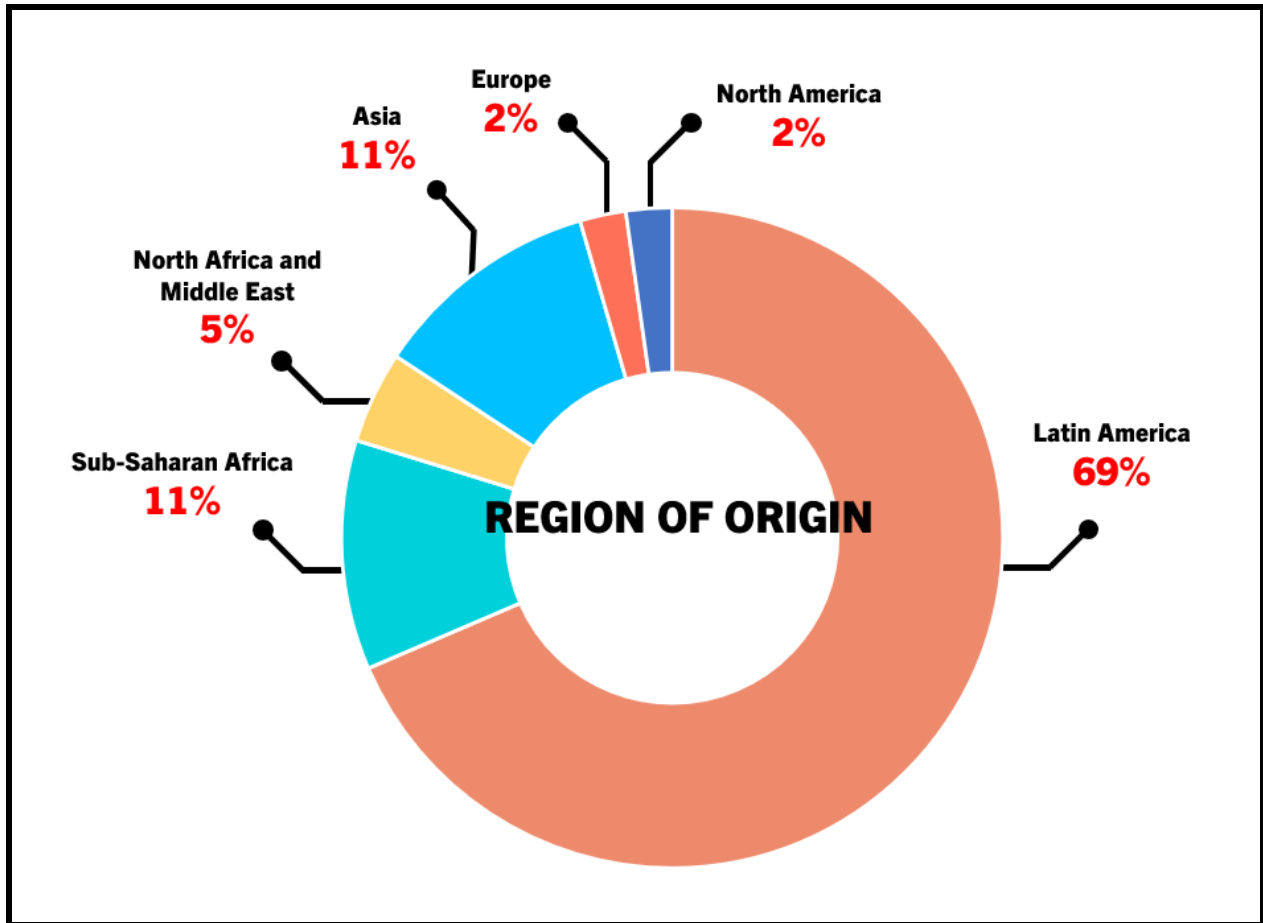


Figure 13: Chart showing “Region of Origin” of arrested individuals.

This both confirms anecdotal and media reports of these Spokane arrests targeting Latin Americans, as well as echoes the findings of the NYCLU, who found that 73.2% of transportation check arrestees in the Rochester Station between 2006 and 2009 were from Latin America.¹⁵⁷ These patterns of the overwhelming arrest of Latin Americans are typical along the northern border in general. The ACLU of Michigan conducted an I-213 based study of all arrests by the Border Patrol in the Detroit sector between 2012 and 2019, including roving patrol arrests

¹⁵⁷ NYU School of Law, *Justice Derailed*.

and those referred by state and local law enforcement. They found that 83.8% of the noncitizens arrested by the Border Patrol during this time were of Latin American origin.¹⁵⁸

The I-213 form also has a field for “Complexion,” with a coding system shown in Figure 14. Although these codes are quite specific, with odd and outdated descriptions such as “Ruddy,” “Sallow,” and “Yellow,” it seems that agents largely use only a small number of the complexion codes. In the Spokane I-213s, only “Medium,” “Black,” “Fair,” and “Light” were employed by agents.

Complexion Codes
Complexion as of 12/23/15

Complexion	Description
ALB	ALBINO
BLK	BLACK
DBR	DARK BROWN
DRK	DARK
FAR	FAIR
LBR	LIGHT BROWN
LGT	LIGHT
MBR	MEDIUM BROWN
MED	MEDIUM
OLV	OLIVE
RUD	RUDDY
SAL	SALLOW
YEL	YELLOW

Figure 14: The Border Patrol’s complexion coding system, as reported by the ACLU of Michigan.¹⁵⁹

As seen in Figure 15, the vast majority of people (sixty-six of seventy-five) were characterized as having a “Medium” (88%) or “Black” (7%) complexion, with only 5% characterized as “Fair” or “Light.” The complexion of fourteen people (all of Latin American

¹⁵⁸ ACLU Michigan, *The Border’s Long Shadow*.

¹⁵⁹ ACLU Michigan, *The Border’s Long Shadow*.

origin) was left blank. This extreme overrepresentation of people with “Medium” or “Black” complexion is similar to the percentages found by the NYCLU and the ACLU of Michigan.

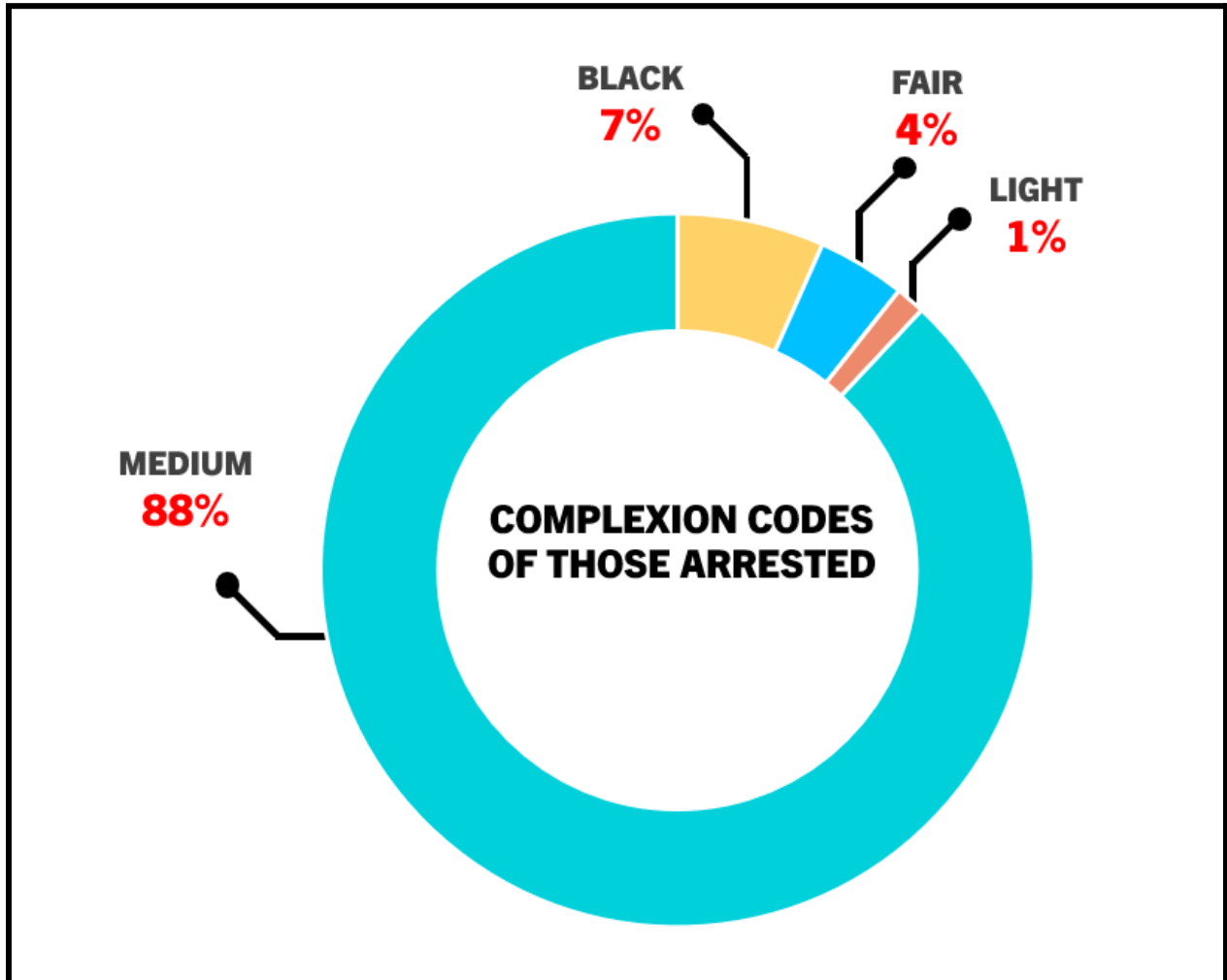


Figure 15: Chart showing “Complexion Code” of seventy-five of the eighty-nine arrested individuals. This does not include the fourteen people for whom complexion was left blank, who were also largely of Latin American origin.

In addition, the Border Patrol’s transportation checks in Spokane resulted in arrests of men 91% of the time. This high percentage of arrests of men is consistent with overall arrests in

the Spokane Sector, where 93% were men in FY 2020. It is slightly higher than the percentage of arrests of men (82%) along the northern border in general in the same year.¹⁶⁰

❖ **The Border Patrol arrested at least nine parents with a combined total of twenty minor U.S. citizen children.**

The data about length of residency in the United States indicates that many people have strong roots here in their communities. The brevity and sterile nature of each I-213, however, obscures these connections that individuals have in the United States, save a brief mention of someone’s job or family.

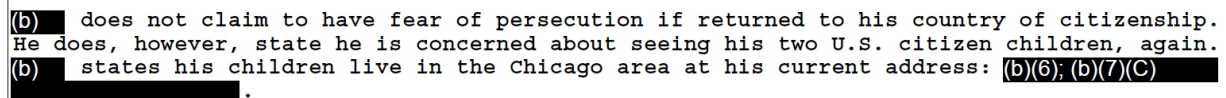
One way that readers can glimpse these connections is through mention of children. This information was gleaned from a field on the I-213 form for “Number and Nationality of Minor Children” (see Figure 16) and in one case, notes about children in the narrative section. Nine individuals reported having U.S. citizen minor children, for a total of twenty U.S. citizen minor children and one child reported to have an Employment Authorization Document. This EAD was likely acquired through DACA or another legal status other than citizen or permanent resident. Several individuals reported minor children in Honduras, Ecuador, and Mexico. There may be more children of people in this dataset who currently live in the United States but are not noted here because they are not U.S. citizens.

Immigration Record POSITIVE - See Narrative	Criminal Record See Narrative	
Name, Address, and Nationality of Spouse (Maiden Name, if Appropriate) See Narrative	Number and Nationality of Minor Children 2 USC	
Father's Name, Nationality, and Address, if known		Mother's Present and Maiden Name, Nationality, and Address, if known

Figure 16: Example of the “Number and Nationality of Minor Children” field.

¹⁶⁰ U.S. Customs and Border Protection, “United States Border Patrol Sector Profile - Fiscal Year 2020.”

This number is likely an undercount, because although there were thirty-nine I-213s where “None” was explicitly written in the field for “Number and Nationality of Minor Children,” in thirty-four cases this field was left entirely blank. In one of these cases where the field was blank, the narrative portion indicated that the individual had U.S. citizen children, as seen in Figure 17: “X stated he had been living in Chicago for about twenty years and has two U.S. children.” The fact that the individual stated this himself, prompting the officer to write it down, indicates the possibility that Border Patrol agents were not directly asking this question of people who they arrested. It supports the possibility that the number of U.S. citizen children is actually higher than twenty.



(b) does not claim to have fear of persecution if returned to his country of citizenship. He does, however, state he is concerned about seeing his two U.S. citizen children, again. (b) states his children live in the Chicago area at his current address: (b)(6); (b)(7)(C) .

Figure 17: Example of an individual stating concern about his U.S. citizen children.

The narrative from the man from Chicago with two U.S. citizen children also includes two more references to family, which show both the strength of this individual’s ties in the United States and the pain of family separation – both things that may be true in many other cases, but are not usually mentioned. The individual told the Border Patrol agents that “he was in route [sic] to Granger, Washington to visit his brother who X states is a naturalized U.S. citizen and his mother.” In addition, the below statement adds some humanity to the normally sterile narratives in that the man shares that he is “concerned about seeing his two U.S. citizen children, again.” One can only imagine how what was actually a plea was sanitized to a statement of “concern.”

- ❖ **Between 69% and 81% of the people arrested had no prior criminal history, despite the Border Patrol’s mission to “protect our Nation by reducing the likelihood that dangerous people and capabilities enter the United States between the ports of entry.”¹⁶¹**

ICE and CBP have a history of exaggerating the criminality of the individuals they target and arrest. Sometimes this is done through statistical misrepresentation or selective publication;¹⁶² ICE has been found to “count...multiple charges or convictions against a single person as separate ‘criminals.’”¹⁶³ The rhetoric ICE and CBP use paints immigrants as dangerous, and claims that those targeted, arrested, and detained are criminals.¹⁶⁴ These organizations’ social media pages regularly exhibit drug seizures and the arrests of “criminal aliens” who are wanted in some locality in the United States, giving the impression that all people arrested are criminals. In addition, politicians and the media often characterize entire swaths of immigrants as criminals. The actual statistics about the criminality of those in immigration detention, and immigrants in general, paint a different picture. ICE’s own statistics show that most of the growth in immigration detention between 2015 and 2019 was of immigrants without criminal convictions.¹⁶⁵ Furthermore, immigrants have been found in study after study to have lower

¹⁶¹ “Border Patrol Overview,” U.S. Customs and Border Protection.

¹⁶² Austin Kocher, “Challenging State Narratives about Immigrant Criminality,” *Border Criminologies Blog*, May 1, 2020, <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/05/challenging-state>.

¹⁶³ University of Washington Center for Human Rights, *Secret Police*.

¹⁶⁴ Kocher, “Challenging State Narratives.”

¹⁶⁵ TRAC Immigration, “Growth in ICE Detention Fueled by Immigrants with No Criminal Conviction,” November 26, 2019, <https://trac.syr.edu/immigration/reports/583/#f1>.

criminal history rates than native-born citizens.¹⁶⁶ This set of eighty-nine individuals adheres to this trend.

As seen in Figure 18, 69% to 81% of people in this dataset did not have any criminal history. The range results from two different levels of scrutiny of the criminal history records in these I-213s: stricter scrutiny included listed arrests, charges, and convictions, while less strict scrutiny included only convictions.¹⁶⁷ These two ways of assessing criminal history were necessary because the information for state and local arrests, charges, and convictions in I-213s is not always complete. For example, some I-213s noted that people had been convicted, and others noted only arrests and charges. In some cases, it was clearly indicated that charges had been dropped, but in others, there was simply no information beyond a charge. It was unclear whether this was due to missing records or because there was no conviction. I chose to use two different methods of calculation in order to not appear to be artificially underexaggerating the crime rates. It is possible that some arrests or convictions are missing altogether from the I-213s, which could slightly bump up the criminal history rates. This appears unlikely, however, given the inclusion of even low-level arrests such as failure to appear or driving without a license.

¹⁶⁶ Michael T. Light and Ty Miller, “Does Undocumented Immigration Increase Violent Crime?,” *Criminology* 56 (March 2018): 370-401, <https://onlinelibrary.wiley.com/doi/full/10.1111/1745-9125.12175>; Robert Adelman, Lesley Williams Reid, Gail Markle, Saskia Weiss and Charles Jaret, “Urban Crime Rates and the Changing Face of Immigration,” *Journal of Ethnicity in Criminal Justice* 15, no. 2 (2017): 52-77, <http://dx.doi.org/10.1080/15377938.2016.1261057>; Alex Nowrasteh, “Criminal Immigrants in Texas,” *The Cato Institute*, February 2018, <https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-4-updated.pdf>; Michael T. Light, Jingying He, and Jason P. Robey, “Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas,” *Proceedings of the National Academy of Sciences of the United States of America*, 117, no. 51 (2020): 32340–32347, <https://doi.org/10.1073/pnas.2014704117>.

¹⁶⁷ I excluded the immigration-related criminal offenses of improper entry and illegal reentry, which criminalize simply coming to the United States and have only recently begun to be tried frequently (See “Prosecuting People for Coming to the United States,” American Immigration Council, August 23, 2021, <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions>.) I also excluded arrests and convictions for driving with a suspended or revoked license, which is a crime that almost exclusively impacts people living in poverty because licenses can be suspended for failure to pay fines and fees. It also disproportionately impacts people of color who are more likely to be pulled over for minor traffic violations. (See Nazish Dholakia, “Driver’s License Suspensions for Unpaid Debt: Punishing Poverty,” Vera, July 19, 2022, <https://www.vera.org/news/drivers-license-suspensions-for-unpaid-debt>.) Driving with a suspended license was the only criminal traffic violation seen in these I-213s other than DUIs, which were included in the calculations of criminal history.

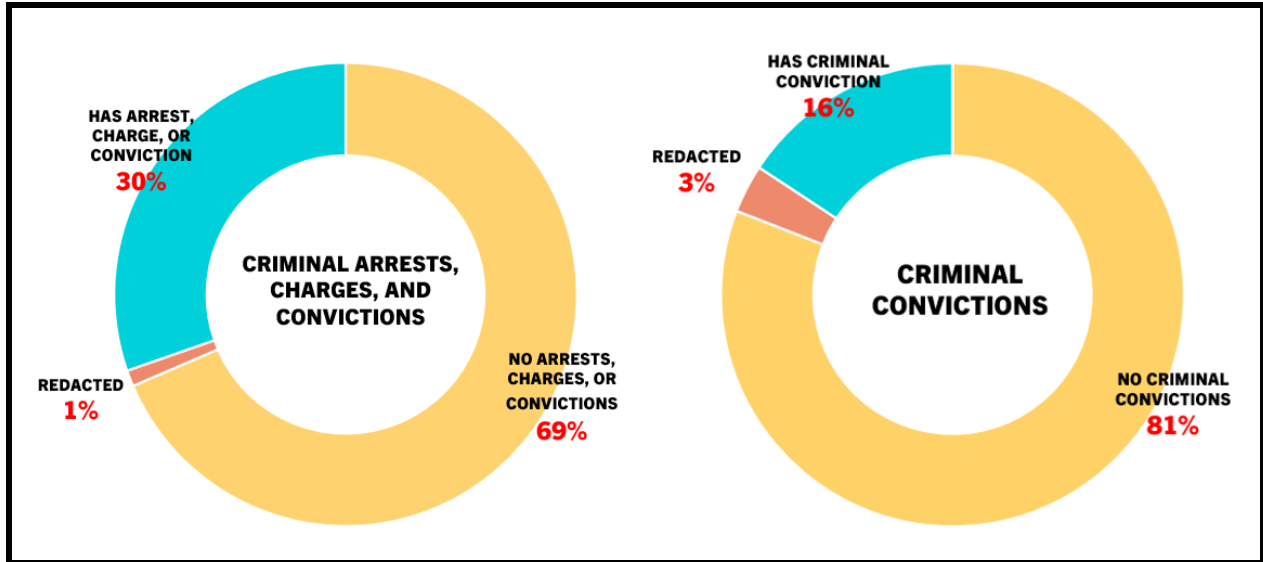


Figure 18: Charts of the rates of criminal history of individuals arrested. The chart on the left uses a stricter method of scrutiny, and includes criminal arrests, charges, and convictions. The chart on the right only considers criminal convictions, excluding arrests and charges.

These rates of criminal history for these eighty-nine people appear to be slightly lower than average for the United States; an estimated one-third (33%) of adults in this country have been arrested as compared to 30% of people in this dataset.¹⁶⁸ These rates must of course be viewed in the context of the United States’ position as the world leader in incarceration. Additionally, the overcriminalization of people of color means that these individuals, 95% percent of whom have “Medium” or “Black” complexion, are likely to have higher rates of arrest or conviction than if they were white, even for crimes that are committed at similar rates across races.¹⁶⁹

¹⁶⁸ Matthew Friedman, “Just Facts: As Many Americans Have Criminal Records as College Diplomas,” Brennan Center for Justice, November 17, 2015, <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas>.
¹⁶⁹ Rose M.C. Kagawa et al., “Racial Bias and DUI Enforcement: Comparing Conviction Rates with Frequency of Behavior,” *Criminology & Public Policy* 20, no. 4 (2021): 645–63, <https://doi.org/10.1111/1745-9133.12558>.

It is crucial to acknowledge that focusing on criminal history, even to illustrate how low it is, has its downsides. It can further cement the idea that having a criminal history means someone is less deserving of human rights. Categories of “deserving” and “undeserving” immigrants have been challenged by many of those people labeled as deserving, as demonstrated by the phrase “felons are also our family.”¹⁷⁰ I chose to include this as a topic of analysis to challenge the predominant narrative and show how the criminality of those arrested by ICE and CBP is overblown by these agencies, politicians, and the media.

❖ **The vast majority (89%) of individuals who were arrested were subsequently sent to immigration detention centers.**

Seventy-nine out of eighty-nine (89%) individuals were detained following their apprehension by the Border Patrol, as shown in Figure 19.¹⁷¹ Most I-213s clearly indicate transfer from Spokane to the Northwest Detention Center (NWDC) in Tacoma, Washington.¹⁷² The NWDC is a private detention center owned and operated by the GEO Group. There have long been serious concerns about human rights abuses at the facility, including unclean facilities and inadequate food, the overuse of solitary confinement, medical neglect and minimal COVID-19 response, and underreporting of sexual abuse.¹⁷³

¹⁷⁰ Ala Sirriyeh, “‘Felons Are Also Our Family’: Citizenship and Solidarity in the Undocumented Youth Movement in the United States,” *Journal of Ethnic and Migration Studies* 45, no. 1 (January 2, 2019): 133–50, <https://doi.org/10.1080/1369183X.2018.1456324>.

¹⁷¹ See the Appendix for a detailed methodology for determining detention and release statistics.

¹⁷² The detention center was rebranded in 2019 to the Northwest ICE Processing Center. I will continue to refer to it as NWDC, as that is how it is known to most people. Many I-213s still use NWDC as its name in the address line, even after the rebranding.

¹⁷³ University of Washington Center for Human Rights, “Conditions at the Northwest Detention Center,” accessed May 12, 2023, <https://jsis.washington.edu/humanrights/projects/human-rights-at-home/conditions-at-the-northwest-detention-center/>.

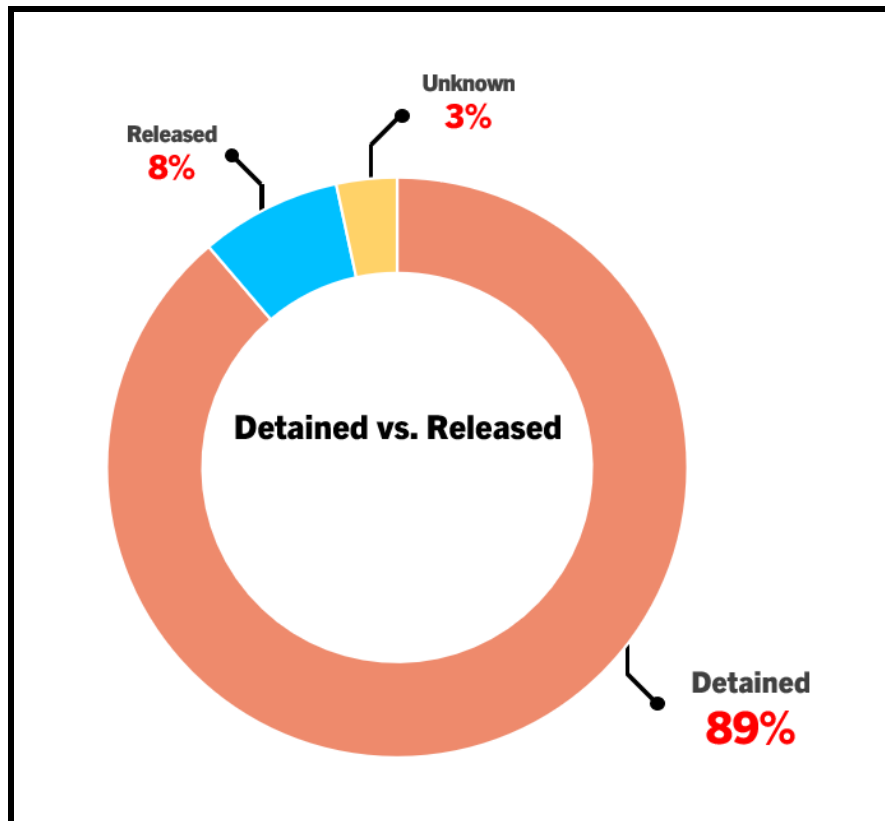


Figure 19: Chart of individuals who were detained versus released after their transportation check arrest.

Only seven of the eighty-nine people arrested were clearly indicated as having been released, all between 2013 and 2017. Three of these individuals were released between July 2015 and January 2017 under the Obama administration’s Priority Enforcement Program (PEP) guidelines about individuals who are not a priority for deportation. This means that these individuals were neither detained nor presented for removal or prosecution. This program was discontinued by President Trump shortly after his inauguration in January 2017. The other four individuals were released “on their own recognizance” in 2013 and 2014, prior to the implementation of PEP. This means that these individuals were placed in removal proceedings and required to report to ICE or ERO for interviews or court hearings, but not placed in detention.

Unfortunately, the percentage of people from this dataset who were detained, despite family ties to the U.S. and little to no criminal history, is not unexpected in the present-day. Detention has been on a steady rise since 1996, when several pieces of legislation were signed that broadened the types of offenses that could trigger removal proceedings. These were the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act. They also instituted a system of mandatory detention for many offenses, as well as for asylum seekers.¹⁷⁴ As seen in Figure 20, the number of people detained nationwide again rose sharply in 2005 and 2006, shortly after Congress' 2004 enactment of the Intelligence Reform and Terrorism Prevention Act. This Act required DHS to add 8,000 beds per year to their immigration detention capacity from FY 2006 through FY 2010. This rise was precipitated by lobbying from private prison companies who stood to gain financially from increased detention.¹⁷⁵ Quotas, or "guaranteed minimums" that contractually require ICE to pay private companies for a minimum number of beds per day, also incentivize the arrest and imprisonment of more immigrants.¹⁷⁶ ICE's contract with GEO Group for the NWDC requires a guaranteed minimum of at least 800 beds per day.¹⁷⁷

¹⁷⁴ "Mandatory Detention," Detention Watch Network, accessed May 12, 2023, <https://www.detentionwatchnetwork.org/issues/mandatory-detention>.

¹⁷⁵ Livia Luan, "Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention," Migration Policy Institute, May 20, 2018,

<https://www.migrationpolicy.org/article/profitting-enforcement-role-private-prisons-us-immigration-detention>

¹⁷⁶ Detention Watch Network, *Banking On Detention: Local Lockup Quotas & the Immigrant Dragnet*, 2015, <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf>.

¹⁷⁷ Detention Watch Network, *Banking on Detention*.

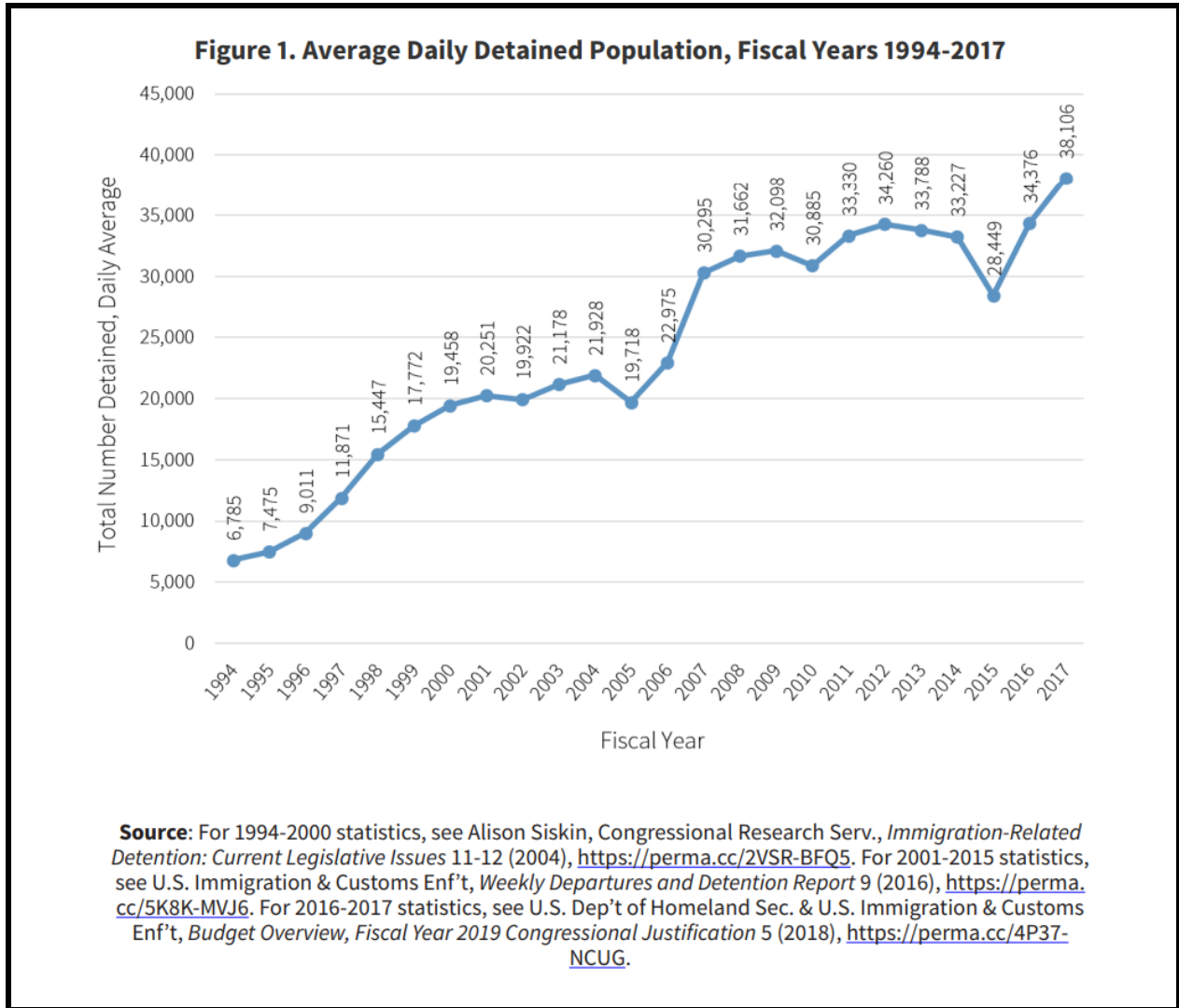


Figure 20: Graph of average daily detained population in the United States, 1994 - 2017.¹⁷⁸

A major finding of the NYCLU’s report about transportation sweeps in 2011 was that 74% of individuals arrested by Rochester Station agents were being detained. The headline for this section of their reports reads, “A staggering proportion of transportation raid arrestees were detained.”¹⁷⁹ Sadly, in our present-day immigration enforcement climate, 89% of individuals arrested being detained is no longer shocking. However, it is worth noting as a critique of the

¹⁷⁸ Emily Ryo and Ian Peacock, *The Landscape of Immigration Detention in the United States*, December 2018, https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf.

¹⁷⁹ NYU School of Law, *Justice Derailed*.

system. During the two years of PEP (2015-2017), individuals were not prosecuted when they had certain characteristics, such as low or no criminal history. The memo that outlined the principles of PEP stated that detention should not be used for people in the following categories unless approved by the ICE Field Office Director: “aliens who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.”¹⁸⁰ Clearly many people from this dataset who were detained in 2018, 2019, or 2020 would not have been detained under the PEP priorities, either because they have no criminal history or because they are primary caretakers of children.

The costs of detention are myriad. First, of course, is loss of freedom and separation from family and community. Detention almost always means family separation and trauma for those involved, including children. There are also extreme financial consequences for families who have not only usually lost a breadwinner, but also incur increased expenses because of the cost of posting bond, hiring a lawyer, or sending financial support to the individual in detention. Fighting deportation from within a detention center is difficult because of the difficulty of accessing legal counsel.¹⁸¹ Finally, detaining such a high number of people is extremely expensive. The federal government spends about \$157.20 per day to detain a single person.¹⁸² Fiscal year 2023 detention funding to ICE was \$2.9 billion of taxpayer dollars.¹⁸³

¹⁸⁰ U.S. Department of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, by Jeh Charles Johnson, (Washington, DC, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

¹⁸¹ Aditi Shah and Eunice Hyunhye Cho, *No Fighting Chance: ICE’s Denial of Access to Counsel in U.S. Immigration Detention Centers*, 2022, <https://www.aclu.org/report/no-fighting-chance-ices-denial-access-counsel-us-immigration-detention-centers>.

¹⁸² American Immigration Lawyers Association (AILA), *Featured Issue: Immigration Detention and Alternatives to Detention*, AILA Doc. No. 21031937, March 28, 2023, <https://www.aila.org/advo-media/issues/featured-issue-immigration-detention>.

¹⁸³ AILA, *Featured Issue*.

- ❖ **Individuals were held temporarily in Spokane County Jail while awaiting transfer to the NWDC. More than half of these cases were after the passage of the Keep Washington Working Act (KWW), which should have prohibited this practice.**

As seen in Figure 21, at least nineteen individuals were held at the Spokane County Jail overnight before their transfer to NWDC. Fourteen of these instances were after the passage of the Keep Washington Working Act (KWW), Washington State’s sanctuary law. The use of a county jail for immigration detention purposes is illegal under KWW: the Act prohibits counties and cities in Washington from having detention contracts with CBP and ICE.¹⁸⁴

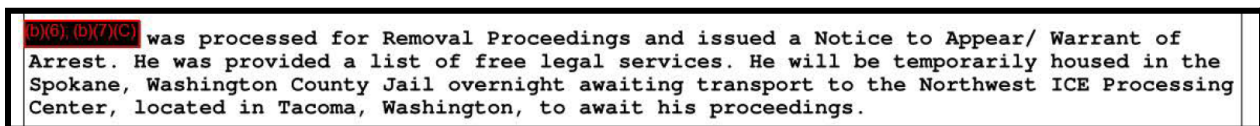


Figure 21: I-213 form indicating temporary housing at the Spokane County Jail.

In 2022, researchers from UWCHR discovered through a public records request to Spokane County that the Border Patrol has had a housing contract with Spokane County Jail since 2016.¹⁸⁵ Invoices from Spokane County Detention Services to the Border Patrol showed the length of time that individual inmates were spending detained at the county jail, but there was no identifying information about who exactly was being held under this contract. These I-213s provide evidence that the Border Patrol used this contract with the county jail to detain immigrants temporarily before they are transferred to the NWDC, and that at least some of these individuals were arrested during transportation checks. Spokane County has now ended this

¹⁸⁴ “Keep Washington Working Act FAQ for Law Enforcement,” Washington State Office of the Attorney General, accessed May 12, 2023, <https://www.atg.wa.gov/keep-washington-working-act-faq-law-enforcement#:~:text=KWW%20prohibits%20law%20enforcement%20officials,%2C%20state%2C%20or%20federal%20law.>

¹⁸⁵ University of Washington Center for Human Rights, forthcoming.

contract after various immigrant rights groups in the state confronted them about its violation of KWW.¹⁸⁶

Process

There has been so little research about transportation checks that even simple questions about the place and time of arrests can reveal new information. Questions of interest include whether these operations were common on carriers other than Greyhound and whether they ever occurred outside of the 100-mile zone. In addition, the process of transportation checks matters for questions of legality. Did Border Patrol agents follow the policies described in their policy handbooks? What pieces of evidence did they use to establish reasonable suspicion to detain and probable cause to arrest someone? Was the passengers' right to end a "consensual encounter" respected? Did Border Patrol agents follow the procedures for claims of fear of persecution?

This section will first look at the locations of transportation checks, the transportation companies that were involved, and the timing of these operations. It will then consider aspects of the transportation check that are essential for whether these checks are constitutional according to Supreme Court precedent on matters of search and seizure. These include consent to board by the driver and voluntariness of the initial conversation with the individual questioned.

- ❖ **Transportation check arrests took place in locations other than the Spokane Intermodal Center and on modes of transport other than Greyhound buses, despite the publicity almost exclusively focusing on that location and corporation.**

Media reports about transportation check arrests in the Northwest from 2018 through 2020 focused almost exclusively on the Spokane Intermodal Center and Greyhound Lines. While

¹⁸⁶ Aaron Korthuis, email message, May 24, 2023.

these I-213s mostly show evidence of arrests at this location and on Greyhound buses, they also reveal that transportation checks occasionally occurred at other locations throughout the Northwest, as shown on the map in Figure 22.

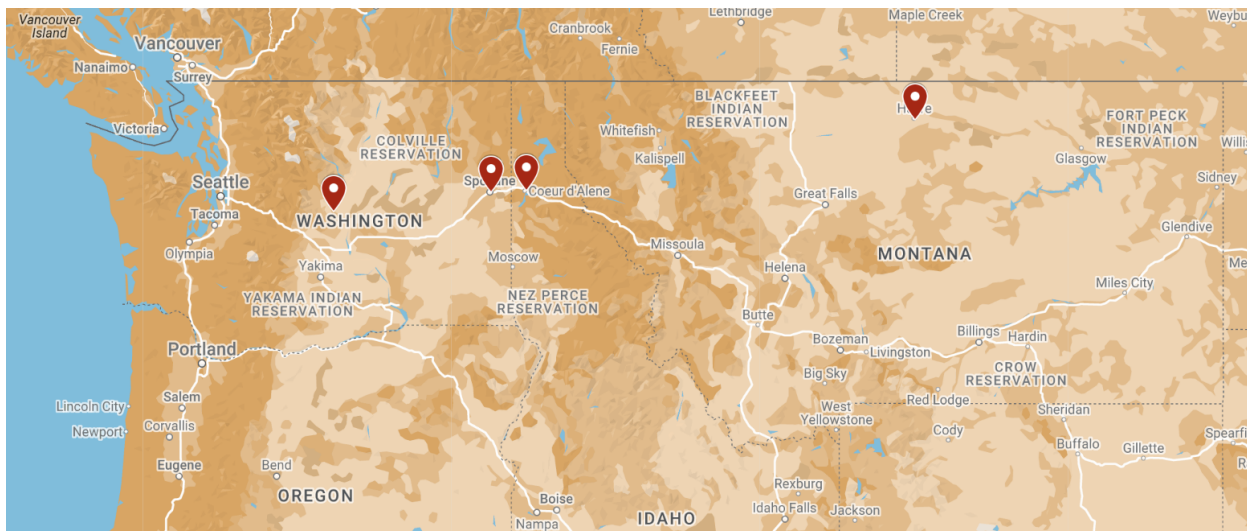


Figure 22: Sites of transportation checks in the Northwest from 2013 through 2020. From left, Wenatchee, WA, Spokane, WA, Coeur d’Alene, ID, and Havre, MT.¹⁸⁷

Seventy-four of the arrests took place on buses at the Spokane Intermodal Center. Thirty-three specifically mention Greyhound, while thirty-eight bus arrests occurred at Spokane Intermodal, but do not specify which bus company. Some of these took place in the waiting area. Finally, three arrests at the Spokane Intermodal Center are specifically mentioned as taking place on buses belonging to companies other than Greyhound. These companies were Northwestern Trailways (now Northwestern Stage Lines) and Jefferson Lines (one person was apprehended on the Jefferson bus, while one person was waiting in line.)

These I-213s also show arrests taking place on Amtrak. Four arrests took place on the Amtrak train in Spokane at the Intermodal Center. In addition, the I-213 for one of these arrests

¹⁸⁷ Google Maps, “Map indicating Wenatchee, WA, Spokane, WA, Coeur d’Alene, ID, and Havre, MT,” accessed May 12, 2023, <https://www.google.com/maps>.

indicates that the Havre, Montana Border Patrol station was conducting transportation checks on Amtrak trains in Havre. (This practice had been documented previously in Havre as early as 2005.)¹⁸⁸ The Havre agents had originally questioned a Chinese citizen in Havre, but “the train departed the station while Havre agents were running record checks.” This individual was eventually arrested in Spokane after Havre agents called ahead agents in Washington.

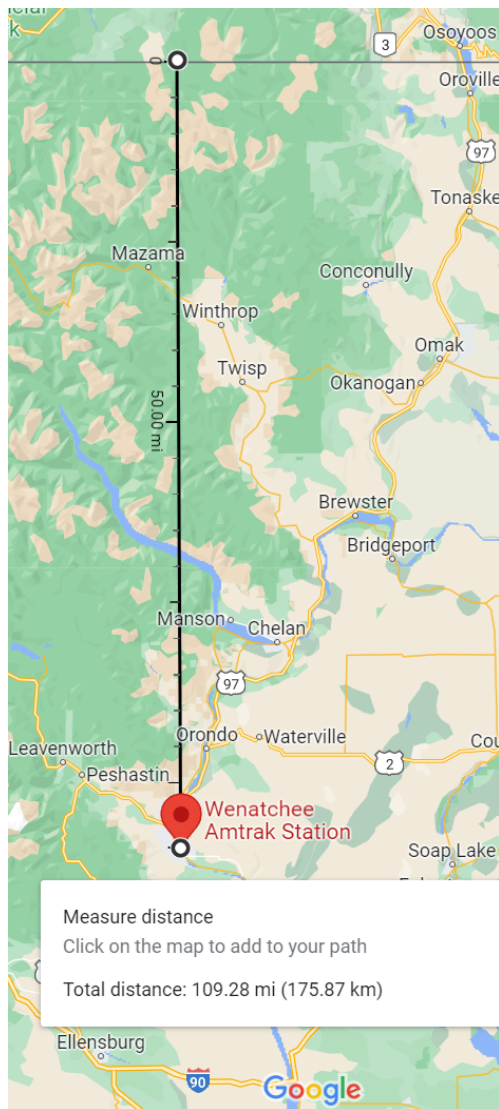


Figure 23: Map showing that Wenatchee is located 109 miles from the Canadian border.¹⁸⁹

¹⁸⁸ Abramsky, “Terror on the Inner Border.”

¹⁸⁹ Google Maps, “Distance from Wenatchee Amtrak Station to a spot directly north on the Canadian border,” accessed May 12, 2023, <https://www.google.com/maps>.

Two arrests also occurred in cities outside of Spokane. One arrest took place in the terminal at Columbia Station in Wenatchee, Washington (referred to in the narrative as the Wenatchee, Washington Northwestern Trailways Bus Station.) As shown in Figure 23, Wenatchee is barely inside the 100-mile zone since this zone is defined as one hundred air miles, or 115 statute miles. Columbia Station is located 109 miles from the border. Another arrest occurred in Coeur d'Alene, Idaho on a bus operated by Jefferson Lines. This likely was at the A & D Mini Mart in Coeur d'Alene, which is the bus stop for both the Greyhound and Jefferson lines.

❖ **Transportation checks were assigned duties and usually occurred at regular times.**

Multiple I-213s from the Spokane dataset contain the wording “assigned to transportation check duties,” indicating that this was a regular assignment rather than individual agents conducting bus arrests to fill their time.

I-213 forms include the time of the arrest down to the minute. As seen in Figure 24, there were large peaks in arrests during the hours of 11am, 5pm, and 6pm. This suggests that transportation checks usually occurred on a regular schedule. There was no discernible pattern in days of the week when transportation checks occurred.

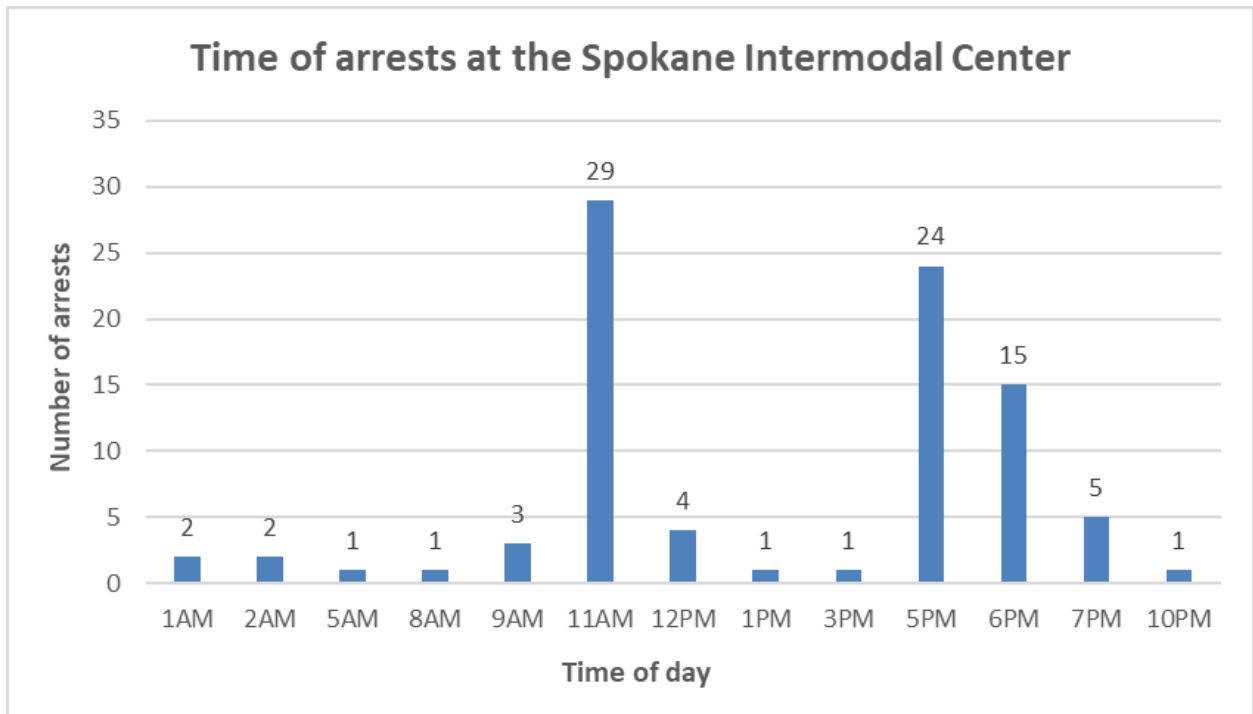


Figure 24: Graph of times of arrest at the Intermodal Center.

- ❖ **Greyhound bus drivers routinely gave consent for Border Patrol agents to board buses. Amtrak conductors also guided Border Patrol agents to people on the train.**

One of the central elements of Greyhound’s defense was that they were required to allow federal officers onto their buses and could not refuse them entry. However, the ACLU and the Washington State Attorney General’s office retorted that the law and CBP policy in fact requires bus drivers to give consent for Border Patrol agents to board their vehicles. These I-213s show that, at least according to the Border Patrol agents who filled out the forms, Greyhound drivers were explicitly or implicitly giving permission to agents to board buses. Sixteen of these I-213s contain language stating that Greyhound drivers gave consent for Border Patrol agents to board their buses, using one of the wordings in Figure 25. These instances were all in late 2018, 2019, or 2020, after media coverage and criticism of both Greyhound’s and the Border Patrol’s

practices became prevalent. This change in the typical language used may have been an attempt by the Border Patrol to document their practice of obtaining consent, since by 2018 this had become a point of contention.

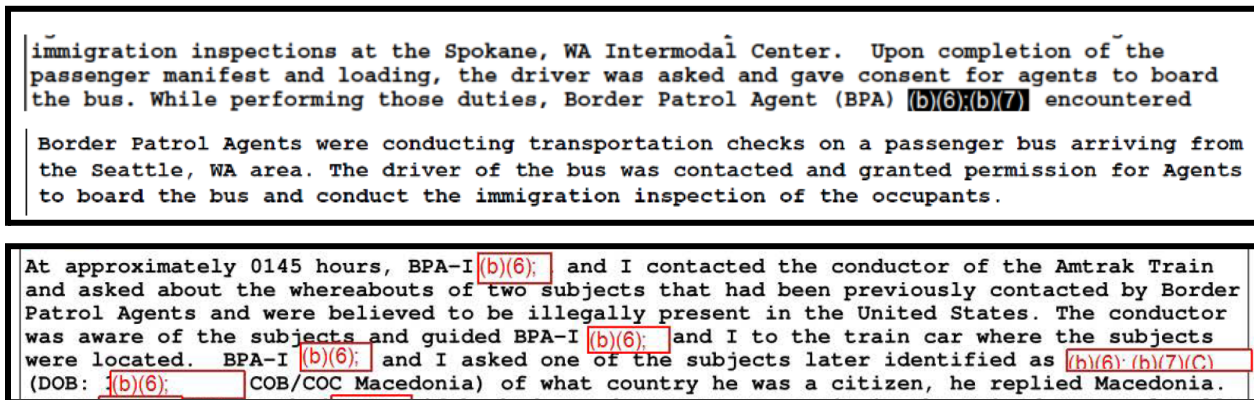


Figure 25: Two examples of I-213 wording about consent from the driver. One case of an Amtrak conductor guiding Border Patrol agents to two people who were then arrested.

Some news articles show congenial relationships between Greyhound drivers and Border Patrol agents. One driver interviewed said that she flirts with the agents and that they “make her feel safe.”¹⁹⁰ However, she also stated the belief that “she had no choice but to allow them on board.”¹⁹¹ It is unsurprising that individual bus drivers did not feel comfortable denying armed and uniformed federal agents entry to their buses without clear indication from Greyhound that this was not required. In one case, an Amtrak conductor actually guided Border Patrol agents to where two people were sitting on the train, as shown in Figure 25.

¹⁹⁰ Martyn, “Spokane vs. the Border Patrol.”

¹⁹¹ Martyn, “Spokane vs. the Border Patrol.”

- ❖ **Thirty-one percent of I-213 narratives indicated that a person did not speak or understand English. Nine percent read that the person “looked nervous” or other similar behavioral characteristics such as “mumbling” or “breathing heavily.” This data suggests that the reasons that Border Patrol agents outline for suspicion in some of these cases are questionable and verge into racial and linguistic profiling.**

I-213 narratives can be thought of as both an explanation of the incident and a justification for the investigation and eventual arrest of an individual. The Border Patrol agents who write them provide descriptions of their methods of boarding and questioning passengers, as well as of their conversations with those they eventually arrest. These conversations often provide (some of) the justifications for why this individual was suspected and detained, possibly as a way of checking the boxes of reasonable suspicion. They also provide an explanation of how the agents reached the higher burden of probable cause, usually by searching the person’s information in federal databases.

The I-213 narratives in the eighty-nine cases examined here state different reasons for suspicion which fall into four general categories: behavior, language, documentation, and admission. These articulable reasons for suspicion are part of the reason why the Border Patrol insists that they do not engage in racial and ethnic profiling. Examples of the four categories are below in Table 2. In most cases, more than one of these categories are listed in the I-213, since multiple justifications for suspicion are listed as the conversation progresses.

Table 2: Categories from I-213 narratives that seem to be justifications for suspicion.

<p>Behavior: something about the individual’s behavior raises suspicion</p>	<p>“Agent X then asked if he had a visa. Y’s eyes widened, he began to breathe more heavily and his voice began to crack and quiver. Y also took several seconds to answer to questions [sic].”</p> <p>“X noticed that Y and her friend appeared to be nervous as they both avoided eye contact with him.”</p>
<p>Language: the person’s perceived inability to speak or understand English raises suspicion</p>	<p>“I asked him as to his citizenship in the English language and he replied in a manner that led me to believe that he did not understand me.”</p> <p>“He replied in Spanish something that led X to believe he was not fluent in the English language. X asked Y if he spoke Spanish, he replied that he did not understand.”</p>
<p>Documentation: the person provides a document that raises suspicion, or does not provide a document</p>	<p>“He handed me an Israeli passport and I examined the document. I noticed that it did not have a US Visa Stamp.”</p> <p>“...Y presented Agent X with a Gambian passport. Agent X inspected the passport and found an A2 nonimmigrant visa which expired on June 19, 2018.”</p>
<p>Admission: the person admits to a certain immigration status</p>	<p>“X freely admitted to being a citizen of India. X stated he had entered the United States illegally on foot circumventing the port of entry and was not inspected by an immigration official.”</p> <p>“X freely admitted to being a citizen of Mexico. Agent Y asked X if he had any immigration documents that would allow him to be present in the United States legally. X stated that he did not. Agent Y asked if he had any petitions filed on his behalf that would allow him to remain in the United States legally. X stated no.”</p>

The first two categories of suspicion, behavior and language, can be a coded form of racial profiling, which will be discussed in more detail later in the “Implications of Findings” section. Twenty-eight of the eighty-nine I-213s (31%) contained the wording “did not speak English” or “did not understand English,” usually at the beginning of the interaction. Eight (9%) included wording about the person being nervous, including describing them as “stammering,” “mumbling,” or “breathing heavily.” The second two categories of suspicion are eventually present in most of the cases, since Border Patrol agents usually continue the conversation until

they have either seen a suspicious document or someone has admitted to their status. It is important to note, however, that not even a “suspicious document” may mean the person has no legal status. Passports are often not stamped nowadays when people enter the country. People in certain legal categories, such as those with Temporary Protected Status (TPS), are not provided any documentation of their status.¹⁹² In addition, there is no comprehensive registration system for non-citizens in the country.¹⁹³ Carrying proof of legal status is not categorically required for the foreign-born in the United States, except for lawful permanent residents.¹⁹⁴

❖ **Despite wording stating that people are allowed to freely leave or “terminate” their encounters with the Border Patrol, there were two instances of people being chased down and arrested while leaving the bus station.**

The “consensual” nature of the Border Patrol’s transportation checks is central to the Border Patrol’s claim that they are constitutional. The CBP Enforcement Law Course handbook states that, “Transportation checks occur when Border Patrol agents have *consensual encounters* with travelers located in or near bus terminals, train stations and airports, or when they board stationary buses and trains at such locations to engage in *consensual encounters* with passengers”¹⁹⁵ (emphasis added). Section 6.520 of the Enforcement Law Course handbook is called “Constitutional Character of Transportation Checks,” and states that,

Nothing in the Constitution prevents an agent from questioning any person in a location where the agent is lawfully present, such as a bus station, train depot, or airport. Of course, the agent must interact with the person in such a manner that a reasonable

¹⁹² NYU School of Law, *Uncovering USBP*, 23.

¹⁹³ Nancy Morawetz and Natasha Fernández-Silber, “Immigration Law and the Myth of Comprehensive Registration,” *UC Davis Law Review* 48 (July 21, 2014): 141-205, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469403, 144.

¹⁹⁴ Morawetz and Fernández-Silber, “Immigration Law,” 181.

¹⁹⁵ *State of Washington v. Greyhound Lines*, “Complaint,” 38.

innocent person *would feel free to leave or terminate the encounter with the agent*.¹⁹⁶
(emphasis added)

These rules come from the cases *Florida v. Bostick* (1991) and *United States v. Drayton* (2002) two Supreme Court cases about bus arrests.¹⁹⁷

Critics of transportation checks have argued that the claim that anyone would “feel free to leave” while being questioned on a bus or train by a federal agent is absurd.¹⁹⁸ These officers are in full uniform and armed. In addition, leaving the bus would require giving up the ticket they have already paid for, not to mention forfeiting their trip, which may be time-sensitive. The 2011 report *Justice Derailed* states that these encounters “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.”¹⁹⁹ So the question arises: do these I-213s describe situations in which someone would have felt free to refuse to answer questions or otherwise end the encounter? What do the actions of the agents (admittedly in the agents’ own words) tell us about this question of voluntariness or consensuality?

In this sample, thirty-eight out of seventy-eight (49%) of the I-213 encounters that were on buses (rather than in line or in the waiting area) contained wording stating that passengers were free to leave and enter the bus. Two examples of this wording are shown in Figure 26 below. However, there were a few I-213s that cast doubt on whether individuals attempting to exit the bus would have been allowed to do so, further challenging the Border Patrol’s claim that people are free to terminate encounters.

¹⁹⁶ State of Washington v. Greyhound Lines, “Complaint,” 38.

¹⁹⁷ *Florida v. Bostick*, 501 U.S. 429 (1991); *United States v. Drayton*, 536 U.S. 194 (2002).

¹⁹⁸ NYU School of Law, *Justice Derailed*.

¹⁹⁹ NYU School of Law, *Justice Derailed*.

Agent (b) (6), (b) (7)(C) boarded the bus and began to conduct an immigration inspection from the rear of the bus moving to the front, questioning each and every passenger. At no time, was the movement of any passenger impeded. All passengers could disembark or embark the bus at any time.

Agent (b) (6), (b) (7)(C) encountered, (b) (6), (b) (7)(C) who was already seated on the bus in the center section. (b) (6), (b) (7)(C) did not make any attempt to exit the bus as BPA (b) (6), (b) (7)(C) approached. BPA (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) as to his citizenship, to which he replied

preparing to depart. SBPA (b) (6), (b) (7)(C) stayed at the front of the bus and stood near the driver's area so as to leave the aisle open to anyone who wished to freely enter or exit the bus. I went to the back of the bus and, in the English language began to ask each passenger as to their citizenship. When I questioned each passenger, I stood at the rear of seat in which the passenger was sitting to allow them to depart from the bus if they wished to do so. Approximately half way between the back and the front of the bus, I encountered

Figure 26: Examples of I-213 wording about passengers being allowed to leave the bus.

In one case, on January 2, 2019, agents “were waved down by one of the bus drivers who told them there were two subjects that ran from the bus once they got off.” As seen in Figure 27, the agents then chased the two men through downtown until eventually locating them in a Starbucks. Although in this case, the individuals had already exited a bus rather than being questioned on the bus, it calls into question the claim that a passenger who decided to depart a bus that Border Patrol agents boarded would be allowed to leave. The fact that the two men fled appears to be the agents’ justification for reasonable suspicion, which must be present in order to make an investigative detention. The Border Patrol agents seem to be explaining their claim to reasonable cause when they write in this I-213: “When the buses arrive, the public can clearly see that Border Patrol is present speaking with passengers. *This sometimes causes criminals and undocumented aliens to flee*” (emphasis added). This raises the question as to whether an individual “fleeing” (or simply walking off the bus) after being questioned by agents would also be considered reasonable suspicion.

ENCOUNTER/ARREST:

On January 2, 2019, while conducting transportation check at the Intermodal Bus Station in Spokane, Washington, agents from the United States Border Patrol, Spokane Station, were waved down by one of the bus drivers who told them there were two subjects that ran from the bus once they got off.

Agents saw the two subjects running southbound over the train tracks toward downtown Spokane and looking back at them. Agents initiated a foot pursuit at this time.

It is widespread public knowledge that Border Patrol Agents check the buses in full uniform and marked Border Patrol vehicles. When the buses arrive, the public can clearly see that Border Patrol is present speaking with passengers. This sometimes causes criminals and undocumented aliens to flee.

Agents tracked two individuals through downtown Spokane, with the help of the public, and were able to locate the two individuals at a Starbucks Coffee Shop located at 172 S Division St Suite A Spokane, Washington 99202.

Agents knew that the two individuals at the Starbucks were the two individuals who ran because they were both dressed in western clothing and as they ran they dropped a western hat and two western jackets. Both of the individuals also became visibly nervous when the agents approached and they were breathing heavily from running.

Figure 27: I-213 form showing two men who ran from the bus after exiting.

Another case, on November 26, 2019, involved an agent stopping a man who, as seen in Figure 28, “exited the terminal prior to bus loading and began walking east.” The agent then asked the man “if he was lost as bus travelers are instructed to stay inside the terminal area until they are told which line to await boarding.” First, it is interesting that this man was chosen for questioning, and that the Border Patrol agent assumed he was a traveler who was “lost,” since he could just have been buying a ticket or seeing a family member off at the station. There must be hundreds of people who exit the terminal each day - why was this man’s choice to exit suspicious? Could he have been suspected instead, because he fit the agent’s stereotype of an undocumented person, as a Honduran man with “medium” complexion? Second, this also shows a situation in which an individual voluntarily chose to leave the station, possibly after seeing Border Patrol agents there, and the agent then used this as an excuse to question him. In this case, the man was not even running as was true of the previous two men, an activity that understandably raised some suspicion. Based on the description, he seems to be walking and minding his own business until the agent stops him.

November 26, 2019, U.S. Border Patrol Agents (b)(6); (b)(7)(C), and (b)(6); (b) were assigned to transportation check duties at the Spokane Intermodal Center. The subject (later identified as (b)(6); (b)(7)(C)) exited the terminal prior to bus loading and began walking east. BPA (b)(6); asked (b)(6); (b) if he was lost as bus travelers are instructed to stay inside the terminal area until they are told which line to await boarding. (b)(6); (b) responded to BPA (b)(6); that he did not speak English. Agent (b)(6); then identified himself as a Border Patrol Agent and asked (b)(6); (b) as to his citizenship in the Spanish Language.

Figure 28: I-213 form about a man who walked out of the terminal and was questioned by a Border Patrol agent.

Both incidents together lead to the question: would an individual who decided to leave their seat and exit the bus when confronted with a Border Patrol agent asking them for their citizenship information simply be allowed to leave? Or would their exit be treated instead as reasonable suspicion to detain them in order to question them further?

Finally, two other cases from this dataset add further doubt to passengers' ability to terminate an encounter by remaining silent and not answering questions. In the first case, a woman does not reply to the agent, first after being asked her citizenship and then after being asked if she speaks English. The next line states, "I then asked her if she had an identification card and she shook her head as to reply no." In the other case, shown in Figure 29, the man in question "ignored" the Border Patrol agent's question about his citizenship and "was talking on his cell phone at the time." He eventually responded "Mexico" and tried to get the agent to talk to someone on the phone (perhaps his lawyer or a family member) rather than speaking to them himself. Admittedly, these two individuals did not perfectly invoke their right to remain silent, but in other cases, much more explicit intentions to remain silent in Spokane were not honored by Border Patrol agents. One passenger even showed a Know Your Rights card. These cases will be discussed in the "Implications of Findings" section.

Additionally concerning is the fact that the second encounter evolved into use of force against the man, who the agents attempted to lift out of his seat against his will. They "forcefully

removed” both his cell phone and his bags from him, and the man ended up being pressed against the bus window and handcuffed.

<p>of the bus, I encountered a subject who was later identified as (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) COB/COC: Mexico). I asked him as to his citizenship in the English language but was ignored. (b) (6), (b) (7)(C) was talking on his cell phone at the time. I tapped him on the shoulder to get his attention and repeated my question as to his citizenship. (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) angrily shouted "Mexico". I then asked (b) (6), (b) (7)(C) to produce any immigration paperwork that allowed him to be in the United States legally. (b) (6), (b) (7)(C) continued to ignore my questions. I could hear him talking to someone on his phone, in the English language, and he kept saying, "They are asking me for my papers, what should I do?" (b) (6), (b) (7)(C) then attempted to hand me his phone to talk to the person on the other line. I told him I was not going to talk to anyone else and to hang up the phone and answer my questions. (b) (6), (b) (7)(C) continued to ignore my commands. I then asked (b) (6), (b) (7)(C) to stand up and go to the front of the bus where Agents (b) (6), (b) (7)(C) and SBPA (b) (6), (b) (7)(C) were standing. (b) (6), (b) (7)(C) also ignored this command. I then forcefully grabbed (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) under his left arm and began to lift him in an attempt to encourage him to stand up as I has asked him to. He jerked his arm away and angrily shouted that he was standing up. (b) (6), (b) (7)(C) still on the phone, gathered his belongings and walked to the front of the bus. SBPA (b) (6), (b) (7)(C) met (b) (6), (b) (7)(C) on the steps of the bus. I walked up behind (b) (6), (b) (7)(C) and instructed him to place his hands behind his back. (b) (6), (b) (7)(C) continued to ignore all commands and talk on his cell phone. After multiple attempts to have him comply, I forcefully removed his phone from his hand along with his bags that were around his neck. (b) (6), (b) (7)(C) began to struggle and resist arrest. SBPA (b) (6), (b) (7)(C) and</p>	
Signature	Title
(b) (6), (b) (7)(C)	Border Patrol Agent

U.S. Department of Homeland Security		Continuation Page for Form	I213
Alien's Name	File Number	Date	
(b) (6), (b) (7)(C)	(b) (6), (b) (7)(C)	08/05/2018	
Event No. (b) (7)(E)			
I were able to press (b) (6), (b) (7)(C) up against the bus window and hold him until we could forcefully handcuff him. We then took (b) (6), (b) (7)(C) off the bus and into the driver area of the bus station.			

Figure 29: I-213 example of use of force and intent to terminate the encounter.

- ❖ Multiple cases indicate agents’ dismissal of claims of fear of persecution. It is not clear that everyone who claimed persecution was referred for credible or reasonable fear interviews, which are an essential part of the asylum process.

I-213s almost always contain a line which either states that a person does or does not fear returning to their country of citizenship. These are an essential part of the I-213 because immigration enforcement agents are required to ask this question for asylum claim purposes

when arresting someone. Figure 30 shows some examples of this sentence, which is found at the end of the I-213.

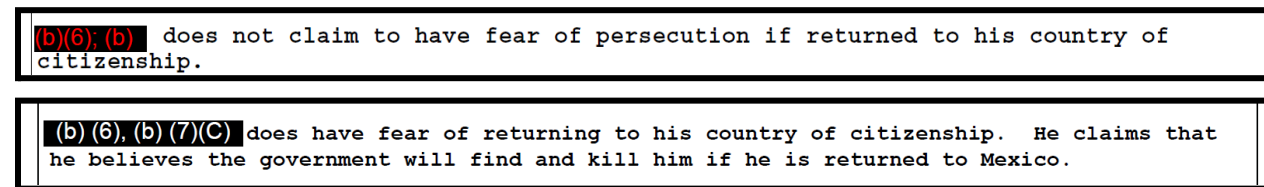


Figure 30: Examples of the question about fear of persecution found on I-213s.

When an individual expresses fear such as in the second case above, Border Patrol agents are required by law (U.S. law, the Refugee Convention and its Protocol, and the Convention Against Torture²⁰⁰) to refer individuals to a USCIS asylum officer for a credible fear interview. The credible fear interview determines whether an asylum seeker can remain in the country until their later appearance in court before an immigration judge, who can grant asylum or not. Thus, the credible fear interview requires a lower level of proof of fear than the actual determination of whether an individual receives asylum.

In cases in which the person is being presented for Reinstatement of Removal, which means they have been previously removed from the U.S. and have reentered the country without permission, the individual is referred for a reasonable fear interview.²⁰¹ This interview has slightly higher standards of fear than the credible fear interview. These people are not eligible for asylum, but they are eligible for Withholding of Removal and protection under the Convention Against Torture (CAT).

²⁰⁰ Rebecca Gendelman, *Pretense of Protection: Biden Administration and Congress Should Avoid Exacerbating Expedited Removal Deficiencies*, August 2022, <https://humanrightsfirst.org/wp-content/uploads/2022/10/PretenseofProtection.pdf>.

²⁰¹ “LOP General Orientation Addendum: A Guide to Summary Removal Proceedings and Fear Interviews,” Vera, accessed May 12, 2023, https://www.vera.org/knowledge-bank/GO-Script-Addendum_English.pdf.

Some I-213s in this dataset showed that people who expressed fear to Border Patrol agents may not have been referred for their credible or reasonable fear interviews. It is customary for these cases to have “Credible Fear Claim” stamped on the first page, as seen in Figure 31. However, six people (three of whom are being served with Reinstatement of Removal orders) in this sample expressed fear, but only one had this “Credible Fear Claim” stamp.

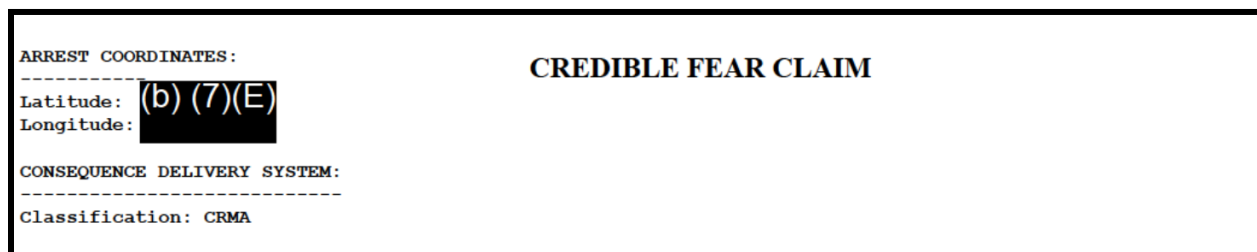


Figure 31: Example of the “Credible Fear Claim” stamp found on the front page of one I-213 in this dataset.

In addition, none of them had any indication that their cases were referred to an asylum officer for a credible or reasonable fear interview. UWCHR researchers also documented the absence of credible fear stamps and lack of evidence of referral to asylum officers in other Washington State I-213s from 2017.²⁰² A case that was correctly referred to an asylum officer could look like the one in Figure 32. Mention of Form M-444 (Information about Credible Fear Interview) or Form M-488 (Information about Reasonable Fear Interview) are indications that this interview actually happened. None of the I-213s for the six people who expressed fear had mentions of asylum officers or these forms.

²⁰² University of Washington Center for Human Rights, “Dismissing Credible Fear in Washington State, August 10, 2018, <https://jsis.washington.edu/humanrights/2018/08/10/dismissing-credible-fear-in-washington-state/>.

U.S. Department of Homeland Security		Continuation Page for Form	I213
Alien's Name (b)(6),(b)(7)(c)	File Number (b)(6),(b)(7)(c)	Date 05/30/2017	
Event No (b)(7)(E)			
credible fear, DHS form M-444 was completed and both subjects will be referred to an asylum officer while in custody.			

Figure 32: I-213 showing referral to an asylum officer and completion of an M-444.²⁰³

There were also sixteen cases where the typical line about fear of persecution was completely redacted, leading to additional questions about why this line has been redacted in some cases but not others. It is impossible to tell whether these redactions are for people who have or have not expressed fear, but it seems odd to redact a declaration of no fear, since it contains no personal information. In addition, a few of these redactions were multiple lines long, whereas a claim of no fear is typically only two lines of text.

U.S. Department of Homeland Security		Continuation Page for Form	I-213
Alien's Name (b)(6); (b)(7)(C)	File Number (b)(6); (b)(7)(C)	Date 10/29/2019	
Event No: (b)(7)(E)			
accepted food and water.			
(b)(3) unspecified statute; (b)(6); (b)(7)(C)			
(b)(6); (b) stated his parents are citizens and nationals of Mexico. (b)(6); (b) is also a citizen and national of Mexico and does not hold citizenship in any other country.			

Figure 33: An example of a redaction of the line about credible fear. It is clear in these sixteen cases that the redacted line is about fear because the questions are listed in a certain order, although this order changes year to year.

²⁰³ University of Washington Center for Human Rights, "CBP-2017-047039Redacted," accessed May 12, 2023, <https://jsis.washington.edu/humanrights/wp-content/uploads/sites/22/2018/06/CBP-2017-047039Redacted.pdf#page=845>.

Ignoring a claim of fear or not giving an individual the chance to have a credible or reasonable fear interview is a denial of the right to seek asylum, which is affirmed in U.S. law and international agreements signed by the United States. In addition, the number of people who claim fear on I-213s may be artificially deflated by agents not asking the question, pressuring people not to claim fear, or fabricating an answer on the I-213. Researchers from the U.S. Commission on International Religious Freedom in 2016 found that “86.5 percent of the cases where a fear question was not asked, the record inaccurately indicated that it had been asked, and answered.”²⁰⁴ Human Rights Watch has also found that Border Patrol agents sometimes push asylum seekers not to claim fear, or simply lie on the I-213 and state that the individual did not express fear.

²⁰⁴ U.S. Commission on International Religious Freedom, *Barriers to Protection: the Treatment of Asylum Seekers in Expedited Removal*, U.S. Commission on International Religious Freedom, August 2, 2016, <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.

Implications of Findings

This chapter will consider questions that emerge from the eighty-nine I-213s in this dataset, occasionally supported with evidence from other accounts of the Border Patrol's bus or train sweeps. I will first consider the claim that these are voluntary, consensual encounters, using Supreme Court precedent to show how Fourth Amendment protections were eroded to this level. Next, I will take up the question of racial profiling, demonstrating how various federal agencies and the Supreme Court have not condemned transportation checks as involving profiling. Finally, I will examine the effectiveness and efficiency of transportation checks, weighing the "good" that the Border Patrol claims they do for national security with the harms they cause.

Are these really consensual encounters?

“‘Consent’ that is the product of official intimidation or harassment is no consent at all.”

- Majority opinion in *Florida v. Bostick*, 501 U.S. 429, 438 (1991)²⁰⁵

The Fourth Amendment outlines the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” It is meant to prevent unjustified intrusions into the lives of people in the United States, including noncitizens. The question of whether searches and seizures are reasonable or unreasonable requires balancing individual rights with government interests such as public safety or national security. The past sixty years have seen a steady erosion of Fourth Amendment protections by the Supreme Court, placing more consideration on public safety and national security (or their interpretation of these concepts) than rights against search and seizure.²⁰⁶ One of the ways that Fourth Amendment

²⁰⁵ *Florida v. Bostick*, 501 U.S. 429 (1991).

²⁰⁶ Guy Padula, *Colorblind Racial Profiling: A History, 1974 to the Present* (New York: Routledge, 2018).

rights have been eroded is through the expanded use of “consensual” stops, which are relatively new in the history of Supreme Court precedent.

The Border Patrol characterizes their transportation checks as beginning with consensual encounters, but this section will argue that transportation check encounters are intimidating and coercive. As the authors of *Justice Derailed* noted in 2011, “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.”²⁰⁷ This section will use court precedent, evidence from I-213s, and people’s accounts of encounters in Spokane to examine the question of consensuality.

Supreme Court Precedent

The Supreme Court has never ruled on the legality of the Border Patrol’s transportation checks within the 100-mile zone, but they have allowed law enforcement bus sweeps for drug and weapons checks in similar situations. They have also made several rulings about immigration enforcement within the 100-mile zone, which will be taken up in the “Racial Profiling” section. These two types of rulings combined give a strong impression that the Supreme Court would rule against the passengers if a case about Border Patrol transportation checks ever came before them. The following history of Fourth Amendment court cases which have established the idea of consensual encounters sheds some light on the issues that confront us in the case of the Spokane Intermodal arrests. Throughout this history, I will highlight the arguments put forth by critics of transportation checks for why they are not consensual, sanction rampant racial profiling, and should not be constitutional.

²⁰⁷ NYU School of Law, *Justice Derailed*.

Terry vs. Ohio (1968)

As seen in the introduction, Border Patrol agents doing transportation checks must establish reasonable suspicion in order to justify an investigative detention of someone. The U.S. Supreme Court created the standard of reasonable suspicion in a case called *Terry v. Ohio* (1968). *Terry v. Ohio* held that “a brief investigative seizure is permissible...if the officer possesses articulable facts sufficient to provide a reasonable suspicion that the suspect is engaged in criminal conduct.”²⁰⁸ In this case, a police officer saw two men walking by a jewelry store multiple times in an hour, confronted and frisked them, and discovered a pistol.²⁰⁹ This was a dramatic change in Fourth Amendment interpretations – lowering the bar from probable cause to the hard-to-define reasonable suspicion allowed officers to investigate someone in order to gain the evidence needed to establish probable cause and actually arrest them.²¹⁰ This allowance for “investigative seizures,” usually called “investigative detentions” in the Border Patrol’s parlance, was novel. The case even allowed officers to frisk a person for weapons if they had a reasonable suspicion that they were armed and dangerous, setting the stage for controversial “stop-and-frisk” policies. However, the bar was further lowered in Supreme Court cases in the 1980s. If a complaint of illegal search and seizure makes it to the courts now, the arguments would likely focus not on whether the officer had reasonable suspicion, but whether the person’s response to questions was “voluntary” and “consensual.”²¹¹

²⁰⁸ Padula, *Colorblind Racial Profiling*, 54.

²⁰⁹ *Terry v. Ohio*, 392 U.S. 1, 6-7, 21 (1968).

²¹⁰ Padula, *Colorblind Racial Profiling*, 54.

²¹¹ Padula, *Colorblind Racial Profiling*, 10.

United States v. Mendenhall (1980)

United States v. Mendenhall (1980) was the first time the Supreme Court heard an institutionalized racial profiling case.²¹² The case set the stage for the Border Patrol's claim that transportation checks begin with consensual encounters, not stops or seizures. In this case, a Black woman named Mendenhall was questioned by federal Drug Enforcement Administration (DEA) agents after disembarking a plane.²¹³ She showed her identification, was taken to a room for further questioning, and was eventually strip-searched, revealing drugs. The reasons for which agents were suspicious of Mendenhall were dubious – the agents were using an unscientific “profile” that was in reality used as a pretext to stop anyone they wanted.²¹⁴ The targets of this suspicion were Black or Latinx the vast majority of the time. The reasonable suspicion test had already been stretched to its limits at this time, essentially allowing law enforcement officers to recite any list of “suspicious” behaviors as justification for their stops.²¹⁵

However, the Mendenhall opinion further eviscerated the already weakened Fourth Amendment protections by eliminating the requirement for suspicion as long as the individual being seized and/or searched “consents.”²¹⁶ Justice Stewart, who wrote the majority opinion, argued that Mendenhall had consented to the entire process: the “encounter” and questioning in the airport terminal, the further questioning in a closed room with two agents, and the strip-search. He wrote that, “As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy.”²¹⁷ This puts the onus on the individual to know their rights and walk away from

²¹² Padula, *Colorblind Racial Profiling*, 9.

²¹³ *United States v. Mendenhall*, 446 U.S. 544 (1980).

²¹⁴ Padula, *Colorblind Racial Profiling*, 105.

²¹⁵ Padula, *Colorblind Racial Profiling*, 105.

²¹⁶ Padula, *Colorblind Racial Profiling*, 101.

²¹⁷ *Mendenhall*, 446 U.S. at 545.

uniformed officers who are in the middle of asking them questions, rather than on the officers to articulate reasonable suspicion, however flimsy it may be.

This case led to what is known as the *Mendenhall* test or the “reasonable person test,” which declares that “[a] person is ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.”²¹⁸ The absurdity of this ruling is clear. Even the DEA agents in the case testified that once they had asked *Mendenhall* to walk to their office for further questioning, they would have stopped her had she tried to leave, so wasn’t she seized?²¹⁹ Yet Justice Stewart and the concurring justices claimed that *Mendenhall* had “voluntarily in a spirit of apparent cooperation” consented to be strip-searched.²²⁰ What person voluntarily consents to be strip-searched, especially one who has drugs on their person? This question of consent has allowed racial profiling to go unchecked, because it can be used to stop, question, and sometimes search anyone an officer wants as long as they can argue that it was a consensual encounter in which the person waived their constitutional rights by cooperating. Implicit and explicit bias lead officers to often target people of color, who may also feel less likely to refuse for reasons discussed later. This reasonable person test established in *Mendenhall* leads us directly to the two bus sweep cases pertinent to our research.

Florida v. Bostick (1991)

The Supreme Court has heard two cases relating to bus sweeps. Both of these cases originated in Florida, where it is believed that bus sweeps began in the 1980s, and both cases involved searches for drugs, not undocumented immigrants.²²¹ The Supreme Court’s rulings in

²¹⁸ *Mendenhall*, 446 U.S. at 554.

²¹⁹ Padula, *Colorblind Racial Profiling*, 102.

²²⁰ *Mendenhall*, 446 U.S. at 549.

²²¹ Padula, *Colorblind Racial Profiling*, 117.

these two cases show that although they have not heard a Border Patrol transportation check case, based on precedent, the Court would almost certainly rule that the most egregious of the arrests in Spokane were constitutional. In *Florida v. Bostick* (1991), Terrance Bostick was napping in the back row of a Greyhound bus when he was approached by officers from the Broward County Sheriff's Department during a short layover in Fort Lauderdale.²²² They admitted to having chosen to search Bostick, of all the passengers on the bus, "without articulable suspicion."²²³ He was napping, so it could not have had anything to do with his suspicious behavior. It is no stretch of the imagination to assume that their decision was based on the fact that he was a 28-year old Black man who fit a profile that the Sheriff's Department was using.²²⁴ Even so, because of the previous *Mendenhall* ruling, it did not matter whether the officers had reasonable suspicion to search Bostick, because they said that he voluntarily consented to not only show his ID, but for them to search two of his bags. The second bag contained 400 grams of cocaine.²²⁵ Bostick fought in court to suppress this evidence as the result of an unreasonable search and seizure. He asserted that he had not given consent to search his second bag, and that the officers had not told him that he could decline their requests, as they claimed.²²⁶ Nevertheless, the Supreme Court held that his Fourth Amendment rights had not been violated, and extended the reasonable person test to bus sweeps. This means that given the circumstances of Bostick's arrest, the Supreme Court felt that a reasonable person would have still felt "free to decline the officers' requests or otherwise terminate the encounter."²²⁷

The lower court rulings in *Bostick* shed more light on the foolishness apparent in the reasonable person doctrine, and especially its application to buses. Bostick's case had previously

²²² *Florida v. Bostick*, 501 U.S.; Padula, *Colorblind Racial Profiling*, 118.

²²³ *Bostick*, 501 U.S. at 431.

²²⁴ Padula, *Colorblind Racial Profiling*, 118-120.

²²⁵ Padula, *Colorblind Racial Profiling*, 118.

²²⁶ Padula, *Colorblind Racial Profiling*, 118.

²²⁷ *Bostick*, 501 U.S. at 436-437.

been heard by Florida’s Fourth District Court of Appeals, who ruled against Bostick’s suppression request, and then by the Florida Supreme Court, who ruled in favor of Bostick.²²⁸ The Florida Supreme Court even ruled that bus sweeps were intrinsically unconstitutional, and that there should be a “bright line rule” against them.²²⁹ Although these lower courts had different rulings from each other, the judges in both courts had serious doubts about whether individuals in this situation would actually feel free to terminate an encounter with an officer. These doubts are very similar to those put forward today by the ACLU and immigrant rights advocates who oppose transportation checks. One of the factors challenging the notion of consent is found in any “consensual” stop, whether on the airport, the street, or a bus: individuals are intimidated by the show of authority by officers. The Florida Supreme Court wrote in response to a case similar to Bostick’s one year later that,

The Court would ill-expect *any* citizen to reject, or refuse, to cooperate when faced with the trappings of power like badges and identification cards. And these officers know that – that is one reason that they display those trappings. It is much like the feeling that an ordinary citizen has on seeing a patrol car behind him, or observing blue lights flashing, or being confronted by a police officer asking questions.²³⁰ (emphasis in original)

Other factors are particular to the bus setting. As Judge Letts from the appellate court wrote in the first *Bostick* hearing,

My version of common sense tells me that a paid and ticketed passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover, while two policemen, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually *was* free to leave, as all of us trained lawyers know he was. The test is whether a layman would reasonably be expected to believe he was free to leave under these circumstances. I conclude he would not.²³¹ (emphasis in original)

²²⁸ Padula, *Colorblind Racial Profiling*, 118-121.

²²⁹ *Bostick v. State*, 554 So. 2d 1153 (1989).

²³⁰ *State v. Kerwick*, 512 So. 2d 347, 348-349 (Fla. Dist. Ct. App. 1987).

²³¹ *Bostick*, 554 So. 2d at 322-323.

This points to the fact that the consequences for terminating an encounter on a bus are unusually high. On the street or in an airport, walking away from a conversation with a police officer may be terrifying and risky, but if the officer does not follow, the person can at least continue on their previous trajectory. On a bus, terminating the encounter with law enforcement entails changing one's trajectory. It usually means leaving the bus, losing the fare paid for a ticket, and potentially ending up at a bus stop in the middle of nowhere. In the case of people beginning or continuing their journey in Spokane, exiting the bus may have meant that passengers could not attempt boarding another bus until the next day. (For now, I am ignoring the question from the "Findings" section of whether leaving would even have been allowed or would simply have been used as further suspicion against the person.) Rather than exiting the bus, a person could instead attempt to end the encounter by invoking their right to remain silent, but this has not worked for individuals in past encounters with the Border Patrol, such as in the case of Andres Sosa, who was simply suspected more strongly based on his Know Your Rights card.²³² In addition, many individuals who do not feel nervous in the Border Patrol's presence will have answered the questions already, giving the appearance to others that ignoring the questions is not possible.

United States v. Drayton (2002)

The second Supreme Court case regarding bus sweeps was *United States v. Drayton* (2002). The facts are similar to *Bostick*: three police officers boarded a bus in Tallahassee, Florida during a scheduled stop. They again chose to target two target Black men, Christopher Drayton and Clifton Brown, Jr. The police searched their luggage and found nothing, and then searched their persons and found that they each had bags of cocaine duct-taped to their lower

²³² Andres Sosa Segura v. United States of America, "Complaint for Damages."

body.²³³ Like *Bostick*, they attempted to have the evidence suppressed in court. The district court refused, but the Eleventh Circuit next found the search unconstitutional and held that “reasonable persons in the defendants’ positions would not have felt free to disregard the officers’ requests without some positive indication that consent could be refused.”²³⁴ They added that the fact that one of the officers kneeled on the front seat of the bus near the exit could have been construed by passengers to mean that they were not free to leave.²³⁵ (Note that having one agent stand near the driver’s seat while supposedly leaving the aisle open is also the Border Patrol’s practice.)

The Supreme Court heard *Drayton* in 2002, and once again ruled that the search and seizure was constitutional because a reasonable person would have felt free to terminate the encounter, citing *Bostick*. Further, the Court ruled that there was no need to advise passengers of their right to refuse to answer officers’ questions or to be searched.²³⁶ CBP has clearly taken note of this ruling; the training documents obtained by the ACLU of Maine include a slide titled “UNITED STATES v. DRAYTON” which states that, “A bus passenger has the right to refuse consent to search and refuse to answer questions. *The officer does not have to advise them of this right*”²³⁷ (emphasis added). Justice Kennedy, who wrote for the majority, outlined the reasons that it should have been clear to a reasonable person in this case that they could terminate the encounter:

When Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice... There was no overwhelming show or application of force, no intimidating movement, no brandishing of weapons, no blocking of exits, no threat, and no command, not even an authoritative tone of voice... Officer Hoover’s position at the front of the bus also does not tip the scale to respondents, since

²³³ Alex Brazier, “The People on the Bus Get Searched and Seized: Why Police Conduct in Suspicionless Bus Sweeps Should Be Circumscribed” *George Washington Law Review* 78, no. 4 (June 3, 2010): 908–41.

²³⁴ *United States v. Drayton*, 231 F.3d 787, 790 (11th Cir. 2000), rev’d, 536 U.S. 194 (2002).

²³⁵ *United States v. Drayton*, 231 F.3d at 790.

²³⁶ *United States v. Drayton*, 536 U.S. 194 (2002).

²³⁷ “CBP Training Documents 1.b,” ACLU Maine.

he did nothing to intimidate passengers and said or did nothing to suggest that people could not exit.²³⁸

The CBP training documents seem to have used Kennedy's arguments in *United States v. Drayton* as a blueprint for crafting their transportation check guidelines, since the justice outlined in detail the factors that made the search and seizure in *Drayton* legal. For example, CBP training documents say that the "agent approaches passengers from behind" so as not to block the aisle and "speaks in a voice just loud enough for individual passengers to hear."²³⁹ The method in *United States v. Drayton*, by which one or two agents went to the back of the bus, working their way forward, while the other waited in the front, is also copied in training documents, as well as detailed in most I-213s.²⁴⁰ Legal scholars have argued that these same factors outlined by Kennedy could just as easily have been used to build a case that the seizure was illegal. For example, a "polite, quiet voice" can be interpreted as a method of control rather than reassurance.²⁴¹ The dissenting opinion from Justice Souter and two others noted that, "A police officer who is certain to get his way has no need to shout."²⁴² In addition, some scholars have pointed out that while Justice Kennedy described the officer leaning over the passengers as a way to keep the aisle free, "one could just as easily see [it]...as a means...of gaining the upper hand with each passenger being questioned – remaining above them, looking down, intimidating them, and invading their personal space."²⁴³ These factors are likely present in the Border Patrol cases, and boil down to a show of authority that very few people are apt to interpret as a consensual encounter or request rather than a command.

²³⁸ *Drayton*, 536 U.S. at 195.

²³⁹ "CBP Training Documents 1.b," ACLU Maine.

²⁴⁰ "CBP Training Documents 1.b," ACLU Maine.

²⁴¹ Janice Nadler, "No Need to Shout: Bus Sweeps and the Psychology of Coercion," *The Supreme Court Review* 2002 (January 2002): 153–222, <https://doi.org/10.1086/scr.2002.3109718>, 199.

²⁴² *Drayton*, 536 U.S. at 212.

²⁴³ Brazier, "Searched and Seized," 916.

The factors in these cases, despite the Supreme Court rulings, explain why many legal scholars have argued that it is improbable that anyone would fit the definition of a “reasonable person” in bus sweep cases. Who in this situation would realize they do not have to answer the officer despite repeated questioning? Who would decide to get off the bus, potentially forfeiting their ticket? There is plenty of reason to suspect that many Supreme Court justices are out of touch with how the average person would respond to armed officers boarding their bus. For example, Justice Kennedy wrote the *Drayton* opinion:

Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort. Much the same can be said for wearing sidearms. That most law enforcement officers are armed is a fact well known to the public...bus passengers answer officers’ questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them.²⁴⁴

The idea that bus passengers are comforted by the boarding of their bus by armed officers shows that Supreme Court justices are actually typifying a reasonable person as “an affluent, educated white professional” with detailed knowledge of their rights.²⁴⁵ They ignore the fact that most people do not have nuanced knowledge of their Constitutional rights. In addition, passengers who are people of color are less likely to feel that an officer boarding their bus “enhances their own safety,” given the history of racial profiling and law enforcement abuse of these populations.²⁴⁶ There is little doubt that Bostick, Drayton, and Brown, three Black men, had had disproportionate encounters with law enforcement, and knew that refusing a police officer’s “request” could result in use of force, even lethal consequences.²⁴⁷ Even if a person of color knows their rights, they may decide that it is better to incorrectly interpret a request as an order

²⁴⁴ *Drayton*, 536 U.S. at 205-206.

²⁴⁵ Joshua Fitch, “*United States v. Drayton*: Reasonableness & Objectivity - Discussion of Race, Class, and the Fourth Amendment,” 38 *New. Eng. L. Rev.* 97, 138 (2003), 114.

²⁴⁶ Fitch, “*United States v. Drayton*.”

²⁴⁷ Fitch, “*United States v. Drayton*.”

and incriminate oneself than to incorrectly interpret an order as a request, which may lead to use of force. The effect of race, ethnicity, or previous negative experience with law enforcement is certainly present in the Border Patrol's transportation sweeps, where most of the people wrongfully believed to be undocumented are people of color.²⁴⁸

Examining a few “consensual encounters” from Spokane

Bostick set the standard for whether an encounter is consensual based on “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”²⁴⁹ I argue along with many legal scholars that many reasonable people would *not* feel free to do so because of the inherent authority and intimidation from federal agents and because of the specific confined nature of transportation check questioning. However, a further question is whether agents would respect bus passengers’ right to terminate an encounter, or whether they would push the passenger harder for information or simply treat their refusal as reasonable suspicion. As detailed in the “Findings” section, a few cases from Spokane, both from I-213s and the media, cast doubt on the claim that bus passengers would have been allowed to simply leave the bus or refuse to engage in conversation. Individuals’ choices to leave the scene or ignore questions were simply treated as further suspicion.

Although it is understandable from the point of view of a Border Patrol agent to feel suspicious of certain behaviors, since it is their job, the Spokane I-213s and media cases cause one to wonder whether or how often someone is allowed to terminate an encounter. (Note that this is especially true if their appearance, often racial or ethnic, has already raised the agent’s suspicion. This will be discussed in detail in the “Racial Profiling” section.) Border Patrol training slides obtained by the ACLU of Maine state that, “Any passenger who refuses to answer

²⁴⁸ NYU School of Law, *Uncovering USBP*.

²⁴⁹ *Bostick*, 501 U.S. at 436-437.

questions or who chooses to exit the bus must be allowed to do so.”²⁵⁰ However, as seen in the textbox in Figure 34, there is a caveat: “...if Agent can develop reasonable suspicion, the subject may be detained for addition [sic] questioning.”²⁵¹ If, as suggested by the four I-213s showcased in “Findings,” refusing to answer questions or exiting the bus can be treated as reasonable suspicion, the right to terminate the encounter is worthless. If reasonable suspicion is that expansive, these guidelines create a Catch-22 whereby exercising the right to refuse or exit enables the agent to detain you.

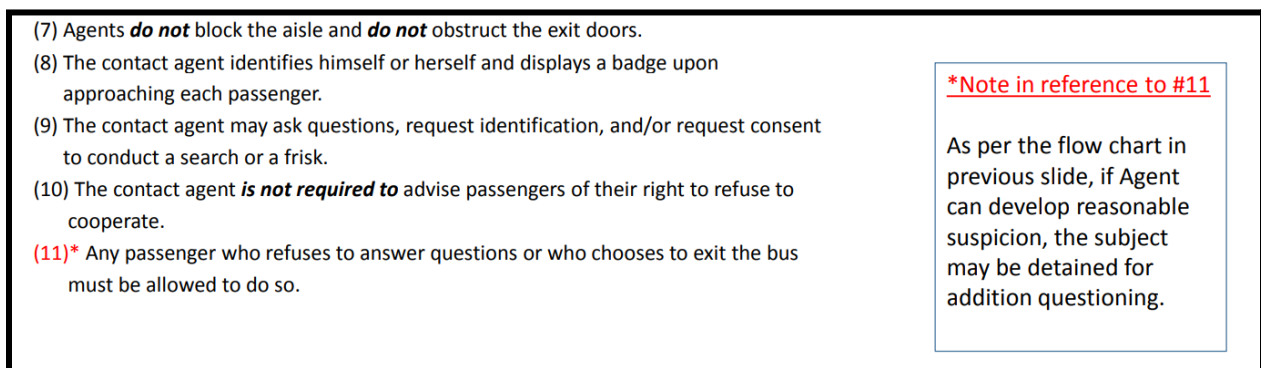


Figure 34: Border Patrol training slides showing the Catch-22 of transportation checks.²⁵²

The clearest media account of someone who was stuck in this Catch-22 is that of Andres Sosa. Sosa was already disembarking a bus in Spokane when stopped by two agents, so he could not try to terminate the encounter by exiting the bus. The agents had no reasonable suspicion or probable cause at this point, so they were still in what CBP would call the “consensual” phase of the encounter. However, it was obviously not consensual from Sosa’s point of view. Sosa says he was singled out as the only Latinx passenger exiting the bus.²⁵³ Sosa showed a clear intention to terminate the encounter when he presented a Know Your Rights card to agents, but regardless of

²⁵⁰ “CBP Training Documents 1.b,” ACLU Maine.

²⁵¹ “CBP Training Documents 1.b,” ACLU Maine.

²⁵² “CBP Training Documents 1.b,” ACLU Maine.

²⁵³ Andres Sosa Segura v. United States of America, “Complaint for Damages.”

this action, the agents forced him to follow them to the Intermodal Center parking lot. They claimed to know that he was “illegal” because he presented the Know Your Rights card, showing how his intent to terminate the encounter was interpreted as suspicious by the agents.²⁵⁴ At this point, they had already investigatively detained him by ordering him to the parking lot, so they must have thought that they had reached reasonable suspicion. However, the only suspicion indicated at this point was the Know Your Rights card itself (presumably on top of his racial/ethnic appearance). The latter part of Sosa’s story also demonstrates how agents intimidate people into finally talking, even despite their attempts to remain silent. Border Patrol agents ordered him to the parking lot and repeatedly told Sosa that they would deport him.²⁵⁵ At the parking lot, after this intense pressure, Sosa finally decided to tell the agents that he had been released on bond from immigration detention, which should have shown that he was legally allowed to remain through his immigration court case.²⁵⁶ Even being shown his ankle monitor did not convince them to release him, and Sosa was eventually taken to the station for further questioning.²⁵⁷

The account of Martin Negrete, who has DACA status, further demonstrates how vehemently someone must refuse to answer questions in order to be taken seriously by the Border Patrol. Negrete is a professional organizer for United We Dream, and knew the rules about consent, so he held his ground on the three different occasions that Border Patrol agents boarded his bus from Spokane to Seattle.²⁵⁸ He told the *Intercept* that “it wasn’t easy,” and that he had to assert his right to remain silent “literally...four or five times.”²⁵⁹ This also shows that these “consensual” encounters are coercive and use intimidation. What if Negrete had finally

²⁵⁴ Ryals and Walters, “ACLU lawsuit.”

²⁵⁵ Andres Sosa Segura v. United States of America, “Complaint for Damages.”

²⁵⁶ Andres Sosa Segura v. United States of America, “Complaint for Damages.”

²⁵⁷ Andres Sosa Segura v. United States of America, “Complaint for Damages.”

²⁵⁸ Martyn, “Spokane vs. the Border Patrol.”

²⁵⁹ Martyn, “Spokane vs. the Border Patrol.”

caved after the third or fourth time of asserting his right to remain silent? Does that seem like a consensual sharing of information? The two people from the I-213s in this dataset who initially showed an intention not to speak to Border Patrol agents did not have the same training or knowledge of their rights as Negrete, and both gave in after questioning.

Other individuals featured in the media have also attested that the claim that aisles are kept clear so that passengers are free to disembark the bus is not true: for example, Mohanad Elshieky's complaint states that once hearing that Elshieky was a Libyan citizen, the agent "placed one hand on the seat in front of Mr. Elshieky and another on the seat beside him, blocking Mr. Elshieky's exit and restraining his movement from the seat."²⁶⁰ NBC reported that another individual, Mercedes Phelan, "said the agents blocked the aisle both times she was questioned," on a bus and a train.²⁶¹ Another reported feeling trapped on a bus in Maine; "If I wanted to exit that bus I would have had to physically push past an officer."²⁶²

In conclusion, there is much to question about the consensual nature of the Border Patrol's transportation check encounters. This presumed consent is what transportation checks are based on, because without a warrant or prior individualized suspicion, the Border Patrol relies on conversation with passengers to reach reasonable suspicion. Thus, whether or not these conversations are consensual is of utmost importance. Individuals on board feel that the interactions are intimidating and coercive rather than consensual, and legal scholars and behavioral scientists back this up, although the Supreme Court (past and present) may argue otherwise.²⁶³ Furthermore, there is little evidence that individuals wishing to terminate the encounters would be able to do so, although ostensibly required by both legal precedent and

²⁶⁰ Mohanad Elshieky v. United States of America, "Complaint for Damages."

²⁶¹ Kaplan and Swales, "Border Patrol searches."

²⁶² Kaplan and Swales, "Border Patrol searches."

²⁶³ Nadler, "No Need to Shout."

CBP's own policy. Also important for equity reasons is that these so-called consensual encounters do not impact everyone equally.

Racial and Ethnic Profiling²⁶⁴

“The basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*.”

- Justice Thurgood Marshall, dissenting in *Florida v. Bostick*²⁶⁵

This analysis of consent and suspicion inevitably leads us to the *unspeakable* (for the Supreme Court) elephant in the room: racial and ethnic profiling. Race and ethnicity are clearly behind immigration enforcement actions and transportation checks, but are rarely discussed because the focus is often on immigration status or other legal issues such as consent. For example, when the Supreme Court decided that transportation sweeps were legal in *Bostick* and *Drayton*, they did not consider the race of the defendants in either case or question whether certain groups are disproportionately targeted during these actions. When it comes to the Border Patrol's transportation checks, agents on buses and trains clearly do not apply the same level of scrutiny to everyone aboard when they ask their questions about citizenship. Border Patrol spokespeople regularly deny to the media that they engage in racial profiling during bus sweeps (and in enforcement in general),²⁶⁶ but immigrant rights organizations and people on the buses

²⁶⁴ I will refer to this occasionally as simply “racial profiling” for succinctness, although in many cases this is actually ethnic profiling, since Latinx and Hispanic identities are considered an ethnicity. In addition, the definition of racial profiling is typically interpreted as including race, ethnicity, religion or national origin.

²⁶⁵ *Bostick*, 501 U.S. at Footnote 1.

²⁶⁶ Daniel Gonzalez, “2 US citizens detained for speaking Spanish in Montana store settle border patrol lawsuit,” *USA Today*, November 25, 2020, <https://www.usatoday.com/story/news/nation/2020/11/25/women-speaking-spanish-montana-settle-border-patrol-lawsuit/6419004002/> (accessed May 12, 2023); Decker, “Spokane, Border Patrol agents.”

state that this is blatantly untrue. The reliance on racial and ethnic appearance has been described as a “dragnet” because it not only sweeps up undocumented people, but also those with legal authorization to be in the United States, including citizens, permanent residents, tourists, student- or work-visa holders, asylees or refugees, and those awaiting their date in immigration court.²⁶⁷

DHS and DOJ policy, and even CBP itself, defines racial profiling as follows: “The invidious use of race or ethnicity as a criterion in conducting stops, searches, inspections, and other law enforcement activities based on the erroneous assumption that a person of one race or ethnicity is more likely to commit a crime than a person of another race or ethnicity.”²⁶⁸ As demonstrated in the quick history of the Supreme Court’s idea of consensual encounters, *de facto* racial profiling is allowed in many areas of policing, even though these practices are not allowed to be overtly based on race. The justices have chosen to ignore that race is often taken into consideration in who to stop and search, relying rather on the fact that individuals gave information or cooperated “consensually.”²⁶⁹ However, in immigration enforcement within the 100-mile zone, using race and ethnicity as a factor in suspicion is *explicitly allowed* – by DOJ policy, Supreme Court precedent, and in a slightly roundabout way, DHS policy. Racial profiling may be deplorable, but it currently goes unchecked within CBP, as much as they may deny it.

This section will begin by reviewing two Supreme Court decisions, *Brignoni-Ponce v. United States* (1975) and *Martinez-Fuerte v. United States* (1976). These, together with glaring exceptions in DOJ and DHS policy, reveal how protections against racial profiling in immigration enforcement, especially within the 100-mile zone, are next to zero. Next, I will review the evidence for racial profiling in the Spokane I-213s, bolstering it with evidence from

²⁶⁷ NYU School of Law, *Uncovering USBP*.

²⁶⁸ “What is racial profiling?,” U.S. Customs and Border Protection, last modified May 24, 2022, <https://www.cbp.gov/faqs/what-racial-profiling>.

²⁶⁹ See Padula, *Colorblind Racial Profiling* for a thorough examination of racial profiling in non-immigration law enforcement.

the ACLU of Michigan and *Uncovering USBP* reports about the demographics of people who are improperly apprehended. I will also look at media accounts by bus passengers that passengers of color are questioned more intensely than white people. Finally, I will review some of the reasons for suspicion that agents documented in the I-213s, questioning particularly the suspicions that arise from people's nervous behavior or inability to speak English and how these intersect with race and ethnicity.

Supreme Court Precedent

Racial profiling has been allowed even more blatantly by the Supreme Court in immigration enforcement cases than in other areas of the law, both historically and in the present-day. Legal scholar Eisha Jain argues that immigration control has long served as a legal rationale for “treating a particular group as perpetually foreign, regardless of their ties to the United States or even their actual legal status.”²⁷⁰ In cases over one hundred years old such as *Fong Yue Ting v. United States* (1893) and *United States v. Wong Kim Ark* (1898), the Supreme Court sanctioned the use of apparent race to treat individuals as potentially deportable. The *Fong Yue Ting* decision allowed officers to single out Chinese-appearing individuals and require them to show their papers, at the risk of arrest and detention.²⁷¹ Many of these people were, of course, U.S. citizens. In *Wong Kim Ark*, the Supreme Court permitted use of “race, language, color, and dress” to make assumptions about someone's citizenship status.²⁷²

Unfortunately, the legalized use of race in immigration law has not changed significantly since these pre-1900 cases. Two cases from the 1970s ushered in the present-day era of allowing overt reliance on race, specifically on “Mexican appearance,” as a factor in establishing

²⁷⁰ Eisha Jain, “Beyond Deportation,” Lawfare, October 5, 2022, <https://www.lawfareblog.com/beyond-deportation>.

²⁷¹ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

²⁷² *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

reasonable suspicion for immigration enforcement in the border region. These cases were about two of the Border Patrol's other tactics, roving patrols and checkpoints, but they provide a glimpse into the legal precedent that would likely be considered if transportation checks made it before the Supreme Court.

United States v. Brignoni-Ponce (1975)

United States v. Brignoni-Ponce (1975) was the first and most important of these, and considered roving patrols. It involved a U.S. citizen driver from Puerto Rico, Brignoni-Ponce, who was pulled over with two undocumented individuals from Guatemala and Mexico in his car. The Border Patrol agent admitted that his reason for suspicion was the “apparent Mexican ancestry” of the three people in the car, two of whom were not Mexican.²⁷³ Brignoni-Ponce was accused of alien smuggling and tried to have the evidence from the stop suppressed because of Fourth Amendment violations. The case eventually made it to the Supreme Court, where the question before the Court hinged on “whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the *only ground for suspicion* is that the occupants appear to be of Mexican ancestry”²⁷⁴ (emphasis added). The Court ultimately ruled in favor of Brignoni-Ponce, but did so in a way that endorsed racial profiling by the Border Patrol moving forward, even giving agents a playbook for how to get away with it.

The Court ruled that “Mexican appearance” was a factor that could be taken into account when establishing reasonable suspicion given “the [high] likelihood that any given person of Mexican ancestry is an alien,” but that “standing alone it does not justify stopping all

²⁷³ Kevin Johnson, “How Racial Profiling in America Became the ‘Law of the Land’: *United States v. Brignoni-Ponce* and *Whren v. United States* and the Need for Rebellious Lawyering,” *Georgetown Law Journal* 98 (June 22, 2009), <https://papers.ssrn.com/abstract=1424183>, 16.

²⁷⁴ *United States v. Brignoni-Ponce*, 422 U.S. 873, 876 (1975).

Mexican-Americans to ask if they are aliens.”²⁷⁵ They then followed this with a “laundry list” of other factors that could be used along with Mexican appearance, creating a playbook for other suspicions an agent could list, even if their first and only real reason for suspicion was someone’s appearance.²⁷⁶ This list included characteristics of the vehicle, the area it was stopped, the number of passengers, the driver’s behavior, the person’s style of clothes and haircut, and the agent’s expertise: “the facts in light of his experience in detecting illegal entry and smuggling.”²⁷⁷ A judge later dissenting in a case that used *Brignoni-Ponce* as precedent protested that it had allowed agents to articulate “virtually anything and everything” as suspicion, including opposites such as, “The vehicle was suspiciously dirty and muddy, or the vehicle was suspiciously squeaky-clean; the driver was suspiciously dirty, shabbily dressed and unkept, or the driver was too clean...”²⁷⁸

Since *Brignoni-Ponce*, most of the Circuit Courts have upheld this reliance on Mexican appearance when used by the Border Patrol. However, the Ninth Circuit Court of Appeals challenged the practice in *United States v. Montero-Camargo* (2000). They ruled that using Mexican appearance (even as one among other factors) is improper in Southern California, where the stop occurred, because the number of people with Mexican ancestry who are also legally present in the area is high. The judges wrote that “[t]he Hispanic population of this nation, and of the Southwest and Far West in particular, has grown enormously” since *Brignoni-Ponce*, “at least five-fold in the four states referred to in the Supreme Court's decision,” which included Arizona, California, New Mexico, and Texas.²⁷⁹

²⁷⁵ *Brignoni-Ponce*, 422 U.S. at 887.

²⁷⁶ Johnson, “How Racial Profiling in America,” 19.

²⁷⁷ *Brignoni-Ponce*, 422 U.S. at 885.

²⁷⁸ *United States v. Zapata-Ibarra*, 223 F.3d 281 (5th Cir. 2000).

²⁷⁹ *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 1999) at 1133.

This would appear a positive move by the Ninth Circuit. However, six years later, the same court approved the use of Mexican appearance in areas “sparsely populated with Hispanics,” when the Border Patrol arrested a man in Havre, Montana (*United States v. Manzo-Jurado* (2006)).²⁸⁰ This is probably the case most similar to Spokane arrests, given the proximity of the towns to the Canadian border and to each other, and the lower population of Latinx people compared to the Southwest. However, it’s important to note that a lower overall population of Latinx people does not actually mean they are more likely to be undocumented. In *Manzo-Jurado* agents stopped six men who were speaking Spanish, but only one was arrested because the other five were legally present.²⁸¹

Martinez-Fuerte vs. United States (1976)

Martinez-Fuerte vs. United States (1976), the other pivotal Supreme Court case for immigration enforcement and race, dealt with permanent checkpoints. At these checkpoints, all cars are stopped briefly, and some are referred for secondary inspection. The checkpoints in question here (various similar cases were combined together into one) were in San Clemente, California and Sarita, Texas, both about sixty-five miles from the southern border.²⁸² The defendants challenged the constitutionality of the checkpoints themselves, plus the use of “Mexican appearance” as a factor that Border Patrol agents regularly use to refer cars to secondary inspections. The justices held that the initial checkpoint stops are constitutional despite having no individualized suspicion because the intrusion is minimal.²⁸³ Furthermore, they ruled that there was no requirement of reasonable suspicion needed to refer certain cars to

²⁸⁰ In this case, however, the Court ruled that this plus the other factors did not together reach the level of reasonable suspicion. See *United States v. Manzo-Jurado*, 457 F.3d 928 (9th Cir. 2006).

²⁸¹ *Manzo-Jurado*, 457 F.3d 928.

²⁸² *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) at 549-550.

²⁸³ *Martinez-Fuerte*, 428 U.S. 560.

secondary inspection.²⁸⁴ This goes even farther than *Brignoni-Ponce* in sanctioning racial profiling. Where in *Brignoni-Ponce*, justifying which cars were pulled over required a list of suspicious factors, one of which could be “Mexican appearance,” in *Martinez-Fuerte* there is no need to articulate any suspicious factors at all. This allows, as the dissenting justices write, an agent to further investigate a car’s occupants “merely on whatever may pique the curiosity of a particular officer.”²⁸⁵ This kind of discretion is a recipe for abuse and harassment of certain individuals and groups. Indeed, the justices admit that the decision to refer to secondary inspection is “made largely on the basis of apparent Mexican ancestry.”²⁸⁶ However, they “perceive no constitutional violation” because the “intrusion here is sufficiently minimal that no particularized reason need exist to justify it.”²⁸⁷

In fact, the justices argue that selectively referring certain cars to secondary questioning, “rather than questioning the occupants of every car – tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public.”²⁸⁸ This is essentially an argument that racial profiling is okay because only Latinx people or “Mexican-appearing” people have their Fourth Amendment rights violated. It is difficult to imagine this kind of argument being put forth if those on the receiving end of the secondary questioning and Fourth Amendment violations were primarily white.²⁸⁹ It is easy, however, to imagine this same argument could be erroneously applied to transportation checks: “We advance some Fourth Amendment interests by choosing *some* people to question more intensely.” Again, as in

²⁸⁴ *Martinez-Fuerte*, 428 U.S. 543.

²⁸⁵ *Martinez-Fuerte*, 428 U.S. 577.

²⁸⁶ *Martinez-Fuerte*, 428 U.S. 563.

²⁸⁷ *Martinez-Fuerte*, 428 U.S. 563.

²⁸⁸ *Martinez-Fuerte*, 428 U.S. 560.

²⁸⁹ In fact, legal scholar Guy Padula notes that the Supreme Court ruled that narcotics roadblocks were *per se* unconstitutional in *City of Indianapolis v. Edmond* (2020). These roadblocks were much more effective at intercepting drugs than individual police officers using a “drug courier profile” that mainly arrested people of color. However, “the general public” was inconvenienced in this case, not just target minorities. See Padula, *Colorblind Racial Profiling*, 185.

Drayton, the justices show their disconnect with the public when they write that, “Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive, because of their public and relatively routine nature.”²⁹⁰ The dissenting justices ask “what actual experience supports [this] conclusion” by their fellow justices.²⁹¹ All of the seven justices who signed on to the majority opinion were white, so they cannot have had any experience with repeated racial profiling at immigration checkpoints or elsewhere.

The two dissenting justices in *Martinez-Fuerte* lament the “continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures,” which they write was the ninth case that term to do so.²⁹² They write that,

Every American citizen of Mexican ancestry, and every Mexican alien lawfully in this country, must know after today’s decision that he travels the fixed checkpoint highways at the risk of being subjected not only to a stop, but also to detention and interrogation, both prolonged and to an extent far more than for non-Mexican appearing motorists. To be singled out for referral and to be detained and interrogated must be upsetting to any motorist.²⁹³

Brignoni-Ponce and *Martinez-Fuerte* show how the Supreme Court has endorsed racial profiling in the border area. Statistics, such as those from the ACLU of Michigan, repeatedly confirm that roving patrols like those in *Brignoni-Ponce* overwhelmingly target Latinx individuals or those of Latin American origin.²⁹⁴ Unsurprisingly, there are no CBP statistics about race and ethnicity of those scrutinized at checkpoints, but an outside study at an Arizona checkpoint found that Latinx-occupied vehicles were twenty times as likely as white-occupied vehicles to be pulled over by agents for secondary inspection.²⁹⁵

²⁹⁰ *Martinez-Fuerte*, 428 U.S. 560.

²⁹¹ *Martinez-Fuerte*, 428 U.S. 572.

²⁹² *Martinez-Fuerte*, 428 U.S. 567.

²⁹³ *Martinez-Fuerte*, 428 U.S. 572.

²⁹⁴ ACLU Michigan, *The Border’s Long Shadow*.

²⁹⁵ “Checkpoint Monitoring Report: Arivaca Road Border Patrol Checkpoint, Amado, Arizona,” People Helping People, May 26, 2014, https://phparivaca.org/?page_id=1174.

Racial Profiling Policies

Racial profiling policies at the federal level set higher standards than the Supreme Court requires, but they each have their own problems that ultimately allow racial profiling in the 100-mile zone. The Department of Justice's (DOJ) policy does this by creating an exception to the profiling protections during activities "in the vicinity of the border."²⁹⁶ DHS's policy does not give special consideration to the border, but it allows nationality to be used "as a screening, investigation, or enforcement factor."²⁹⁷ This does not seem like a problem at face value: nationality is a relevant factor in immigration enforcement, and, combined with legal status, should be the only relevant factor. However, nationality cannot be seen, and is often judged by agents based on perceived national origin, which is in itself based on visual proxies such as race or ethnicity.²⁹⁸ In addition, accountability mechanisms for civil and human rights abuses within DHS, CBP, and the Border Patrol are ineffective.²⁹⁹ These anti-racial profiling policies serve little purpose if there are no consequences for violators or remedies for impacted individuals.

The DOJ's Guidance

The DOJ has issued policies prohibiting racial profiling for federal law enforcement agencies twice during the last twenty years. Both policies stated in no uncertain terms the

²⁹⁶ U.S. Department of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*, December 2014, https://www.dhs.gov/sites/default/files/publications/use-of-race-policy_0.pdf.

²⁹⁷ Janet Napolitano, "The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities," U.S. Department of Homeland Security, April 26, 2013, https://www.dhs.gov/sites/default/files/publications/secretary-memo-race-neutrality-2013_0.pdf.

²⁹⁸ Jennifer M. Chacón and Susan Bibler Coutin, "Racialization through Enforcement," in *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging*, eds. Mary Bosworth, Alpa Parmar, and Yolanda Vázquez First edition (Oxford: Oxford University Press, 2018), 162.

²⁹⁹ Scott Shuchart, "Building Meaningful Civil Rights and Liberties Oversight at the U.S. Department of Homeland Security," Center for American Progress, April 2, 2019, <https://www.americanprogress.org/article/building-meaningful-civil-rights-liberties-oversight-u-s-department-homeland-and-security/>; Homeland Security Advisory Panel, "Final Report of the CBP Integrity Advisory Panel," March 15, 2016, [https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20\(accessible\)_0.pdf](https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20(accessible)_0.pdf); "Abuse of Power," SBCC.

“terrible” costs of “the use of race as the basis for law enforcement decision-making... both to the individuals who suffer invidious discrimination and to the Nation, whose goal of ‘liberty and justice for all’ recedes with every act of such discrimination.”³⁰⁰ However, both of these policies have allowed the use of racial profiling for border security, continuing the tradition of allowing individuals to be stereotyped as outsiders to the nation based on their race or ethnicity.

The DOJ issued “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies” in 2003, during the Bush administration. This guidance set a stricter racial profiling policy than required by the Supreme Court’s interpretations of the Constitution in most areas of federal law enforcement. However, it carved out specific exceptions to this rule for national security and “border integrity.”³⁰¹ The document specifically cites the aforementioned and flawed *Brignoni-Ponce* decision.³⁰²

The DOJ under the Obama administration released further policy in December 2014 which superseded the 2003 guidance. This expanded the list of identity characteristics protected from profiling, with the title “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity.”³⁰³ Although this guidance expanded the 2003 profiling protections in some ways, it also added an explicit exception for “interdiction activities in the vicinity of the border, or to protective, inspection, or screening activities.”³⁰⁴ This exception was reportedly a subject of

³⁰⁰ U.S. Department of Justice, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, June 2003,

https://www.dhs.gov/xlibrary/assets/training/xus/crcl/racelawofficers/Common/pdf/doj_profiling_guidance.pdf, 1.

³⁰¹ U.S. Department of Justice, *Guidance Regarding the Use of Race*; The Leadership Conference on Civil and Human Rights, “Re: Concerns with the U.S. Department of Justice Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity,” February 24, 2015,

<https://civilrights.org/resource/re-concerns-with-the-u-s-department-of-justice-guidance-for-federal-law-enforcement-agencies-regarding-the-use-of-race-ethnicity-gender-national-origin-religion-sexual-orientation-or-gender-id/>.

³⁰² U.S. Department of Justice, *Guidance Regarding the Use of Race*, 9.

³⁰³ U.S. Department of Justice, *Guidance for Federal Law Enforcement Agencies*.

³⁰⁴ U.S. Department of Justice, *Guidance for Federal Law Enforcement Agencies*, 2.

contention between the DOJ, which was ready to release the guidance without the border carveout, and DHS, who argued that they could not do their job without “taking ethnicity into account.”³⁰⁵ A negotiation process involving both agencies and the White House was required, and perhaps this last-minute change is why this vast exception is simply added in a footnote on the second page. The definition of the “vicinity of the border” is not given, but the exception has been interpreted to apply to both CBP and the Transportation Security Administration (TSA) and to extend across the 100-mile zone.³⁰⁶

This carveout is especially striking because, if one reads the guidance and skips the footnote with the border exception, the revised guidance appears to guard against the types of untargeted Border Patrol actions seen in transportation sweeps. Reading the guidance shows how the border exception is so unusual, since it allows the consideration of race, ethnicity, and/or national origin in situations where, if not “near” the border, they would have been outlawed. For example, consider how the following sections of the guidance would apply to the Greyhound bus cases in Spokane.

- Race, ethnicity, and national origin (as well as the other factors) are not allowed to be used “to any degree...[i]n making routine or spontaneous law enforcement decisions.”³⁰⁷ These routine or spontaneous activities include traffic stops and foot patrols that are not related to a specific criminal investigation. This protection would seem to cover “routine” actions such as a daily or weekly visit to the Greyhound station that does not involve any individual case.

³⁰⁵ Matt Apuzzo and Michael S. Schmidt, “U.S. to Continue Racial, Ethnic Profiling in Border Policy,” *New York Times*, December 5, 2014,

<https://www.nytimes.com/2014/12/06/us/politics/obama-to-impose-racial-profiling-curbs-with-exceptions.html>.

³⁰⁶ The Leadership Conference on Civil and Human Rights, “Re: Concerns.”

³⁰⁷ U.S. Department of Justice, *Guidance for Federal Law Enforcement Agencies*, 2.

- The guidance goes on to state that during routine and spontaneous activities, federal law enforcement is not allowed to use overall discrepancies in crime rates to justify targeting a specific group. This is true “[e]ven if there were overall statistical evidence of differential rates of commission of certain offenses among individuals possessing particular characteristics.”³⁰⁸ The guidance states that this is because it is “tantamount to stereotyping,” “casts a pall of suspicion over every member of certain groups,” and “offends the dignity of the individual improperly targeted.”³⁰⁹ This would mean that even if the percentage of undocumented immigrants of a certain racial appearance or national origin is higher than the percentage of undocumented people from other groups, these factors still cannot be used. If this had been applied to border areas as well, this would have meant a contradiction of Supreme Court precedent in *Brignoni-Ponce*.
- Finally, there are some very specific cases in which law enforcement can use protected identity characteristics for their investigations. It is unlikely that any transportation check cases would fit the stringent requirements for considering race and ethnicity, such as the investigation being of “particular identified criminal incidents [or] violations of Federal immigration law.” In addition, law enforcement officers cannot rely on protected characteristics unless they “also reasonably believe that the law enforcement, security, or intelligence activity to be undertaken is merited under the totality of the circumstances, such as any temporal exigency and the nature of any potential harm to be averted.”³¹⁰ The examples given include a bomb threat and a drug trafficking organization, which have a much higher level of “harm to be averted” than any of the immigration violation cases

³⁰⁸ U.S. Department of Justice, *Guidance for Federal Law Enforcement Agencies*, 3.

³⁰⁹ U.S. Department of Justice, *Guidance for Federal Law Enforcement Agencies*, 3.

³¹⁰ U.S. Department of Justice, *Guidance for Federal Law Enforcement Agencies*, 2.

seen here.³¹¹ If the DOJ believes that racial profiling is as harmful as they state throughout this guidance, it is unlikely that the use of race would be merited when the potential harm is simply someone's presence without papers in the country.

All of the above DOJ guidelines would have gone above and beyond Supreme Court precedent in protecting from Border Patrol agents boarding buses and trains and using race or ethnicity as factors in enforcement. However, their exception in the "vicinity of the border" continues the tradition of different standards being applied to racial profiling in the border region. The failure to define "the vicinity of the border" also allows an implied interpretation of this as one hundred miles, allowing this profiling to continue for almost two-thirds of the U.S. population.

DHS's Nondiscrimination Policy

The Department of Homeland Security (DHS) also has their own April 2013 policy called "Commitment to Nondiscriminatory Law Enforcement and Screening Activities." Like the DOJ guidance, it describes racial profiling as "premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity."³¹² However, it describes no meaningful accountability measures for agents who are found to overstep the bounds of this policy.³¹³ The only process currently in place is for individuals to complain to the Office for Civil Rights and Civil Liberties (CRCL), whose processes are ineffective at changing policies within the various components of DHS.³¹⁴ The CBP Integrity Advisory Panel described CBP's disciplinary

³¹¹ U.S. Department of Justice, *Guidance for Federal Law Enforcement Agencies*, 8-9.

³¹² Napolitano, "Commitment to Nondiscriminatory Law Enforcement."

³¹³ Harsha Panduranga and Faiza Patel, *Stronger Rules Against Bias: A Proposal for a New DHS Nondiscrimination Policy*, September 15, 2022, <https://www.scribd.com/document/594995692/Stronger-Rules-Against-Bias#>.

³¹⁴ Shuchart, "Building Meaningful Civil Rights."

processes as “broken,” with little accountability for misconduct.³¹⁵ Rules against racial profiling without consequences for breaking those rules are worthless.

In addition, the policy does not effectively prohibit racial profiling because of another carveout that deserves significant consideration. The DHS policy sets restrictions on the use of “an individual’s simple connection to a particular country, by birth or citizenship,” otherwise known as national origin or nationality.³¹⁶ However, the policy specifies that these restrictions “do not apply to antiterrorism, immigration, or customs activities in which nationality is expressly relevant to the administration or enforcement of a statute, regulation, or executive order, or in individualized discretionary use of nationality as a screening, investigation, or enforcement factor.”³¹⁷ Unsurprisingly, CBP interprets this clause as meaning that “the use of nationality is appropriate for the vast majority of situations encountered by front-line CBP personnel,” since nationality and legal status are exactly what CBP is tasked to consider.³¹⁸

The problem here is that, in reality, assumptions about the nationality of an individual are often made by law enforcement agents based on the racial or ethnic appearance of that person, which is then extrapolated to assume their national origin. Thus, an unprotected class (nationality) is used as a cover for profiling based on three protected classes (race, ethnicity, and national origin, although national origin is only protected under the DOJ guidance, not DHS policy). One cannot perceive someone’s nationality or national origin by simply looking at them. However, in the day-to-day reality of immigration enforcement (when it is not preceded by an investigation into a specific person), racial or ethnic appearance is often assumed to indicate

³¹⁵ Homeland Security Advisory Panel, “Final Report.”

³¹⁶ Napolitano, “Commitment to Nondiscriminatory Law Enforcement.”

³¹⁷ Napolitano, “Commitment to Nondiscriminatory Law Enforcement.”

³¹⁸ “CBP Policy on Nondiscrimination in Law Enforcement Activities and all other Administered Programs,” U.S. Customs and Border Protection, May 24, 2022, <https://www.cbp.gov/about/eo-diversity/policies/nondiscrimination-law-enforcement-activities-and-all-other-administered#:~:text=It%20is%20the%20policy%20of,but%20the%20most%20exceptional%20circumstances.>

national origin, as when a person who looks stereotypically Mexican or Chinese is assumed to be born in Mexico or China.³¹⁹ Two further assumptions are made in conflating assumed national origin with nationality and legal status: because that person looks Mexican, they are 1) a citizen of Mexico and 2) do not have any legal status in the United States. In fact, none of these assumptions may be true (the person was born in the United States), or one may be true but the other false (the person was born in Mexico but is a naturalized citizen of the United States or has some other legal status).

Mexicans, just like U.S. citizens and citizens of many other countries, are “as varied in appearance as the people of the globe,” although they are each stereotyped in certain ways.³²⁰ We see the stereotyped conception of U.S. citizens as white in the tendency for white people to be assumed to belong, while people of other races or ethnicities are not. This happens on a personal level, when individuals are asked questions such as, “Where are you *really* from?” It also occurs on a systemic level, as in cases of intense scrutiny of someone’s nationality (whether at a checkpoint, on a bus, or while driving their car) stemming from their non-white racial or ethnic appearance.³²¹

Appearances may provide “weak evidence of national origin in the sense that they can provide imperfect clues to an individual’s ancestral roots.”³²² However, ancestral roots may mean that someone has Mexican-origin great-grandparents, not that they were born in Mexico themselves. Many “Mexican-appearing” people may not have actually been born in Mexico. In fact, they could be third or fourth-generation U.S. citizens. Or, because “Mexican” is a term that in the United States is often used to refer to people of Latinx appearance in general, the

³¹⁹ Chacón and Coutin, “Racialization through Enforcement,” 162.

³²⁰ Chacón and Coutin, “Racialization through Enforcement,” 162.

³²¹ Chacón and Coutin, “Racialization through Enforcement,” 161.

³²² Chacón and Coutin, “Racialization through Enforcement,” 162.

individual in question may actually be Guatemalan or a Puerto Rican U.S. citizen, as was the case in *Brignoni-Ponce*. Scholars Jennifer Chacón and Susan Bibler Coutin point out that “Mexican” is often used as a derogatory term in a way that is much more racially-ethnically than nationally motivated:

Individuals who deploy racist rhetoric about someone who is ‘Mexican’ or ‘Japanese’ are not particularly concerned about the niceties of whether they are using accurate national origin descriptions... They are using national origin descriptors to suggest that the individual in question is a social outsider, and they are doing so in a context that further expresses the sentiment that the outsider is unassimilable and inferior in ways that justify their exclusion. This sort of exclusion is certainly not about nationality, it is not really even about national origin; this is racism.³²³

These arguments show that allowing discrimination based on nationality is a slippery slope into racial profiling, since racial and ethnic appearance are proxies for national origin and nationality. DHS’ policy allowing discrimination based on nationality gives them an easy out when something is labeled racial profiling by the public or advocates. DHS simply claims that it is actually concerned with nationality. In one example of this, a Border Patrol agent interviewed by Spokane television station KREM in October 2018 said, “You get people out here claiming that we’re shaking people down for their papers, calling us the Gestapo and everything else. It’s nothing further from the truth. Out here racially profiling... nothing further from the truth... We’re not concerned with race, we’re concerned with nationality.”³²⁴ However, people who are profiled by CBP and ICE do not see it this way, including those who have been targeted during transportation sweeps.

³²³ Chacón and Coutin, “Racialization through Enforcement,” 164.

³²⁴ Decker, “Spokane, Border Patrol agents.”

What do the records from Spokane show?

The I-213 records from Spokane provide evidence of racial and ethnic profiling in their skew towards arrests of Latinx individuals and people of color. As noted in the “Findings” section, Border Patrol agents arrested people of Latin American origin 69% of the time. In addition, 95% of the people arrested were recorded as having “Medium” or “Black” complexion, as opposed to “Fair” or “Light” only 5% of the time.

Only 13.7% of people in Washington State identify as Hispanic or Latinx, indicating a much higher arrest rate of individuals of Latin American origin than their overall presence in the state.³²⁵ Critics may argue that these numbers make sense, however, because the correct comparison would be the percentage of *undocumented* individuals in the state who are of Latin American origin. Indeed, data from the Migration Policy Institute shows that 75% of the undocumented population in the United States is from Mexico, Central America, and South America.³²⁶ Using this same logic, African people are extremely overrepresented in the Spokane arrests: they make up 12% of those arrested but only 3% of the U.S. undocumented population.³²⁷ However, looking at the racial and ethnic composition of only those “successfully” interrogated and arrested is not enough. It obscures the extent that racial profiling affects individuals other than those ultimately arrested. A comprehensive look at racial profiling by the Border Patrol must consider individuals who are suspected, questioned, apprehended, and sometimes detained for further investigation, but who are not actually unlawfully present.

³²⁵ America Counts Staff, “Washington State.”

³²⁶ “Profile of the Unauthorized Population: United States,” Migration Policy Institute, accessed May 12, 2023, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US>.

³²⁷ “Profile of the Unauthorized Population,” Migration Policy Institute.

Who is apprehended and/or detained, but not ultimately arrested?

The official name for Form I-213 is “Record of Deportable/Inadmissible Alien.” Thus, this dataset excludes individuals who were questioned but not found to be deportable, including those who were determined to be citizens or Legal Permanent Residents (LPRs) or to have been granted some other form of relief such as asylum, DACA status, temporary protective status (TPS), or work or student visas.³²⁸ It also would exclude anyone released on bond while awaiting their immigration proceedings, as in the case of Andres Sosa. Statistics about the complexions or regions of origin of people questioned and sometimes even detained for hours, but later found to be non-deportable would be even more indicative of racial profiling, because this would show the frequency with which people of different racial appearances are wrongly suspected. These cases of wrongful suspicion are also important because they challenge the idea that racial/ethnic appearance correlates with nationality and/or legal status.

Unfortunately, the data resulting from UWCHR’s FOIA and lawsuit does not include evidence of how many legally present individuals were interrogated or even wrongfully detained at the Spokane Intermodal Center. However, evidence from the ACLU of Michigan and from *Uncovering USBP* shows that the number of U.S. citizens and non-deportable foreign-born people caught in this dragnet near the northern border is significant.

The ACLU of Michigan’s report *The Border’s Long Shadow* is about Border Patrol encounters in the Detroit area in general, not just transportation checks, but it gives strong evidence of racial profiling. Ninety-six percent of those arrested were characterized as having a

³²⁸ Anyone who is not a citizen can be found to be deportable in some cases, but they have to have committed crimes in certain categories in order for this to be the case. LPRs have the highest bar: they must be convicted of aggravated felonies or crimes of moral turpitude, which have very broad definitions in immigration law. For more information, see Ilona Bray, “Crimes That Will Make an Immigrant Deportable,” NOLO, accessed May 12, 2023, <https://www.nolo.com/legal-encyclopedia/crimes-that-will-make-immigrant-deportable.html#:~:text=It%20includes%20such%20crimes%20as,only%20had%20to%20serve%20part>.

“Black,” “Dark Brown,” “Dark,” “Light Brown,” “Medium Brown,” “Medium,” or “Yellow” complexion, as opposed to “Fair” or “Light.”³²⁹ The ACLU of Michigan was also provided with apprehension logs through their FOIA request and subsequent lawsuit. These apprehension logs show not just those that were arrested, but everyone who was “apprehended,” which in CBP parlance means that they were stopped (whether walking or driving), asked questions, and possibly detained for some period of time.³³⁰ These logs reveal that one-third of the 13,239 people the Border Patrol apprehended between 2012 and 2019 were in fact U.S. citizens.³³¹ Unfortunately, these apprehension logs do not include information on race, ethnicity, or country of origin for individuals.³³² However, it is likely that the racial and ethnic patterns of apprehension of U.S. citizens follow the patterns of arrest of non-U.S. citizens. These apprehension logs also demonstrate how often the Border Patrol’s suspicions about individuals’ immigration status are incorrect, and this one-third “miss rate” does not even include those with legal status who are not U.S. citizens. The ACLU of Michigan writes that this high apprehension rate of U.S. citizens “coupled with the data on the hugely disproportionate number of noncitizens arrested who are of Latin American origin, strongly suggests that many Border Patrol stops are based on race and ethnicity – not any evidence of unlawful presence or activity.”³³³

The authors of *Uncovering USBP* continued the research in *Justice Derailed* about transportation checks in upstate New York, this time using a form called an I-44 to study the patterns of apprehensions of individuals later found to have legal status. The I-44 form is filled out for legally present individuals who are not just questioned, but actually detained and transported to Border Patrol stations before record checks prove that the person is not

³²⁹ ACLU Michigan, *The Border’s Long Shadow*, 4.

³³⁰ ACLU Michigan, *The Border’s Long Shadow*, 50.

³³¹ ACLU Michigan, *The Border’s Long Shadow*, 25.

³³² ACLU Michigan, *The Border’s Long Shadow*, 25.

³³³ ACLU Michigan, *The Border’s Long Shadow*, 25.

deportable.³³⁴ In some cases, family members or employers were even required to fax documents to the Border Patrol for the person's release.³³⁵ *Uncovering USBP* found evidence of racial profiling in these wrongful apprehension patterns, with the majority of those wrongfully detained from South Asian, East Asian, African, and Caribbean backgrounds. These detentions of people who were legally present included twelve U.S. citizens in just five years.³³⁶ The arrest rates for people with valid visas (whether visitor, temporary work, or student visas) from regions that are predominantly populated by non-white people far exceeded the percentage of overall visas granted to people from these regions.³³⁷ For example, Africans make up only one percent of people on visitor visas in the United States, but were 23% of the people arrested with valid visitor visas.³³⁸ Similarly, only two percent of student visas in the United States were for African students at the time, but 18% of the students arrested with valid visas were African.³³⁹ People with visitor, work, or student visas from Asian countries were arrested at a rate of two or three times more than would be expected based on their share of these visas.³⁴⁰

The authors of *Uncovering USBP* blame Rochester Station's detentions of so many people with legal status on "USBP's *de facto* presumption of unlawful status for the foreign born."³⁴¹ They note that statistically, this presumption is far from the truth in New York State, where more than 75% of residents born in other countries have some kind of lawful status.³⁴² In Washington State, these statistics are very similar – about 77% of foreign-born Washingtonians

³³⁴ NYU School of Law, *Uncovering USBP*, iv.

³³⁵ NYU School of Law, *Uncovering USBP*, 20.

³³⁶ NYU School of Law, *Uncovering USBP*, iv.

³³⁷ NYU School of Law, *Uncovering USBP*, 17.

³³⁸ NYU School of Law, *Uncovering USBP*, 17.

³³⁹ NYU School of Law, *Uncovering USBP*, 17.

³⁴⁰ NYU School of Law, *Uncovering USBP*, 18.

³⁴¹ NYU School of Law, *Uncovering USBP*, 17.

³⁴² NYU School of Law, *Uncovering USBP*, 17.

are here legally, and about 23% are undocumented.³⁴³ And with 16% of Washingtonians born abroad, “presumption of unlawful status for the foreign born” in Washington negatively affects a large portion of the state’s population.³⁴⁴

The media has profiled multiple cases of apprehension and prolonged detention of people with some kind of legal status by the Border Patrol at the Spokane Intermodal Center, even leading to prolonged detention. Sergio Vera was taken to a Border Patrol office and held for multiple hours despite having Deferred Action for Childhood Arrivals (DACA) status, which Border Patrol agents should be able to confirm in their databases. Instead, Sergio’s mother had to text pictures of his paperwork, which agents did not accept at first.³⁴⁵ Andres Sosa was also held for four hours at a Border Patrol office before agents eventually returned him to the Intermodal Center. His wife drove five hours to retrieve him because he had by then missed the last bus to Portland.³⁴⁶ The cases of both of these men show that Latinx individuals are often not believed when telling the truth about their immigration status. Andres Sosa even showed the agents his ankle monitor in an attempt to prove that he was out on bond from immigration detention.³⁴⁷ These are not simply misunderstandings; they cause real harm to the individuals who are unlawfully apprehended and detained, as acknowledged by CBP’s \$35,000 settlement in Sosa’s case.³⁴⁸

³⁴³ “Immigrants in Washington,” American Immigration Council, August 6, 2020, <https://www.americanimmigrationcouncil.org/research/immigrants-in-washington>.

³⁴⁴ Gene Balk, “How Many WA Residents Are Immigrants Or Have At Least One Parent Who Is,” *The Seattle Times*, July 22, 2022, <https://www.seattletimes.com/seattle-news/data/how-many-wa-residents-are-immigrants-or-have-at-least-one-parent-who-is/>.

³⁴⁵ Phan, “Father, son with DACA.”

³⁴⁶ Andres Sosa Segura v. United States of America, “Complaint for Damages,” 3-4.

³⁴⁷ Andres Sosa Segura v. United States of America, “Complaint for Damages,” 3.

³⁴⁸ “U.S. Border Patrol Agrees,” ACLU Washington.

Who is questioned by agents?

The case of Mohanad Elshieky, who had just been granted asylum when he was interrogated, shows us that there are also many individuals who are *questioned excessively* but not ultimately apprehended or arrested. Elshieky and other individuals with similar cases would not have been issued an I-44 because they were not taken into Border Patrol custody, but that does not mean that harm has not been done. In fact, Elshieky also filed a claim against CBP for loss of liberty and emotional harm, and the case was settled for \$35,000.³⁴⁹

The Border Patrol maintains that they question all individuals during transportation checks.³⁵⁰ Many of the I-213s in this dataset include statements such as, “All of the other passengers of the bus were also questioned as to their citizenship” or “Agent X questioned each person on the bus as to their immigration status.” However, other accounts, both in Spokane and elsewhere in the United States, refute this, claiming that individuals are held to different standards when proving their citizenship based on their race or ethnicity. Some accounts, such as that of comedian Mohanad Elshieky, describe selective questioning of minority passengers. Elshieky’s federal tort claim against CBP states that in addition to Elshieky, three individuals “of apparent Hispanic descent” were questioned, and that “Mr. Elshieky does not recall the CBP officer questioning any Caucasian passengers.”³⁵¹ Andres Sosa testified that he was “the only Latino appearing passenger on the bus,” and the lone passenger exiting his bus who was questioned at the Spokane Intermodal Center.³⁵² Mercedes Phelan, a U.S. citizen who is Black and Puerto Rican, told NBC that she has been questioned on both a Greyhound bus in

³⁴⁹ “U.S. Border Patrol Agrees,” ACLU Washington.

³⁵⁰ Johnson, “AP Exclusive.”

³⁵¹ Mohanad Elshieky v. United States of America. “Complaint for Damages.”

³⁵² Andres Sosa Segura v. United States of America, “Complaint for Damages.”

Pennsylvania in 2018 and an Amtrak train in Syracuse, New York in 2019.³⁵³ She said that, “They literally skipped over every single white person,” only questioning people of color.³⁵⁴

In other cases, the initial question “Are you a U.S. citizen?” may be asked of everyone on the bus, but answers are given a different level of scrutiny based on the agents’ personal standard of whether to believe someone. According to many accounts, this increased scrutiny is applied to people of color, while the question is asked of white people in a cursory way. A Western Washington University student questioned on a bus in Spokane in 2018 noted that the officer only asked, “‘Are you a citizen of the United States?’ to all of the white people,” but that they “noticed anytime he was questioning a brown person he would ask them multiple questions and would also ask to see their I.D.”³⁵⁵ They later told NBC that, “When it came to Caucasian people, he wouldn’t even wait for their answers.” A woman on a bus checked in Vermont at two a.m. said that, “The agent asked everyone ‘Are you American?’ He only checked the IDs of those who didn’t present as white.”³⁵⁶ Agents then held back “one international student, and a woman vacationing from Hong Kong,” neither of whom was eventually detained or arrested.³⁵⁷

Although I-213 and I-44 data cannot reveal who was questioned excessively (or at all), these accounts from bus passengers state that white people’s claims to citizenship are taken at face value, while people of color and especially Latinx-appearing individuals are questioned excessively. This is racial profiling, since this interrogation is based on the assumption that people of color, and particularly Latinx people, are more likely to be in the United States without legal status than white people.

³⁵³ Kaplan and Swales, “Border Patrol searches.”

³⁵⁴ Kaplan and Swales, “Border Patrol searches.”

³⁵⁵ Cody Clark and Stella Harvey, “Border Patrol questioning Greyhound bus passengers,” *The Front*, January 23, 2019, <https://www.westernfrontonline.com/article/2019/01/border-patrol-questioning-greyhound-bus-passengers> (accessed May 12, 2023).

³⁵⁶ John Walters, “Papers, Please: The Feds Reach Deeper Into Vermont,” *Seven Days*, August 9, 2017, <https://www.sevendaysvt.com/vermont/papers-please-the-feds-reach-deeper-into-vermont/Content?oid=7243409>.

³⁵⁷ Walters, “Papers, Please.”

What factors led to suspicion during the initial questioning?

We have established that the Supreme Court allows law enforcement agents to search and seize people with basically no evidence through the assertion that encounters are consensual. During this initial “consensual” conversation, agents gather and document factors that must together amount to reasonable suspicion in order to execute an investigative detention and (possibly) establish probable cause. In the narrative section of the I-213s, Border Patrol agents assert the reasons they had for suspecting certain people, as discussed in the “Findings” section.

If we take the narratives from the I-213s at face value, it would seem that suspicion arises only based on people’s answers during the initial questioning, not based on suspicions that *precede* speaking with someone. Border Patrol agents do not note when they were immediately suspicious of a certain individual simply because of their appearance, and information about race or ethnicity is only listed in the country of origin and complexion fields. There is not a single I-213 that reads, “He looked Mexican,” or “She looked like an illegal alien.” However, the above accounts from affected individuals and statistics from *Uncovering USBP* and ACLU of Michigan show us that suspicion precedes conversation in many instances – why else would an agent aggressively question a Latinx person and not a white person?

A study of immigration enforcement in the 1980s concluded that “[o]fficers can easily strengthen their reasonable suspicion for an interrogation after they have begun talking to an individual It is easy to come up with the necessary articulable facts after the fact... . [This practice] is referred to as ‘canned p.c.’ (probable cause).”³⁵⁸ Thus, we can think about the elements of the I-213 narrative that state reasons for suspicion as strategically building the case for suspicion for reasons *other than* initial appearance. As in *Bostick, Drayton, Brignoni-Ponce*,

³⁵⁸ Edwin Harwood, “Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement,” *U.C. Davis Law Review* 17 (1984): 531.

and *Martinez-Fuerte*, the initial suspicion may be based on race, but by the end of the “consensual conversation,” the agent has usually gained enough evidence through the person’s own admission to warrant reasonable suspicion. Thus, the suspicion was *initially* but is no longer based *solely* on race.

In some of the I-213s in this dataset, the agents arrive to their reasonable suspicion when someone hands them a passport with an expired visa, or admits to their immigration status. While this arrival at reasonable suspicion is more cut and dry than those that follow, what we don’t see in these cases, of course, is the conversation that preceded this admission and was perhaps not documented in the I-213. It could have included verbal or physical intimidation, and we cannot forget that the entire conversation was based on a warrantless, suspicionless boarding of a bus by a federal agent.

However, there are even more clearly problematic elements of suspicion in the I-213 narratives that agents do not hesitate to include. These have to do with an individual not speaking or understanding English, or appearing nervous in the presence of an officer. These fall into the categories “Behavior” and “Language” outlined in the “Findings” section. While they may be included as additional non-appearance based elements to establish suspicion, they are often just covert forms of racial profiling themselves. Behavior usually refers to nervousness on the part of the individual, which may be noted simply because the person had already caught the eye of an agent. Language is regularly used as a veiled way to talk about someone’s race, making linguistic profiling simply another form of racial profiling.

Twenty-eight out of eighty-nine I-213s (31%) show that Border Patrol agents use their perception of an individual’s inability to speak or understand English as evidence that someone is undocumented. I write “perception” because the narrative is often written in a way that

references the agent's perception of the individual's understanding, such as "...he replied in a manner that *led me to believe* that he did not understand me" (emphasis added). In other cases, the person may not answer right away because they're trying to assert their right to remain silent, and this is interpreted as not understanding.

CBP has a history of cases along the northern border in which they target individuals who are speaking Spanish. Two illustrative cases occurred in the small town of Havre, Montana, which is forty-seven miles from the U.S.-Canada border. In one case, two U.S. citizen women were speaking Spanish to each other in a convenience store in Havre, Montana in 2019 when an agent approached and asked for identification. He admitted on video that "the reason I asked you for your IDs is because when I came in here I saw that you guys were speaking Spanish which is very unheard of up here."³⁵⁹ A Border Patrol supervisor admitted during evidence collection for the case that people speaking Spanish are routinely linguistically profiled in Havre: "If there is somebody speaking Spanish down here, it's like all of a sudden you've got five agents swarming in like 'What's going on?' So Havre is kind of like that."³⁶⁰ The women eventually won a monetary settlement from a case brought by the ACLU, but they also had to leave Havre because of fear for their families after the negative attention they received from speaking up.³⁶¹

Another instance in which the same two women were profiled at a bar in Havre reveals how when language is mentioned by law enforcement, it is often a stand-in for commentary on someone's race or ethnicity. In 2018, a presumably off-duty Border Patrol agent overheard the two women speaking Spanish at the bar and texted a photo of them to other agents with the message, "There are two Mexicans at the bar."³⁶² The agent interpreted the speaking of Spanish

³⁵⁹ Gonzalez, "2 US citizens detained."

³⁶⁰ Gonzalez, "2 US citizens detained."

³⁶¹ Gonzalez, "2 US citizens detained."

³⁶² Allyson Waller, "U.S. Border Agency Settles With 2 Americans Detained for Speaking Spanish," *New York Times*, November 26, 2020, <https://www.nytimes.com/2020/11/26/us/montana-spanish-border-patrol.html> (accessed May 12, 2023).

as showing that the women were “Mexican,” demonstrating how language is used as a proxy for race. Although “Mexican” is not actually a racial or ethnic category, but a nationality, Jennifer Chacón and Susan Bibler Coutin have argued that people use it as a catch-all for Latinx/Hispanic when it is used in a derogatory way.³⁶³ Thus, when the Border Patrol agent called these women “two Mexicans,” he is using their language to racially and ethnically profile them. (He may argue that he is actually concerned with nationality rather than race or ethnicity, but it is not possible to tell someone’s nationality through their appearance and their speech, as this case of two U.S. citizens proves.) These cases of linguistic profiling in Havre are not alone. The 2006 Ninth District Court case, *United States v. Manzo-Jurado*, involved linguistic profiling of six men speaking Spanish at a football game in Havre.³⁶⁴ Only one of the men seized by CBP was not lawfully present in the United States. These cases together show not only how language is misused as a proxy for legal status, they also demonstrate how Latinx populations on the northern border are profiled repeatedly because their appearance and language are seen as out-of-the-ordinary.

Finally, eight (9%) of the I-213s in this dataset noted that the individual appeared nervous. This is interpreted as a reason to investigate the person further, but in the U.S. context of racial profiling and disproportionate use of force, arrest, and imprisonment of people of color, there are many reasons why certain individuals, especially Black and Latinx people, would feel heightened fear in the presence of a Border Patrol agent, regardless of their legal status. Appearing nervous in this context could just be a natural reaction to seeing a law enforcement officer, rather than a sign of guilt as it is often interpreted by agents. For example, it should be expected that the two women twice profiled in Havre, Montana would be nervous when

³⁶³ Chacón and Coutin, “Racialization through Enforcement,” 164.

³⁶⁴ *Manzo-Jurado*, 457 F.3d 928.

approached by CBP agents, despite both being U.S. citizens. Nervousness could be a trauma reaction to having experienced profiling by a law enforcement officer previously. This would not be at all surprising for a U.S. citizen who saw an undocumented parent arrested by ICE and deported as a child, or even for someone in less dramatic circumstances. A 2012 report by One America and UWCHR showed that the Border Patrol's pervasiveness in Washington's northern border communities has caused psychological anxiety even among U.S. citizens with no undocumented family members.³⁶⁵ Children in mixed status communities internalize fear of immigration enforcement, and "also know that just because they are U.S. Citizens doesn't mean they are exempted from facing racial profiling."³⁶⁶ Indeed, young Latinx U.S. citizens in northwestern Washington have been profiled, with Border Patrol agents demanding to see their birth certificates.³⁶⁷ One young man was even mistakenly detained in Tacoma for three days.³⁶⁸

One of the Spokane I-213s describes the case of a man from Mexico who claimed to be a U.S. citizen, but did not have documentation and "appeared nervous and spoke uncertainly" to the officer. This might appear to be incriminating, however, the report *Uncovering USBP* shares an example of a man in a similar situation who was arrested in 2009 on a Greyhound bus in Rochester. He was Latino, said he was a U.S. citizen, and appeared nervous. The only difference is that he *was* a U.S. citizen, and the man in my dataset was not. It is worth reading the summary of the I-44 narrative from *Uncovering USBP*:

A USBP agent questioned the citizen about whether he was a citizen of the United States and reported that the man "stared" back at him. The agent repeated the question in Spanish, at which point the man responded "yes" and handed over a valid Georgia driver's license. Despite the man's assertion of his U.S. citizenship and his offer of a valid form of identification, the man's interrogation did not cease. *The agent later claimed that he continued the encounter because he noticed that the man was "shaking"*

³⁶⁵ Curry et al., *The Growing Human Rights Crisis*, 27.

³⁶⁶ Curry et al., *The Growing Human Rights Crisis*, 27.

³⁶⁷ Curry et al., *The Growing Human Rights Crisis*, 19, 27.

³⁶⁸ Curry et al., *The Growing Human Rights Crisis*, 27.

and “avoiding eye contact,” which, according to the agent, was the “sort of behavior” exhibited by “undocumented aliens illegally present in the United States.” Again, the agent asked the man in Spanish where he was from. The man responded that he was born in Brownsville, a prominent border city in Texas. The agent proceeded to arrest the man and brought him to the station. Later, the agent was able to use the man’s social security number to confirm that he was, as he stated, a U.S. citizen.³⁶⁹ (emphasis added)

Some people, upon seeing the similarity between these stories, may point to the fact that the first man lied as proof of the necessity of scrutiny in the second situation. However, U.S. citizens, whether by birth or naturalization, are not required to carry any proof of citizenship.³⁷⁰ What is the cost of repeatedly questioning and sometimes detaining U.S. citizens, permanent residents, and others who are legally in the United States? As the U.S. Supreme Court themselves stated in 1959 in *Henry v. United States*, “It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest.”³⁷¹ The cost will be considered more in the “Effectiveness vs. Harm” section, where I consider the efficacy of “successful” transportation check arrests compared to the number of innocent individuals inconvenienced by them, sometimes even harassed and traumatized. For now, I compare these stories in order to show that “shaking” and “avoiding eye contact” or not understanding English might not be the incriminating evidence that the Border Patrol thinks it is.

Racial Profiling Conclusion

Racial profiling is allowed by the Supreme Court and the DOJ for immigration enforcement in the border region, whose expansive definition comes from the 100-mile rule. Racial profiling is allowed by DHS implicitly through their conflation of nationality with national origin, and reliance on appearance to assume national origin. Even if there were tighter

³⁶⁹ NYU School of Law, *Uncovering USBP*, 10.

³⁷⁰ NYU School of Law, *Justice Derailed*.

³⁷¹ *Henry v. United States*, 361 U.S. 98 (1959) at 361.

restrictions on racial profiling, the current lack of accountability mechanisms allow Border Patrol agents (and others within DHS) to profile with impunity.

Transportation checks clearly use race and ethnicity as criteria for investigation, yet these operations do not meet DHS's own nondiscrimination guidelines that state that race and ethnicity are prohibited "in all but the most exceptional instances."³⁷² Although the Border Patrol would not say that they are using race and ethnicity on buses, most experts and even casual observers do not agree. The DHS guidelines go on to explain that "DHS personnel may use race or ethnicity only when a compelling governmental interest is present, and only in a way narrowly tailored to meet that compelling interest."³⁷³ First, many would argue that there is no "compelling governmental interest" present when the Border Patrol conducts untargeted transportation sweeps. They do not have an intended, high-profile target, and agents themselves admit that the individuals arrested are "regular people" and visa overstays. CBP may argue otherwise, because national security is considered almost *per se* to be a compelling interest, and border security has become synonymous with national security, but when we look at the details of the people considered "national security threats" who are arrested in these operations, we can see the folly of these arguments.³⁷⁴

Second, *if* the constitutional standard of compelling interest is met, the use of race or ethnicity must be narrowly tailored, meaning that "it must promote that [compelling government] interest without affecting more people than is necessary to achieve it."³⁷⁵ In deciding this, courts consider whether the use of race or ethnicity is overinclusive, sweeping up more people than necessary, or underinclusive, focusing on one group and leaving out others who may pose the

³⁷² Napolitano, "Commitment to Nondiscriminatory Law Enforcement."

³⁷³ Napolitano, "Commitment to Nondiscriminatory Law Enforcement."

³⁷⁴ Panduranga and Patel, *Stronger Rules Against Bias*.

³⁷⁵ Panduranga and Patel, *Stronger Rules Against Bias*.

same threat. In this case, singling out people of color and especially Latinx individuals on a bus because of an assumption that they are more likely to commit the “crime” of residing in the United States without legal status is overinclusive. It means that citizens, legal residents, asylees, and others are profiled, in addition to those who are actually undocumented. It is also underinclusive, because it leaves out people of other races or ethnicities, especially people who present as white, who are in the United States without legal status. In the next section, I will calculate the “miss” rate of transportation check questioning versus actual arrests in Spokane to show that these sweeps are not narrowly tailored by any means.

The 100-mile rule allows this dragnet, broadly tailored racial profiling to extend farther into the United States. Although the 100-mile rule is currently not used often on the coastal borders, it could be if the Executive Branch wanted to expand their power. This means that there would conceivably be cover for Border Patrol agents to treat as a potential suspect anyone they like out of the two-thirds of the U.S. population who live in the 100-mile zone. This rule combined with the systemic problems within the Border Patrol and the lax Supreme Court stance on racial profiling provide an environment ripe for abuse by an authoritarian-leaning leader.³⁷⁶

Increased cooperation between the Border Patrol and local law enforcement also means that allowing racial profiling in immigration enforcement causes it to seep into mainstream criminal law enforcement and the legal system. This is especially true because of the modern-day fusion of immigration and criminal enforcement into what many scholars call “crimmigration.” Police and sheriff forces are asked to assist with immigration enforcement goals through 287(g) agreements, data-sharing programs, and immigration detainers. They may selectively enforce

³⁷⁶ Katherine Hawkins, “The Border Zone Next Door, and Its Out-of-Control Police Force,” POGO, January 10, 2023, <https://www.pogo.org/report/2023/01/the-border-zone-next-door-and-its-out-of-control-police-force#:~:text=In%20New%20Hampshire%2C%20state%20police,judge%20found%20their%20conduct%20unconstitutional.>

certain low-level crimes as a way of checking people’s immigration status, as was the case in the ACLU of Michigan’s research from the Detroit area.³⁷⁷ This serves to “encourage race-based policing” by domestic police officers “under the guise of immigration control.”³⁷⁸ In another example, courts in New Hampshire and Vermont recently ruled that evidence of drug possession collected by the Border Patrol in the 100-mile zone and then handed over to state law enforcement and courts is not permissible, because state police would have needed a warrant for similar stops.³⁷⁹ These two cases are victories, but they illustrate how lax constitutional protections in the border region bleed into state and local law enforcement and can cause disproportionate arrests of people of color under state and local laws.

Mission and Effectiveness vs. Harm

Is conducting transportation checks over ninety miles from the border “as a preventative” worth the violations of constitutional rights of so many travelers, especially people of color? The words of the Florida Supreme Court in *State v. Kerwick* (1987), another warrantless and suspicionless bus sweep case that preceded the U.S. Supreme Court’s *Bostick* decision, shed some light on this question:

[T]he evidence in this case has evoked images of other days, under other flags, when no man traveled his nation’s roads or railways without fear or unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American

³⁷⁷ Eisha Jain, “Policing the Polity,” *Yale Law Journal* 131, no. 6 (April 2022): 1719–2019; ACLU Michigan, *Border’s Long Shadow*.

³⁷⁸ Jain, “Beyond Deportation.”

³⁷⁹ Ron Nixon, “Drug Arrests at Immigration Checkpoint Violated Constitution, New Hampshire Court Finds,” *The New York Times*, May 4, 2018, <https://www.nytimes.com/2018/05/04/us/new-hampshire-border-patrol-illegal-checkpoints-aclu.html>; Derek Brouwer, “Vermont Supreme Court Deals Blow to Border Agents’ Roving Patrols,” *Seven Days*, September 24, 2021, <https://www.sevendaysvt.com/OffMessage/archives/2021/09/24/vermont-supreme-court-deals-blow-to-border-agent-s-roving-patrols>.

citizens being asked, by badge-wielding police, for identification, travel papers – in short a *raison d’etre* – is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler’s Berlin, nor Stalin’s Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains (“that time permits”) and check identification, tickets, ask to search luggage – all in the name of “voluntary cooperation” with law enforcement – to the shocking extent that just one officer, Damiano, admitted that during the previous nine months, he, himself, had searched in excess of three thousand bags! In the Court’s opinion, the founders of the Republic would be thunderstruck.³⁸⁰

These words were repeated by Justice Thurgood Marshall in his dissent in the *Bostick* decision, and more recent critics of transportation checks have also made these comparisons to totalitarian regimes and pass laws.³⁸¹ These arguments point to a fundamental civil liberties problem with warrantless and suspicionless sweeps on buses or trains. The brief Fourth Amendment and racial profiling history demonstrates how the constitutional right against unreasonable search and seizure has been chipped away at since *Terry v. Ohio* in 1968. However, our shifting baseline (a term from ecology) may lead each generation to believe that the reduced Fourth Amendment protections they are afforded are normal.³⁸² This underestimation of the abnormality of federal agents boarding buses and demanding identification is dangerous to our democracy. Many people would agree that the Fourth Amendment and racial profiling concerns alone are enough to condemn transportation checks. However, this next section will outline final thoughts on the reasons that transportation checks should be discontinued: they are outside of

³⁸⁰ *State v. Kerwick*, 512 So. 2d 347, 348 (Fla. Dist. Ct. App. 1987).

³⁸¹ Shawn Vestal, “Shawn Vestal: The Greyhound sweeps will end — three years after the strong mayor let them go on,” *Spokesman-Review*, October 1, 2021, <https://www.spokesman.com/stories/2021/oct/01/shawn-vestal-the-greyhound-sweeps-will-end-three-y/>; ACLU Southern California, “ACLU asks court to halt deportation of man unlawfully arrested at Greyhound Station,” July 17, 2018, <https://www.aclusocal.org/en/press-releases/aclu-asks-court-halt-deportation-man-unlawfully-arrested-greyhound-station>

³⁸² Shifting baseline syndrome “describes a persistent downgrading of perceived ‘normal’ environmental conditions with every sequential generation, leading to under-estimation of the true magnitude of long-term environmental change on a global scale.” See Lizzie P. Jones et al., “Investigating the Implications of Shifting Baseline Syndrome on Conservation,” ed. Xiaodong Chen, *People and Nature* 2, no. 4 (December 2020): 1131–44, <https://doi.org/10.1002/pan3.10140>.

CBP's mission of border enforcement, they do not fulfill a national security interest, and they are overreaching, inconveniencing and harming people in a dragnet approach.

First, these I-213s show that transportation checks do little to fulfill the Border Patrol's mission of preventing terrorists and "dangerous people and capabilities" from entering the United States.³⁸³ They do not even fulfill the goal of transportation checks – to stop people from furthering their entry into the country – since the Spokane transportation checks largely arrested individuals with a lengthy history in the United States who were traveling on mostly East-West routes, none of which crossed the Canadian border. Over half of the individuals arrested in Spokane had been living in the country for over six years, and 41% for over ten years, indicating that many had strong ties to their communities. The 100-mile rule allows these transportation checks to happen without warrants or suspicion despite the fact that these arrests have little to nothing to do with border enforcement, instead resembling interior immigration enforcement. Interior enforcement is the purview of ICE, not CBP (although the myriad problems with ICE are similar to those outlined here.)

In addition, between 69% and 81% of the individuals in the dataset have no criminal history, and most of those who do have criminal history could not be considered "dangerous people." These I-213s do not contain any indication of criminal organizations, terrorists, or weapons intercepted in the Spokane transportation checks. An extensive search of the Spokane Border Patrol Sector's "local media releases" about "significant arrests" also reveals nothing significant – only announcements of individuals arrested at the station. Spokane Sector Border Patrol agents themselves have admitted that arrests at the Spokane Intermodal Center did not target high-profile individuals. Bill Kingsford, the spokesperson for the Spokane Sector, said in

³⁸³ "Border Patrol Overview," U.S. Customs and Border Protection.

an interview that, “We haven’t seen an increase of smuggling, drugs, [sic] of humans.”³⁸⁴ He said that the individuals arrested at the bus station have mostly been “regular people” and visa overstays, as our I-213s confirm, and that the Border Patrol is “doing it, for lack of a better word, as a preventative.”³⁸⁵ No matter their intention, the data shows that transportation checks in the Spokane Sector were not intercepting drug shipments or catching would-be terrorists. Instead, they typically went for the low-hanging fruit: untargeted arrests that are easy to execute because they occur all in one location and require no intelligence collection or complex investigation.

Another way to consider the effectiveness of transportation checks compared to the harm they cause is to estimate the proportion of innocent people seized in order to complete an arrest. Other scholars have calculated similar rates to show the inefficiency of troubling practices such as using “drug courier profiles” to choose which motorists to pull over.³⁸⁶ We can look at the number of people actually found to be violating immigration law versus the number “encountered” – questioned on buses by the Border Patrol.

First, the Border Patrol arrested seventy-one people during their Spokane transportation checks in 2019.³⁸⁷ *The Intercept* reported in 2019 that they happen “three or four days a week,”³⁸⁸ and Attorney General’s suit against Greyhound stated the same – “at a minimum.”³⁸⁹ Border Patrol agent Zach Crosson told KREM in October 2018 that, “We try to do checks every day.”³⁹⁰ Transportation checks four days per week mean that there were 208 days of transportation checks at Spokane Intermodal Center in FY 2019. Most charter buses have fifty-six seats.³⁹¹ If on

³⁸⁴ Martyn, “Spokane vs. the Border Patrol.”

³⁸⁵ Martyn, “Spokane vs. the Border Patrol.”

³⁸⁶ Padula, *Colorblind Racial Profiling*, 145.

³⁸⁷ Martyn, “Spokane vs. the Border Patrol.”

³⁸⁸ Martyn, “Spokane vs. the Border Patrol.”

³⁸⁹ *State of Washington v. Greyhound Lines*, “Complaint.”

³⁹⁰ Decker, “Spokane, Border Patrol.”

³⁹¹ Dani Henion, “The Complete Guide to Charter Bus Rentals,” GOGO Charters, accessed May 12, 2023, <https://gogocharters.com/blog/complete-guide-charter-bus-rentals/#:~:text=A%20typical%20bus%20will%20have,s eats%20fewer%20than%2035%20passengers>.

each of these 208 days, agents checked four buses that were only about half-full, with twenty-five individuals on board, or two buses that were full, that would mean 208,000 people were questioned by the Border Patrol each year. With only seventy-one people arrested in 2019, that is a 0.03% “success” rate for people asked about their citizenship versus actually found to be deportable.³⁹²

If we assume that one person on each of these 832 buses received unwanted, overzealous questioning (or even temporary detention) in the vein of that received by Elshieky, Sosa, or Vera, that would be 832 people unnecessarily interrogated for only seventy-one “successful” arrests: an 8% “success” rate. Viewed another way, this is a 92% “miss” rate: 92% of those excessively questioned are *not* found to be deportable. This is certainly not “narrowly tailored.” This estimate of one person wrongly questioned per bus does not seem like an overestimate, given the many media accounts of witnesses seeing others asked to leave the bus for questioning, only to be let back aboard, or the number of cases such as those of Elshieky, Sosa, and Vera, who were all questioned and even taken to Border Patrol stations, only to be released. These rates of efficiency of transportation check operations may be halved, even quartered, if we assume more days per week of transportation checks, more buses per day, fuller buses, or more than one person excessively questioned on each bus.. Given the losses of freedom and constitutional protections inherent in these transportation sweeps, is an eight percent, four percent, or even two percent “success” rate worth it to arrest individuals whose only violation is being in the United States without permission or overstaying a visa? Is interrupting the trips of hundreds of thousands of people each year at only one bus station justified by the “successful” arrest of seventy people, the vast majority of whom have zero criminal history?

³⁹² Note that between FY 2013 and FY 2017, the average number of transportation check arrests per year was exactly half the FY 2019 total, so assuming that the checks happened half as often during this time period, the “success rate” for 2013 through 2017 is the same as for 2019.

Why does the Border Patrol focus on the removal of non-citizens like those on the Greyhound buses in this study, and why are they presented as threats? Contemporary immigration policy “blurs the line” between undocumented immigrants, “criminal aliens,” and people who threaten national security. Viewing these groups as one often ends up incorrectly presenting “the expanded and accelerated removal of non-citizens...as an answer to all of these problems.”³⁹³ This is possibly because the government finds it the easiest to show results in this area: as we see in the case of transportation checks, arresting undocumented immigrants in this manner yields high arrest numbers without any need for prior investigation. Border Patrol Sectors, stations, and individual agents that want to show their impact may choose to focus on reaching these easier numbers rather than the more difficult job of actually preventing terrorism. In addition, members of the public who conflate undocumented individuals with terrorists and other national security threats will feel safer if they see high arrest and deportation rates. Legal labels such as “criminal alien” and repetition of these phrases by government agencies and the media continues the charade that arresting undocumented people equates to protection from crime.

One example of this exaggeration is seen in a Local Media Release from CBP lauding the work of agents in the Spokane Sector who “were involved in two notable arrests over the Labor Day weekend” in 2019.³⁹⁴ One of these “notable arrests” is of a citizen of Yemen who was arrested at the Intermodal Center because he overstayed his B1/B2 visa.³⁹⁵ This man’s I-213 is in our dataset, so I can see that he has no criminal history. His is one of the I-213s where the line about fear of persecution is completely redacted, implying that perhaps he indicated fear of

³⁹³ Jennifer M. Chacón, “Unsecured Borders: Immigration Restrictions, Crime Control and National Security,” *Connecticut Law Review*, 39 (2007): 1827, 1834.

³⁹⁴ “Spokane Sector Border Patrol agents arrest smuggler, three people illegally present in U.S. over Labor Day weekend,” U.S. Customs and Border Protection, September 6, 2019, <https://www.cbp.gov/newsroom/local-media-release/spokane-sector-border-patrol-agents-arrest-smuggler-three-people>.

³⁹⁵ “Spokane Sector Border Patrol agents,” U.S. Customs and Border Protection.

return. It is not difficult to imagine that he feels afraid to return to Yemen, a country that has been devastated by protracted conflict and where 80% of the population relies on humanitarian aid.³⁹⁶ Human Rights Watch refers to Yemen as “the largest humanitarian crisis in the world.”³⁹⁷ Nevertheless, Spokane Sector Border Patrol celebrated this arrest and reported that “he was transported to the Northwest Detention Center in Tacoma to await his proceedings.”³⁹⁸ The media release reads:

“Agents are constantly working to ensure our laws are followed and our communities are safe,” said Chief Patrol Agent Henry Rolon. “Whether it is a smuggling event or a visa overstay, my agents will continue to do their job to make sure those breaking U.S. laws are arrested and prosecuted. I appreciate the assistance and tremendous support we receive from the community as we continue to complete our important mission.”³⁹⁹

Despite the agent’s words, this arrest of the Yemeni man did nothing to keep the community safe and does not complete what the Border Patrol states is their mission. In fact, these kinds of arrests are completely unrelated to the border. This low-level, untargeted enforcement wastes resources on arresting and prosecuting people who are of no threat, distracting from investigations that could target areas of actual concern.

Finally, despite the Border Patrol’s emphasis that they are “do[ing] their job to make sure those breaking U.S. laws are arrested and prosecuted,” we must also consider that there are crimes that happen daily in our society that are largely ignored by law enforcement. Individuals who overstayed the terms of their visa or who crossed the border without permission may well be breaking U.S. laws, but there are many laws that are broken daily but not enforced. White collar criminals get away with crimes such as wage theft, fraud, and insider trading everyday. Drug

³⁹⁶ “Yemen: Events of 2020,” Human Rights Watch, accessed May 12, 2020, <https://www.hrw.org/world-report/2021/country-chapters/yemen#:~:text=Six%20years%20into%20an%20armed,at%20the%20beginning%20of%202020.>

³⁹⁷ “Yemen” Human Rights Watch.

³⁹⁸ “Spokane Sector Border Patrol agents,” U.S. Customs and Border Protection.

³⁹⁹ “Spokane Sector Border Patrol agents,” U.S. Customs and Border Protection.

laws are enthusiastically enforced in low-income neighborhoods of color and rarely enforced at elite nightclubs or white-majority neighborhoods. Border Patrol agents themselves have high rates of crimes that they get away with on the job, such as bribery, corruption, and sexual abuse of migrants and other Border Patrol agents.⁴⁰⁰ There is ample precedent for laws being on the books but not enforced.

There are people in the United States who think that simply being in the country without authorization is a crime that should be punishable by detention and deportation. For those readers who feel this way, this analysis does not have the scope to highlight all the reasons that this is a problematic viewpoint: the historic and economic factors that cause people to move, the place of billion-dollar corporations in promoting the expansion of immigration enforcement laws and detention in order to line their pockets, the propaganda from the conservative news media that promote this divisiveness, and the importance of immigrants to the United States economy and workforce, not to mention basic human rights. Just because the Border Patrol *can* find and arrest individuals on buses does not mean they *should*, or that this enforcement actually furthers the security interests of residents of the United States. In fact, it is detrimental to the well-being and security of many residents; racial profiling *decreases* security by undermining constitutional rights and lowering trust in law enforcement. It also adds tremendous taxpayer costs for enforcement, detention, and deportation, as well as pads the pockets of large corporations and private prisons such as GEO and CoreCivic. And for the individuals and families of those individuals who are arrested during transportation checks, detention and deportation have even more devastating costs and consequences, which spill over to society as well.

⁴⁰⁰ “Abuse of Power and Its Consequences,” Southern Border Communities Coalition, last modified February 8th, 2023, https://www.southernborder.org/border_lens_abuse_of_power_and_its_consequences.

Policy Recommendations

Transportation checks have been mostly halted for the time being, with Greyhound's capitulation to public pressure and evidence from the leaked CBP memo. However, not all bus companies have followed Greyhound's lead, and Amtrak appears not to have changed their policy. In addition, this practice could feasibly come back in a worst-case scenario situation if transportation companies decide to cooperate with CBP, realizing that the Supreme Court would be on their side. The Project for Government Oversight argues that an authoritarian leader could abuse the 100-mile rule to the extreme, including through transportation checks.⁴⁰¹ It is important for concerned leaders to act now to put more laws and guidance in place to prevent transportation checks in the future. Many of these recommendations also contribute to a broader impact within the border zone in general. These recommendations limit the intrusion that the lax border zone protections currently permit in the hometowns, cities, and highways where two-thirds of U.S. residents live. Other recommendations enhance transparency, oversight, and accountability mechanisms within CBP, and expand the definition of profiling by eliminating the border region and nationality loopholes. These recommendations will improve oversight and prevent abuses well beyond those commonly experienced in transportation checks.

The federal stakeholders who have been addressed so far in this analysis include the Border Patrol, CBP, DHS, the DOJ, and the Supreme Court. The Supreme Court is unlikely to change course on the issues of consent and racial profiling in immigration enforcement anytime soon, given Fourth Amendment precedent and the Court's conservative composition, so these recommendations focus on policy change rather than legal actions.⁴⁰² CBP, DHS, and the DOJ

⁴⁰¹ Hawkins, "The Border Zone Next Door."

⁴⁰² Hawkins, "The Border Zone Next Door."

are ultimately controlled by the Executive Branch, who can set priorities for CBP and DHS through the Secretary of Homeland Security and guidelines for federal law enforcement through the Attorney General. In addition, Congress controls appropriations to CBP and DHS and could introduce legislation regarding the 100-mile border zone or racial profiling. I will also provide a few recommendations for state and local governments, who may have less power but more interest in this issue.

For Customs and Border Protection and the Border Patrol:

CBP is unlikely to reform themselves when it comes to interior enforcement and transportation checks, given the history of impunity within the agency,⁴⁰³ poor oversight by the DHS Inspector General,⁴⁰⁴ and internal incentives to maintain their existence and funding. However, here are some steps that reform-minded leaders within the Border Patrol and CBP ranks *should* take. Note that, if CBP themselves do not make these changes, DHS leadership could require them to make some of these changes, so many of these same recommendations can also be made to DHS.

- **Stop performing transportation checks and using suspicionless questioning:** The Border Patrol should categorically stop allowing transportation checks through a directive from the Border Patrol Chief. Similarly, the Border Patrol should use targeted investigatory techniques instead of suspicionless questioning, following clear enforcement priorities. The use of suspicionless “consensual conversations” leads to categories such as race, ethnicity, and language being used to wrongly single out individuals and groups.

⁴⁰³ “Abuse of Power and Its Consequences,” SBCC; Hawkins, “The Border Zone Next Door.”

⁴⁰⁴ Brian and Derman, “POGO Calls on Biden.”

- **Stop engaging in interior enforcement:** The Border Patrol should focus on enforcement at the actual border, as their mandate suggests. They should not cooperate with local law enforcement, which often brings them into towns and cities far from the border.
- **Measure success based on different factors:** As shown in *Uncovering USBP*, some Border Patrol stations and sectors track success simply based on the number of people arrested, without consideration towards their actual security threat status.⁴⁰⁵ Even the Government Accountability Office (GAO) has encouraged CBP to develop standards of measurement to assess their success at securing the northern border.⁴⁰⁶ Appropriate measures for success are crucial to show what is working and to control the pattern of ever-increasing Congressional appropriations for border security. Measures of success based simply on arrest numbers create perverse incentives for arrest, and can skew agents towards easier low-priority arrests such as those done in transportation checks. Success should be measured based not on the number of people arrested, but the national security threat averted. Undocumented people should not be considered a national security threat.
- **Establish accountability mechanisms for agents that violate protocols:** The Border Patrol must establish accountability mechanisms for agents who violate protocols or engage in abusive behavior. This includes those who engage in racial profiling. These accountability mechanisms currently do not exist, as evidenced by the lack of disciplinary action for sexual abuse within the Border Patrol, for actions of agents against Haitian migrants in Del Rio, or for participation in racist and sexist conversations in the secret “I’m 10-15” Facebook group.⁴⁰⁷ Although the widespread racial profiling that CBP

⁴⁰⁵ NYU School of Law, *Uncovering USBP*, 8.

⁴⁰⁶ U.S. Government Accountability Office, *Northern Border Security: CBP Identified Resource Challenges but Needs Performance Measures to Assess Security Between Ports of Entry*, GAO-19-470 (Washington, DC, 2019), accessed May 12, 2023, <https://www.gao.gov/products/gao-19-470>.

⁴⁰⁷ Hawkins, “The Border Zone Next Door.”

characterizes as concerning nationality will not be solved by CBP, the agency should punish the most egregious violations. This should include agents who blatantly disregard evidence that someone is not deportable or detain people in obvious cases of profiling, such as for speaking Spanish.

- **Reduce excessive Border Patrol staffing:** The Border Patrol should reduce staffing in areas where there are more staff than needed to fulfill the new metrics of success. Staffing should be decreased in areas where complaints are made about agents arresting people because they have nothing to do or “as a preventive,” especially when these arrests can be defined as interior enforcement. These excess staffing issues are often seen along the northern border, as documented in previous research about the Port Angeles, Washington station or the Rochester station.⁴⁰⁸

For the Executive Branch:

Given the current makeup of Congress, with the House of Representatives controlled by the Republican Party, the Executive Branch is the most realistic and imperative venue for making change. The Biden administration has significant authority over the work of the DOJ, DHS, and CBP. The administration has already attempted to implement new prosecutorial discretion rules through DHS Secretary Mayorkas’ “Guidelines for the Enforcement of Civil Immigration Law.”⁴⁰⁹ These guidelines require a focus on arresting people who are “a threat to our national security, public safety, and border security,” which generally excludes those without a serious criminal history who have already been living in the United States. Unfortunately, this guidance is currently awaiting review by the Supreme Court after several legal challenges. These

⁴⁰⁸ Fred T. Korematsu Center for Law and Equality, *Terror in Twilight*; NYU School of Law, *Uncovering USBP*.

⁴⁰⁹ Alejandro N. Mayorkas, “Guidelines for the Enforcement of Civil Immigration Law,” U.S. Department of Homeland Security, September 30, 2021, <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.

guidelines would provide some protection against arrests of parents of U.S. citizen children and people with limited or no criminal history – the majority of those who were arrested and detained at the Spokane Intermodal Center. The Biden administration can do much more, however, including inducing CBP to take the steps listed above.

The Biden administration may be the best target for advocates’ pressure, given the many promises they made about immigration reform and dismantling Trump’s policies on the campaign trail. These changes will be especially important for advocates to push for during Biden’s second term, if he is elected, when he will be more likely to make politically-charged decisions on immigration. Advocates should emphasize the fact that the weakening of the Fourth Amendment in the expanded border zone is a threat to many U.S. citizens and permanent residents, not just immigrants.

- **End or restrict transportation checks:** The Executive Branch can give direction to CBP leadership to end transportation checks. This can be done through directives such as those issued by the Border Patrol Chief during the Obama administration.⁴¹⁰ A new directive regarding transportation checks should go much farther than the Obama-era memo, since this research shows that many people were still swept up in transportation checks during that time period. If needed, Biden can use strategic leadership appointments within CBP to accomplish this goal.
- **Ban profiling in the border area:** The Executive Branch should extend the DOJ’s 2014 “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity” to cover activities in “the vicinity of the border” and national security investigations, as the DOJ

⁴¹⁰ “CBP Training Documents 1.b,” ACLU Maine, 3-4.

originally intended.⁴¹¹ They can also institute new racial profiling policies specifically within DHS, following the Brennan Report’s “Model DHS Policy on Nondiscriminatory Profiling.”⁴¹²

- **Decrease the size of the border zone:** The Executive branch can reassess the definition of a “reasonable distance” from the border as defined in the Federal Register.⁴¹³ The current regulation lays out factors to assess this distance sector by sector. These factors are “topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting [sic] illegal entry into the United States.”⁴¹⁴ Measurements should start from actual international boundaries, not domestic lakes such as Lake Michigan. This reassessment will likely lead to a shrinking of the 100-mile zone, especially around major cities.
- **Increase transparency within CBP:** DHS should require CBP to collect detailed information on stops, searches, detentions, and arrests, and release summaries of this information to the public on a regular basis.⁴¹⁵ The information collected should include characteristics of individuals stopped or arrested (such as race and country of birth), criminal history, circumstances of the encounter, and basis for each stop. Detailed statistics on stops, searches, and arrests during roving patrols, transportation checks, and checkpoints should also be released quarterly to the public. This data must be available for external audit. Finally, one of the most basic ways that DHS can improve

⁴¹¹ Liz Goodwin, “A big loophole in Holder’s new racial profiling guidance—the border,” *Yahoo! News*, December 9, 2014, <https://news.yahoo.com/a-big-loophole-in-holder-s-new-racial-profiling-guidelines%E2%80%94the-border-172657057.html> (accessed May 12, 2023).

⁴¹² Panduranga and Patel, *Stronger Rules Against Bias*.

⁴¹³ Hawkins, “The Border Zone Next Door.”

⁴¹⁴ 8 C.F.R. § 287.1(b)

⁴¹⁵ Hawkins, “The Border Zone Next Door.”

transparency is to compel its component agencies to follow the law and respond quickly and completely to FOIA requests, rather than using their typical foot-dragging or “so sue us” approach.⁴¹⁶

- **Remove the DHS Inspector General:** President Biden should act quickly to remove and replace DHS Inspector General Joseph Cuffari, who has neglected to perform his duties as an independent investigator of DHS and its subordinate agencies.⁴¹⁷ The Inspector General’s disregard for his duties has lent to a culture of impunity within DHS, CBP, and the Border Patrol, and teaches a lesson to agents that they will not be held accountable for their actions.
- **Request a lower budget for the Border Patrol:** The President can submit a budget request with decreased appropriations for the Border Patrol, specifying actions that they should and should not be doing. Even if this budget is not expected to be passed by Congress, the President can use it to make a political statement and communicate policy priorities.

For Congress:

Members of Congress also have the ability to introduce legislation regarding the border zone and racial profiling, although these are unlikely to pass given the current Republican majority in the House of Representatives and the intractability of immigration reform as an issue. Congress has ultimate control over appropriations for immigration enforcement, and can withhold money from the Border Patrol or CBP barring certain changes in policy.

⁴¹⁶ Tim Cushing, “Judge Tells CBP That It Certainly CAN Be Sued For Its FOIA Response Foot Dragging,” *TechDirt*, September 28, 2015, <https://www.techdirt.com/2015/09/28/judge-tells-cbp-that-it-certainly-can-be-sued-foia-response-foot-dragging/>.

⁴¹⁷ Danielle Brian and Joanna Derman, “POGO Calls on Biden to Remove Inspectors General Cuffari, Ennis,” POGO, March 8, 2023, <https://www.pogo.org/letter/2023/03/pogo-calls-on-biden-to-remove-inspectors-general-cuffari-ennis>.

- **Decrease the size of the border zone:** Congress should re-introduce and pass the Border Reasonableness Restoration Act to amend 8 U.S.C. § 1357(a) and reduce the definition of the border zone. This would limit transportation checks to within twenty-five miles of the border, instead of one hundred.⁴¹⁸ This law would also require temporary and fixed checkpoints to be no more than ten miles from an international border.
- **Authorize lawsuits against federal officers:** Members of Congress should re-introduce and pass the Bivens Act, which would make it possible for people to sue individual federal officers for violating the Constitution.⁴¹⁹ The Supreme Court recently curtailed this right in a June 2022 decision.⁴²⁰
- **Increase transparency:** Congress should pass legislation to require regular release of statistics by CBP, as outlined above.⁴²¹ Transparency is currently such a problem within DHS that attempts to increase transparency should be made from every possible angle.
- **Reduce appropriations for the Border Patrol:** Congress should reduce their appropriations for the Border Patrol rather than raising them as they have regularly for the past thirty years, as shown in Figure 35. Legislators should understand that “an increase in funding to the Border Patrol does not equate with increased security in border communities, and may mean the opposite.”⁴²²

⁴¹⁸ U.S. Congress, Senate, Border Zone Reasonableness Restoration Act of 2019.

⁴¹⁹ U.S. Congress, House, Bivens Act of 2021, HR 6185, 117th Cong., 1st sess., introduced in House December 8, 2021, <https://www.congress.gov/bill/117th-congress/house-bill/6185/text>.

⁴²⁰ Shaw Drake and Katie Hoepfner, “Four Things to Know About the Supreme Court’s Ruling in *Egbert v. Boule*,” ACLU, June 27, 2022,

<https://www.aclu.org/news/civil-liberties/four-things-the-supreme-court-ruling-egbert-v-boule-ice>.

⁴²¹ Hawkins, “The Border Zone Next Door.”

⁴²² Fred T. Korematsu Center, *Terror in Twilight*, 32.

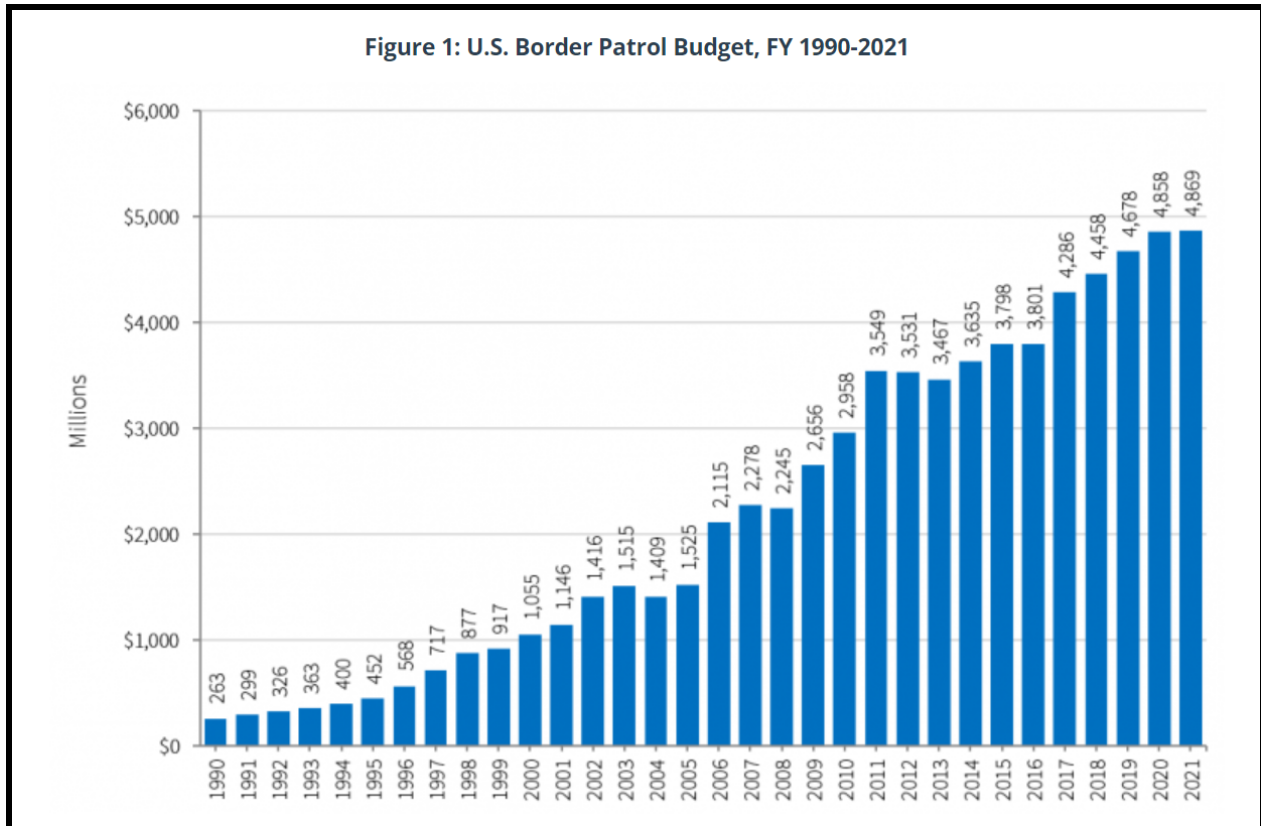


Figure 35: U.S. Border Patrol Budget, FY 1990-2021.⁴²³

For state and local governments:

As seen in the case of the Washington State Attorney General’s lawsuit against Greyhound, state and local governments can also act to stop transportation checks. Public pressure can be very effective at the state or local level.

- **Pressure companies to end collaboration with CBP:** States can use state laws, especially anti-discrimination or consumer protection laws, to put pressure on companies that collaborate with federal immigration enforcement, as the Washington State Attorney General did with Greyhound.⁴²⁴ These lawsuits or campaigns should intervene to both keep federal agents off of buses and trains and to require companies to inform passengers

⁴²³ “The Cost of Immigration Enforcement and Border Security,” American Immigration Council, January 20, 2021, <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security>.

⁴²⁴ State of Washington v. Greyhound Lines, “Complaint.”

of their rights. Focusing on the largest corporations pressures smaller companies to act as well.

- **Prohibit collaboration with immigration enforcement:** States and local governments should enact policies that prohibit collaboration with CBP and ICE on immigration enforcement issues, often known as sanctuary laws.⁴²⁵ As seen in cases in Vermont and New Hampshire, state and local law enforcement has taken advantage of CBP's warrantless searches in the border zone to work together and gather evidence to enforce state drug possession laws.⁴²⁶ Sanctuary laws, while they do not directly reduce transportation checks, which are initiated by CBP, can limit state and local law enforcement's stake in the continuation of this practice in the border zone.
- **Prohibit CBP and ICE presence in government-owned buildings:** Although ultimately unsuccessful, the Spokane City Council attempted to prevent transportation checks in the Intermodal Center by restricting the Border Patrol from the facility. Thinking creatively like this can also be effective, and also maintains the media focus on immigration sweeps so that they remain in the public's consciousness.

⁴²⁵ "Keep Washington Working Act," Washington State Office of the Attorney General."

⁴²⁶ Nixon, "Drug Arrests at Immigration Checkpoint;" Brouwer, "Vermont Supreme Court."

Conclusion

By revealing the details of transportation checks in one locality, this research serves to highlight the problems inherent in these operations. The similarities between issues found in 2013-2020 data from Spokane and 2006-2009 data from Rochester, New York show that transportation checks continued to have the same problems, even when they were restricted during the Obama administration. These injustices include overwhelming arrests of long-term residents of the United States as well as racial and linguistic profiling that sweeps up many people of color who are legally in the country, including U.S. citizens. Transportation checks have occurred in cities and towns up to and over one hundred miles from the border, functioning as interior immigration enforcement despite the Border Patrol's border-focused mission. The data and media accounts from Spokane also show that agents of the Border Patrol use intimidating tactics that sometimes contradict CBP's policy that passengers have a right to terminate the encounter by leaving the bus or remaining silent. In addition, the numbers from Spokane demonstrate that these transportation checks are incredibly inefficient and overreaching. They cause traumatic experiences for many passengers who are questioned, detained, and arrested, while providing negligible national security benefits.

Transportation checks disproportionately hurt people of color and particularly undocumented individuals, restricting their freedom to move and travel throughout the United States without harassment. Constitutional violations have a tendency to expand from marginalized groups to encompass ever-larger groups of people. Immigration enforcement agencies and agents must be held accountable for adhering to the Constitution so that U.S. residents do not gradually lose their rights in the border zone. At the same time, transportation checks are a small part of a system of racist immigration enforcement in the United States. The

fight to end transportation checks and abuses in the 100-mile border zone must hold as an end goal the larger vision of fighting this immigration enforcement regime in its entirety.

Appendix

Methodology: Length of time in the United States

The I-213 form has a field for “Length of Time Illegally in U.S.,” which can be used to distinguish between people who have been in the United States for less than 72 hours, 3-30 days, one month to one year, or more than one year. However, this field was left blank for all but thirty of the I-213s UWCHR received. (Only five of the fifty-six forms from 2019 had this field filled out. The rest that had this field filled were all from 2013 to 2018.) For this reason, and also because inaccuracies were found in some of the twenty-one forms that did contain this data, I manually calculated the length of time each person had been in the United States.

This was done by first consulting the I-213 field, “Date, Place, Time, and Manner of Last Entry.” I then consulted the rest of the narrative to ensure that the person had not been in the United States previously, since this date was the manner of *last*, or most recent, entry, and does not reflect the total time they have been living in the country. In some cases, there was an indication of a prior appearance before an immigration judge, a prior order or removal, or a criminal arrest or conviction at an earlier date. The earliest date was used unless the date clearly referred to a deportation immediately after someone had crossed the border, since that date would not necessarily indicate living in the United States. This practice should lead to underestimating rather than overestimating peoples’ length of time in the United States, since it is possible that the person re-entered the country shortly after their deportation without being apprehended. (For example, one I-213 said that “X had been arrested entering the country illegally on June 3, 2004,” but the date listed as the last entry is 1/27/2009. This was counted as 2009 because of the lack of other dates, but if the person did in fact cross the border again after

their removal in 2004, they may have actually been living in the United States for fifteen rather than ten years.)

In cases where “Date, Place, Time, and Manner of Last Entry” was listed as “unknown,” I also consulted the narrative section for previous dates in the manner described above. Only in six cases was there absolutely no indication of how long a person had been in the country. These were classified as unknown.

Thus, the dates used to calculate time in the United States were proxies for the individual’s first day in the country. In many cases they simply identify the federal government’s first record of the person being in the country, and could all be underestimates. Once the proxy date was recorded, I used that date and the date of their I-213 arrest to calculate time spent in the United States, based on the same scale employed by the NYCLU’s 2011 report on transportation checks. This led to the following breakdown of categories: within 72 hours, 4 to 30 days, 1 month to 1 year, 1 to 3 years, 3 to 6 years, 6 to 10 years, or more than 10 years.

Methodology: Detention and release

Most of the I-213s indicated in the narrative that the individual was transferred to the NWDC in Tacoma. On other forms, the address field showed the address of the detention center (1623 E J St, Tacoma, WA 98421), or the street address was redacted and contained only the city, state, and zip code of the detention center. All of these were categorized as cases in which the individual was detained. There were also seven individuals who were clearly indicated as being released, leaving twenty-seven I-213s that I was unsure about. I spoke to an immigration lawyer in the Seattle area who works with many individuals in detention at the NWDC. He read the information for each case and indicated to me based on disposition statements and other relevant

case information whether the person was likely detained or not. In twenty-four of these cases, the individual was detained. In three of these cases, the lawyer was unsure from the wording whether the person would have been detained or not, because they were “being processed for removal under bag and baggage guidelines.” These guidelines are usually used in different circumstances, when a person is ordered removed while not in ICE or CBP custody and asked to present themselves with their “baggage” to ICE to be deported. These three cases were marked as unknown.

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