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ACLU Recommendations Regarding Use of Force by U.S. Customs and Border Protection Officers

Since January 2010, at least 19 use of force incidents at the southern and northern borders have resulted in death.¹ That number includes seven minors under 21, six U.S. citizens, eight individuals alleged to be throwing rocks, and six individuals killed while on the Mexican side of the border.² To date, it is unknown whether U.S. Customs and Border Protection (CBP) has conducted a thorough investigation of each of these incidents to determine whether the force used was justified and whether it could have been avoided through different tactics or training, better supervision, different tools, adherence to policy, or changes in policy. Moreover, according to administrative complaints, CBP officers at ports of entry have a pattern of using force abusively.³ It is imperative that CBP officers, as employees of the nation's largest law enforcement agency, are trained in and held to the highest professional law enforcement standards. This imperative is consistent with CBP's March 2012 directive on Standards of Conduct.⁴

“Use of force” as used in this document means physical effort to compel compliance by an unwilling subject above unresisted handcuffing, including pointing a firearm at a person and employing canines. “Reasonable force” means force that is objectively reasonable under the circumstances and the minimum amount of force necessary to make a lawful arrest or protect the officer or other person from imminent physical harm. “Reportable use of force” is any force above hand control or escort techniques that are not used as pressure point compliance techniques, do not result in injury or complaint of injury, and are not used to overcome resistance.

The American Civil Liberties Union (ACLU) urges CBP to implement the following recommendations⁵ in order to reduce the incidence of unreasonable use of force, strengthen oversight and accountability, and protect CBP officers from baseless accusations. Implementation of these recommendations would bring CBP into line with best practices on use of force in police departments across the country.

CBP Use of Force Policy Handbook Revisions

The CBP Use of Force Policy Handbook should, at a minimum, include the following provisions:

- A clear values statement that recognizes the paramount value of human life;
- Guidance on how and when force may be used under the Constitution and laws of the United States and the policies and training of CBP;
- An explicit requirement that officers intervene when feasible to stop other officers from using force that is not objectively reasonable and proportional to the risk presented;
- An explicit requirement that officers report force by their peers or supervisors that is not objectively reasonable and proportional to the risk presented, as well as a prohibition on retaliation for reporting such force;
- Oversight and accountability systems to ensure that all uses of force are consistently reported and promptly and thoroughly evaluated to determine whether the force used was consistent with CBP policies, training, and sound tactics, and whether the force could have been avoided or minimized through different tactics or training, better supervision, different tools, adherence to policy, or changes in policy;

- Prompt, thorough, and unbiased investigation of all allegations of misconduct relating to use of force to determine whether misconduct occurred and whether any remedial and/or disciplinary action is warranted; all such investigations should be made public, appropriately redacted to protect the privacy of alleged subjects and witness; and
- Protocols for the collection, maintenance, and regular analysis of use of force data.

Revisions to the CBP Use of Force Policy Handbook also should make clear that:

- Non-force techniques, including advisements, warnings, and verbal persuasion, should be used to effect compliance whenever feasible;
- De-escalation techniques and deployment of additional officers and/or protective equipment by officers should be used at the earliest possible moment;
- Force may only be used when objectively reasonable and proportional to the risk presented, never as a means of interrogation or punishment, and must end or de-escalate as soon as force is no longer necessary;
- Lethal force may be used only when there is an imminent threat of serious injury or death to officer/agent or another person and no alternative is feasible; lethal force may not be used to prevent the escape of a fleeing suspect unless the officer has probable cause to believe the suspect has committed an offense in which the suspect caused or attempted to cause death or serious bodily harm *and* the suspect poses an imminent danger of death or serious bodily harm should the escape succeed, *and* the use of lethal force presents no substantial risk of injury to innocent persons;
- Prior to using lethal force, a warning should be given if feasible;
- Uses and frequency of force applications should always be minimized and deployed in a manner that avoids unnecessary injury, as well as unnecessary effects on other countries' sovereign territory;
- Every application of force must be followed by inspection and observation of subjects for injury or complaints of pain, with provision of necessary medical care as soon as possible; any complaints of pain or requests for medical attention should also be documented and promptly be reported to a supervisor and trained medical professional. At a minimum, documentation should include the date, time, types, and details relating to complaints/requests, medical consultation, supervisory consultation, and provision of medical services;
- Unreasonable use of force will subject personnel to discipline up to and including termination, possible criminal prosecution, and/or civil liability;
- The determination of when and how to use force must be made without regard to an individual's citizenship, immigration status, religion, national origin, race, ethnicity, sexual orientation, or gender identity and expression; and
- All reportable uses of force should be immediately⁶ reported to a supervisor, who should follow up immediately with a complete supervisor Use of Force Report, including individual officer Force Statements.

The CBP Use of Force Policy Handbook, including a clear explanation of investigatory and disciplinary protocols for use of force incidents, should be made public.

Use of Force Training

Use of force training should be provided to all CBP personnel who implement immigration and customs laws, as part of both academy and regular ongoing training or re-certification.

- The 2013 DHS Office of Inspector General report on CBP use of force states that CBP basic academies do not train new officers on all less-lethal force options available. It also states that high-risk situations, such as vehicular and rock assaults, are not sufficiently trained at the basic academies.⁷ These deficiencies should be remedied immediately.

Use of force training should not be limited to training in use of lethal and less-lethal force. Training should be consistent with the revisions detailed above and, at a minimum, include:

- Proper use of force decision-making, including the following situational responses as options even when the use of force would be legally justified: de-escalation techniques that encourage personnel to act without using force, disengagement, tactical withdrawal, area containment, surveillance, waiting out a subject, summoning reinforcements, calling in specialized units, or delaying arrest, as well as instruction on proportionality and limitations on the use of force against individuals apprehended or encountered while on duty;
- Threat assessment;
- Factors to consider in initiating or continuing a pursuit;
- Appropriate training on conflict management;
- Proper use of all intermediate force devices, including batons, canines, Electronic Control Weapons, and munition launchers (e.g., Pepper Ball);
- Ethical decision-making in use of force situations and mandatory peer intervention to avoid unreasonable uses of force;
- Mandatory reporting of use of force by peers or supervisors that is not necessary to protect the officer or another person from imminent physical harm, objectively reasonable, and proportional to the risk presented; and sanctions for failing to report such use of force;
- Use of force reporting and referral requirements (see “Oversight and Accountability” below); and
- Investigatory and disciplinary protocols for use of force incidents, as well as mandatory graduated sanctions and the possibility of criminal prosecution and/or civil liability.

For supervisors of all ranks, as part of their initial and annual in-service supervisory training, additional training should, at a minimum, address:

- Conduct of investigations necessary to produce supervisor Use of Force reports;
- Protocol for referring certain use of force incidents – including incidents involving Level 3 or 4 force, resulting in serious physical injury or death, or involving inappropriate use of force – to CBP Internal Affairs, DHS OIG, and DHS CRCL, and to DOJ or another external component when appropriate;
- Strategies for effectively directing officers to minimize uses of force and to intervene effectively to prevent or stop uses of force that are not objectively reasonable and proportional to the risk presented; and
- Support for officers who report unreported use of force or use of force that is not objectively reasonable and proportional to the risk presented; or who are retaliated against for using only reasonable force or attempting to prevent use of force that is not objectively reasonable and proportional to the risk presented.

Equipment

CBP should dedicate funding to upgrade the technology and equipment available to officers, including for:

Lapel cameras:

- The use of body-worn cameras, deployed within an appropriate policy framework that includes strong privacy protections for officers and the public, should be mandated and funded for all CBP enforcement encounters with the public. *[See attached backgrounder for further detail.]*

Intermediate weapons and technologies:

- All Border Patrol agents should carry intermediate force devices that provide them sufficient means to de-escalate situations.

Oversight and Accountability

Oversight and accountability, both individual and system-wide, are essential to professional and effective law enforcement activities, and to the protection of civil liberties and human rights.

Data collection:

- Develop a uniform supervisor Use of Force Report, which should include individual officer Force Statements, and be required for all reportable uses of force. Uses of force should be divided into four levels, as described in the endnote.⁸
- Systematize data collection relating to use of force complaints, investigations, resolutions, and disciplinary actions, up to and including termination, as well as any criminal prosecutions and/or findings of civil liability. Consistent data formats for use of force incidents should be used for all complaint intake mechanisms, including Joint Intake Center Complaints, OIG complaints, CRCL complaints, or CBP hotline complaints.

Investigation and reporting of all use of force incidents:

- Ensure appropriate supervisory investigation of all uses of force to determine whether the force used was consistent with CBP policies, training, and sound tactics, and whether the force could have been avoided or minimized through different tactics or training, better supervision, different tools, adherence to policy, or changes in policy. Develop protocol for preservation of tape of use of force incidents, within an appropriate policy framework that includes strong privacy protections for officers and the public. See Appendix for special considerations for officer-involved shootings and other critical incidents.
- Ensure supervisory referral of certain use of force incidents – including incidents involving Level 3 or 4 force, resulting in serious physical injury or death, or involving inappropriate use of force – to CBP Internal Affairs, DHS OIG, and DHS CRCL, and to DOJ or another external component when appropriate;
- Develop and implement policy on notification and reporting on all deaths that occur as a result of an encounter with CBP officials, modeled after ICE’s policy on deaths in detention.⁹ Reporting should include cause of death; location, date, and time of death; and gender, race, nationality, ethnicity, and age of the deceased. Within 24 hours, deaths should be reported to the OIG, CRCL, the Office of the CBP Commissioner, and the Ranking and Majority leaders of the relevant House and Senate oversight committees, as well as to the consulate and/or next-of-kin.
- On a semi-annual basis, publicly report data relating to use of force complaints, investigations, resolutions, and disciplinary actions, up to and including termination, as well as any criminal prosecutions and/or findings of civil liability. Reporting should include complaints received through all Departmental complaint mechanisms, including the OIG hotline, CRCL complaint system, CBP hotline complaints, or Joint Intake Center.

Audits:

- On an annual basis, analyze trends with respect to supervisor Use of Force reports, identify deficiencies revealed by analysis, and proactively correct deficiencies system-wide.
- On an annual basis, analyze trends with respect to statistics regarding deaths that occur as a result of an encounter with CBP officers, and take actions to reduce and prevent such deaths.
- On an annual basis, analyze trends with respect to complaints received through all Departmental complaint mechanisms, including the OIG hotline, CRCL complaint system, CBP hotline, or Joint Intake Center.

- On an annual basis, review statistics relating to incident investigations and disciplinary actions, and proactively correct deficiencies in internal accountability mechanisms.

Complaints:

- In addition to existing mechanisms at the DHS Office of Civil Rights and Civil Liberties and the DHS Office of Inspector General, CBP should establish a hotline modeled after the ICE ERO Community and Detainee Helpline¹⁰ to receive complaints regarding use of force.
- CBP should otherwise ensure an open and accessible complaint system by:
 - Accepting complaints in all formats (electronic, written, verbal, and anonymous);
 - Making complaint materials available in multiple languages, with access to translators, consistent with the Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," and the February 27, 2011 Attorney General Memorandum "Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166";
 - Conducting periodic audits of the complaint intake system, to ensure consistency and accessibility; and
- All staff should receive training in complaint intake and processing, and victim services, and should be instructed to refer certain use of force incidents – including incidents involving Level 3 or 4 force, resulting in serious physical injury or death, or involving inappropriate use of force – to CBP Internal Affairs, DHS OIG, or DHS CRCL;
- Complainants should be informed of complaint status within 14 days. In cases where additional investigation by CRCL and/or OIG is necessary, complainants should be informed of complaint outcome within 14 days of conclusion of investigation, and no later than 180 days after complaint was lodged. In all other cases, complainants should be informed of complaint outcome within 30 to 90 days. Outcome should include findings of fact, findings of law, remedies, and all available appeal and redress avenues.

Misconduct investigation standards:

- CPB should conduct prompt, thorough, and unbiased investigations of all allegations of improper use of force. See Appendix for general standards for misconduct investigations.

Disciplinary sanctions and remedial actions:

- Corrective actions, which can be disciplinary and/or remedial, should be swift, fair, and certain.
- The disciplinary system should be fair and consistent and aimed at creating a culture of compliance among CBP officers by conveying to all officers that violations of use of force policy will be sanctioned.
- Sanctions should be based on a disciplinary matrix that lists the possible penalty ranges for policy violations. It should be a progressive system, with escalating penalties for more serious misconduct, and should take into account an officer's history and level of culpability. Sanctions should include written reprimand, relinquishment of time or benefits, fines, extended or imposition of probationary period, reassignment from a position that provides additional pay or benefits, suspension, demotion, retirement in lieu of discipline, resignation in lieu of discipline, and termination. The system must provide officers with required due process.
- Remedial actions should include training, supervisory counseling, supervised field observation for a period, professional counseling, peer support counseling, fitness for duty evaluation, and reassignment not resulting in pay cut or demotion.
- The disciplinary system should be clearly described in the Use of Force Policy Handbook, emphasized during all use of force trainings, and reinforced consistently by supervisors.

APPENDIX

General Standards for Misconduct Investigations

Prompt, thorough, unbiased investigations:

- In general, misconduct investigations should be completed within 30 to 90 days, with exceptions only for particularly complex investigations;
- Misconduct investigations should be conducted by trained, impartial investigators outside the chain of command.
- Interviews with complainant, officer, and all witnesses at a minimum should be audiotaped.
- Witnesses and other relevant evidence should be identified, collected, and analyzed promptly using all reasonable investigative techniques. Depending on the nature and severity of the misconduct allegations, these techniques may include scene examination, review of dispatch tapes, police reports, supervisor Use of Force reports, review of photographic and video evidence, medical evidence, re-enactment, surveys and diagrams, ballistics and other forensic analyses, communications records, equipment examination, searches, chemical tests, line-ups, review of financial records, and use of covert evidence-collection techniques.
- Officers' statements should not automatically be deemed more credible than complainants' or witnesses' statements. Complainants and witnesses should be assured that their statements will be used only for the purpose of the investigation.
- Follow-up interviews should be conducted in order to resolve discrepancies and clarify any material ambiguities
- Patterns of officer conduct should be considered (e.g., past complaints of excessive force).

Resolution:

- All issues identified during misconduct investigations should be assessed and resolved, not simply the misconduct alleged by the complainant.
- Preponderance of evidence standard should be used to resolve complaints.
- Complaints should be resolved with one of the following findings: not sustained (investigation failed to produce a preponderance of evidence to either prove or disprove the allegations); exonerated (the allegation occurred but the conduct was legal, justified, proper, and consistent with agency policy and training); unfounded (a preponderance of the evidence proves the allegation did not occur); or sustained (investigation produced a preponderance of evidence to prove the allegation of an act which was misconduct). All findings should be documented in a memorandum, with substantiation, and reviewed by a supervisor.
- All sustained complaints should result in prompt, documented corrective action (see "Disciplinary sanctions and remedial actions" above).

Special Considerations for Investigations of Officer-Involved Shootings and Other Critical Incidents

Level and type of investigation:

- Investigation effort should be significant. Personnel rolled out to the scene should include homicide or other criminal investigator(s); Internal Affairs or other administrative investigator(s); legal counsel to focus on the potential criminal aspects and civil liability aspects of the incident; and training personnel. The intent should be to ensure that evidence is properly preserved and collected during the first critical minutes and hours after the use of deadly force.
- Both criminal and administrative/internal investigations should be conducted. The criminal investigation should be handled by criminal investigators and aimed at determining whether the officer

committed a crime. The administrative/internal investigation should be handled by Internal Affairs or a critical-incident investigative team focused on policy, training, tactics, and risk-management issues.

- Safeguards must be in place to ensure appropriate separation between criminal and administrative/internal investigators.

Conduct of investigation:

- Involved officers should be immediately separated and not permitted to speak with anyone about the incident (other than their lawyer) prior to giving a statement.
- Involved officers should provide brief, immediate statements to on-scene supervisors and conduct a walk-through of the scene to describe what transpired. Walk-through should be video-recorded.
- Detailed interviews of involved officers should occur promptly following the incident, and generally before the officer's shift has concluded.
- Photographs of involved officers and victims should be taken while on-scene and reflect their appearance at the end of the incident.
- Involved officers' weapons, holsters, and any other parts of the uniform with evidentiary value should be collected before officers leave the scene.
- In all investigations, witness statements should be recorded, but in investigations of shootings, video recording is recommended.
- Scene diagrams and photographs should be used to assist involved personnel and witnesses in describing events and to document those descriptions.
- Personnel cell-phone records covering the time period after the use of deadly force should be collected so that the agency can assure itself and the public that officers did not inappropriately converse with other involved officers or third-party intermediaries before providing their description of events to investigators.
- Agency must maintain tight control of the scene and restrict the number of personnel allowed access in order to avoid disturbing evidence and to maintain the integrity of the scene.
- Whenever an officer causes the death of another person, he or she should be placed on a minimum of three days of administrative leave with pay while the investigation is pending. The officer should not be allowed to return until cleared by a fitness-for-duty examination and should be assigned to non-enforcement duties while the administrative investigation is pending.

Special Considerations for Investigations Involving Women or Children

- Interviews of child complainants or witnesses should be conducted by investigators who have been trained in interviewing children, preferably by child welfare professionals, in a language they understand. Prior to interviewing a minor, investigators should obtain the written consent of a parent or guardian in a language the parent or guardian understands, and permit the parent's or guardian's presence during the interview.
- Interviews of complainants alleging sexual misconduct by an agent or officer should be conducted by investigators of the gender preferred by the complainant whenever possible.

¹ Jorge A. Solis, 28, shot and killed, Douglas, AZ (Jan. 4, 2010); Victor Santillan de la Cruz, 36, shot and killed, Laredo, TX (March 31, 2010); Anastasio Hernandez Rojas, 32, tortured to death, San Diego, CA (May 28, 2010); Sergio Adrian H. Huereca, 15, shot and killed, El Paso, TX (June 7, 2010); Juan Mendez, 18, shot and killed, Eagle Pass, TX; Jesus E. Castro Romo, 30, survived shooting, Santa Cruz County, AZ (Nov. 16, 2010); Ramses Barron Torres, 17, shot and killed, Nogales, Mexico (Jan. 5, 2011); Roberto Pérez Pérez, beaten while in detention and died due to lack of proper medical care, San Diego, CA (Jan. 13, 2011); Alex Martinez, 30, shot and killed, Whatcom County, WA (Feb. 27, 2011); Carlos Lamadrid, 19, shot and killed, Douglas, AZ (March 21, 2011); Jose Gutierrez Guzman, 41, tased into a comatose state, survived, San Luis port of entry, AZ (March 30, 2011); Jose Alfredo Yañez Reyes, 40, shot and killed, Tijuana, Mexico (June 21, 2011); Gerardo Rico Lozana, 20, shot and killed near Corpus Christi, TX (Nov. 3, 2011);

Byron Sosa Orellana, 28, shot and killed near Sells, AZ (Dec. 6, 2011); Alexander Martin, 24, died in car explosion that may have been caused by Border Patrol tasers (March 15, 2012); Charles Robinson, 75, shot and killed, Jackman, ME (June 23, 2012); Juan Pablo Perez Santillán, 30, shot and killed on the banks of the Rio Grande, near Matamoros, Mexico (July 7, 2012); Guillermo Arévalo Pedroza, 36, shot and killed, Nuevo Laredo, Mexico (Sept. 3, 2012); Valerie Tachiquin-Alvarado, 32, shot and killed, Chula Vista, CA (Sept. 28, 2012); José Antonio Elena Rodríguez, shot and killed, Nogales, Sonora (Oct. 11, 2012); and Margarito Lopez Morelos, 19, shot and killed in the Baboquivari Mountains, AZ (Dec. 3, 2012).

² ACLU of New Mexico Regional Center for Border Rights; analysis of information gathered from newspaper articles on deaths noted in footnote above (Dec. 2012).

³ Complaint and request for investigation of abuse of power, excessive force, coercion, and unlawful confiscation of property by Customs and Border Protection at ports of entry along the U.S.-Mexico border, American Civil Liberties Union, May 9, 2012, available at https://www.aclu.org/files/assets/aclu_2012_cbp_abuse_complaint_2.pdf

⁴ See Department of Homeland Security, U.S. Customs and Border Protection “Standards of Conduct,” Directive No. 51735-013A, March 13, 2012, available at http://www.cbp.gov/linkhandler/cgov/careers/senior_exec/ethics/std_of_conduct.ctt/std_of_conduct.pdf

⁵ ACLU’s recommendations are based on reviews of CBP’s October 2010 Use of Force Policy Handbook (redacted) and the September 2013 DHS Office of Inspector General report on CBP use of force (redacted), consideration of U.S. Department of Justice use of force standards articulated in recent consent decrees, and consultation with police practices experts.

⁶ The September 2013 DHS Office of Inspector General report suggests that current policy requires a report within one hour. There is no justification for waiting up to one hour, during which time evidence can be compromised and the appearance of impropriety is heightened. See DHS Office of Inspector General, “CBP Use of Force Training and Actions to Address Use of Force Incidents (redacted),” OIG-13-114 (revised), p. 12, available at http://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf.

⁷ *Id.* at 19.

⁸ Level 1: pointing a firearm at a person and hand control or escort techniques (e.g., elbow grip, wrist grip, or shoulder grip) applied as pressure point compliance techniques or that result in injury or complaint of injury. Level 2: use of an Electronic Control Weapon (ECW) (including where an ECW is fired at a person but misses); use of an impact weapon to strike a person but where no contact is made; use of a baton for non-striking purposes (e.g., prying limbs, moving or controlling a person); and weaponless defense techniques (e.g., elbow strikes, kicks, leg sweeps, and takedowns). Level 3: any strike to the head (except for a strike with an impact weapon); use of impact weapons where contact is made (except to the head), regardless of injury; or the destruction of an animal. Level 4: all uses of lethal force; all firearm discharges except for range and training discharges; all uses of force resulting in serious physical injury or requiring hospitalization; all neck holds; all uses of force resulting in a loss of consciousness; all canine bites; more than one application of an ECW on an individual during a single interaction, regardless of the mode or duration of the application, and whether the application is by the same or different officers, or ECW application for longer than 15 seconds, whether continuous or consecutive; and any strike, blow, kick, ECW application, or similar use of force against a handcuffed subject.

⁹ See ICE Office of Policy, Directive 7-9.0, *Notification and Reporting of Detainee Deaths*, Oct. 1, 2009, available at http://www.ice.gov/doclib/dro/pdf/11003.1-hd-notification_reporting_detainee_deaths.pdf.

¹⁰ See “ICE ERO Community and Detainee Helpline,” available at <http://www.ice.gov/about/offices/enforcement-removal-operations/ero-outreach/cmnty-helpline.htm>.