



Customs and Border Protection's (CBP's) 100-Mile Rule

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Background

8 U.S.C. § 1357(a)(3) addresses CBP officials' authority to stop and conduct searches on vessels, trains, aircraft, or other vehicles anywhere within "a reasonable distance from any external boundary of the United States." Without further statutory guidance, regulations alone expansively define this "reasonable distance" as 100 air miles from any external boundary of the U.S., including coastal boundaries, unless an agency official sets a shorter distance.¹ CBP agents can also even enter private property without a warrant (excepting dwellings) within 25 miles of any border. In this 100-mile zone, CBP has claimed certain extra-constitutional powers. For instance, Border Patrol claims the authority to operate immigration checkpoints. Agents, nevertheless, cannot pull anyone over without "reasonable suspicion" of an immigration violation or crime (more than just a "hunch"). Similarly, courts have determined that outside of Ports of Entry Border Patrol cannot search vehicles in the 100-mile zone without a warrant or "probable cause" (a reasonable belief, based on the circumstances, that an immigration violation or crime has occurred). In practice, Border Patrol agents routinely ignore or misunderstand the limits of their legal authority, violating the constitutional rights of innocent people. Although the 100-mile border zone is not literally "Constitution-free," CBP frequently acts like it is.

As a result, two-thirds of the U.S. population, or approximately 200 million people, are potentially subject to so-called investigatory detention and warrantless search by CBP agents. (Most of the ten largest U.S. cities are within 100 air miles of the boundary, and several states lie entirely within this area, including Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont.)²

These policies originated in a statutory change to the Immigration and Nationality Act (INA) passed in 1946³, and a federal regulation interpreting that change issued in 1953 – in both instances with little deliberation or review.⁴

¹ Or "any shorter distance which may be fixed by the chief patrol agent for CBP, or the special agent in charge for ICE," taking into consideration "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 illegal entry into the United States." 8 C.F.R. § 287.1(b). Due to unusual circumstances, a distance of more than 100 miles may also be declared reasonable by application to the Commissioner of the CBP or the Assistant Secretary of ICE.

² American Civil Liberties Union, "Fact Sheet on U.S. 'Constitution Free Zone,'" <http://www.aclu.org/technology-and-liberty/fact-sheet-us-constitution-free-zone>.

³ See H.R. 386, 79th Congress (1946).

Consequences of CBP Operations Far Removed from the Border

As a result of regulations issued interpreting 8 U.S.C. § 1357(a)(3), CBP can and does conduct operations far removed from the border and on roads with no immediate border access, where encounters with non-border crossers, including U.S. citizens and permanent residents, are the norm, and notwithstanding that primary responsibility for interior enforcement rests with a different agency – Immigration and Customs Enforcement (ICE). These non-border operations by CBP may force residents to encounter CBP enforcement regularly while moving about their home county, including on their way to and from work. ***Allowing CBP to divert its attention from the border distracts from its primary mission and results in widespread violations of Americans’ rights to property and liberty, including Fourth Amendment and other constitutional violations.*** For example:

-Between 2006 and 2010 in the Rochester, NY, area, approximately 300 immigrants with legal status were arrested by Border Patrol agents, then released. The arrests coincided with an incentive program that rewarded agents with cash bonuses and Home Depot gift cards based on the number of arrests they made.⁵

-According to the ACLU of Arizona, in Tucson, community members report CBP agents entering courthouses and hospitals (including maternity wards) and approaching and interrogating hospital patients, motorists, and pedestrians. A patient at University of Arizona Medical Center was reportedly forced to deliver her child with a CBP agent in the room. CBP agents in Tucson regularly respond to calls to investigate from police, hospital staff, and school officials. These incidents often result from and encourage racial profiling of U.S. citizens and lawful residents.

-In April 2012, residents of the Olympic Peninsula in Washington State filed a class-action lawsuit challenging the Border Patrol’s practice of stopping vehicles and interrogating occupants without legal justification.⁶ CBP settled the lawsuit and agreed to require training for Border Patrol agents in the area on Fourth Amendment protections against illegal searches and seizures, and to provide the ACLU with data regarding all traffic stops that take place in the area for the next 18 months. These terms should be extended nationwide and data collected from CBP checkpoints as well as roving patrols.

Federal courts are also skeptical of CBP enforcement in the interior. For example:

-In *U.S. v. Gabriel*, the District Court in Maine expressed unease with the “constitutional implications of ‘pushing the border in’ and the fact that Border Patrol was conducting operations well inside the territorial borders of the U.S.”⁷

⁴ See H.R. REP. No. 186 (1945); S. REP. NO. 632 (1945).

⁵ Families for Freedom and New York University School of Law Immigrant Rights Clinic, UNCOVERING USBP: BONUS PROGRAMS FOR UNITED STATES BORDER PATROL AGENTS AND THE ARREST OF LAWFULLY PRESENT INDIVIDUALS (2013).

⁶ *Sanchez et. al. v. U.S. Office of Border Patrol et. al.* 2:12-CV-00735 (Litigated by: ACLU of Washington, Northwest Immigrants’ Rights Project and Perkins Cole LLP).

⁷ 405 F. Supp. 2d 50, 59 (D. Me. 2005).

-In *United States v. Venzor-Castillo*, the Tenth Circuit ruled that a Border Patrol search 235 miles from the border exceeded CBP's authority.⁸ "The further one gets from the border," the court stated, "the greater the likelihood the volume of legitimate travelers will increase." *Id.* at 639.

-The Fifth Circuit regards the distance from the border as a "vital element" in evaluating the reasonableness of a Border Patrol stop. *See U.S. v. Rubio-Hernandez*, 39 F. Supp. 2d 808, 810 (W.D. Tex. 1999). When the stop occurs over fifty miles from the border, this "vital element" is missing.⁹ *See U.S. v. Inocencio*, 40 F.3d 716, 722 & nn. 6-7 (5th Cir. 1994). If the "vital element" rule has not been met, all other factors must be examined 'charily.' *See U.S. v. Pena-Cantu*, 639 F.2d 1228, 1229 (5th Cir. 1981)

Conclusion

The "100-Mile Rule" has never been subjected to meaningful debate or scrutiny in Congress. There is nothing in the record to indicate whether the Justice Department's designation of 100 miles as a "reasonable distance" was anything other than an arbitrary selection.¹⁰ To prevent CBP from engaging in operations far from the border where border crossers are few and far between, and legitimate travel and commerce are currently often impeded, we urge restricting CBP's authority to no more than 25 miles from the border and limiting incursions onto private property to no more than 10 miles.

⁸ 991 F.2d 634 (10th Cir. 1993).

⁹ For example, in *U.S. v. Hernandez-Lopez*, 761 F. Supp. 2d 1171, 1196 (D.N.M. 2010), the court used the 50-mile rule, noting that "Gutierrez stopped the Dodge sedan approximately 92 air miles from the border. This distance is almost twice the guidelines that the Tenth Circuit and Fifth Circuit have established. Additionally, ninety-two air miles is on the threshold of the 100 air mile regulatory limit of the Border Patrol's authority to make warrantless stops . . . The Court therefore finds weak, if any, support from this consideration."

¹⁰ The Justice Department did not issue regulations defining a "reasonable distance" from the border as 100 miles until 1953. In 1957, these regulations were then published in the *Federal Register*, along with other new regulations for the revised INA. *See Field Officers: Powers and Duties*, 22 Fed. Reg., 236, 9808-09 (Dec. 6, 1957). However, other than their presence in these publications, there is no public history as to why the Justice Department chose 100 miles as the "reasonable distance" from the border under the INA. It may simply be that 100 miles has a history of being the distance considered to be reasonable regarding the availability of witnesses for examination, responses to subpoenas, and numerous other discovery issues under other federal laws. *See, e.g.*, 10 U.S.C. § 849; Fed. R. Crim. P. 7; Fed. R. Civ. P. 45.