



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

Dogs of DHS: How Canine Programs Contribute to Homeland Security

Submitted to the Senate Committee on Homeland Security and Governmental Affairs

March 3, 2016

ACLU Washington Legislative Office

Karin Johanson, Director

Christopher Rickerd, Policy Counsel

Tyler Ray, Legislative Assistant

ACLU of Arizona, Border Litigation Project

James Duff Lyall, Staff Attorney

The ACLU respectfully submits this statement for the record for the Homeland Security and Governmental Affairs Committee hearing, *Dogs of DHS: How Canine Programs Contribute to Homeland Security*. We urge the Committee to oversee the use of service canines by Customs and Border Protection (CBP), particularly in its interior enforcement operations, and to address civil rights violations that are occurring.

For nearly 100 years, the American Civil Liberties Union (ACLU) has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law.

I. Effectiveness and Consequences of Service Canine Use by Border Patrol

Residents of the American southwest frequently contact the ACLU to report civil rights violations arising out of encounters at Border Patrol checkpoints located far into the interior of the United States.¹ In recent years, an alarming number of these complaints have involved Border Patrol service canines "alerting" to nonexistent contraband. Southwest border residents—including retired canine handlers—have reported scores of incidents in which these false alerts resulted in the prolonged, unjustified detention and searches of innocent travelers, most of whom are American citizens. The Department of Homeland Security's own records confirm that such incidents are all too common.² The government's records further indicate that these recurring incidents are exacerbated by a lack of oversight, and that the time for Border Patrol to address systemic deficiencies in its use of service canines is long overdue.

Problems with law enforcement use of service canines are well-documented. Law enforcement experts acknowledge, and independent studies have confirmed, that the reliability of service canines is severely compromised in uncontrolled environments, such as vehicle checkpoints. For example, data collected and published under the Illinois Traffic Stop Statistical Study Act of 2003 show that service canines can be wrong as often as they are right.³ A review of that data demonstrates that in 2013, no contraband was found during 40% of the officer searches performed in response to a dog alert. Stated differently, false alerts by police dogs caused police officers to conduct a manual search of the vehicles of 1,715 innocent motorists. The data also showed stark racial disparities: statewide, African American motorists were 55% more likely than white motorists to be subjected to a dog sniff. Yet white motorists were 14% more likely than African American motorists to be found with contraband during officer searches performed in response to a dog alert. In 2013, stops involving Illinois state troopers using service canines had a success rate of just 50%.

Litigation involving the use of service canines by Border Patrol and other law enforcement agencies has raised similar questions about the dogs' reliability in uncontrolled settings, including public spaces like checkpoints.⁴ In one case, Border Patrol canine certification records showed marginal performance, but were too heavily redacted to assess the search.⁵ In another, narcotics were not found in 27 out of 28 alerts at a temporary checkpoint.⁶ And in yet another case, the court file indicated 35 out of 50 encounters produced a false alert.⁷

Still, despite the recognized limitations of service canines in uncontrolled environments and the agency's documented false alerts, Border Patrol does not require continuing service-canine certification based on field performance,⁸ does not record or track false alerts,⁹ and does not take action when a service canine's recurrent false alerts call the dog's accuracy into question.¹⁰ These fundamental deficiencies must be addressed to ensure respect for the rights and well-being of innocent motorists in encounters with Border Patrol. Otherwise, those innocent motorists will continue to be subjected to searches and detentions at Border Patrol checkpoints that violate the Fourth Amendment because Border Patrol cannot search vehicles without a warrant or probable cause (a reasonable belief, based on the circumstances, that an immigration violation or crime has likely occurred).

II. Improper Use of Service Canines: Examples

Agency records obtained by the ACLU in Freedom of Information Act (FOIA) litigation have confirmed what many in the border region have known for years: abuses at Border Patrol checkpoints involving service canines are both common and rarely investigated.¹¹ Those DHS and CBP documents included complaints and investigations, apprehension statistics and stop records, policies, and training materials. Among the extensive complaint and investigation records were dozens of accounts of service canines falsely alerting at vehicle checkpoints, resulting in prolonged detention and searches of innocent travelers. None of those incidents appears to have resulted in an investigation or any other remedial action.

In 2014, the ACLU submitted to DHS complaints of abuse at multiple Arizona Border Patrol checkpoints, including eight complaints of false canine alerts.¹² Of those eight complaints, none resulted in the discovery of contraband. Perhaps even more troubling, in some instances, *agents appeared to be falsely claiming a canine had alerted in order to justify a search for which the agent otherwise lacked probable cause*. Reported incidents of these false alerts resulting in unlawful searches include:

- a. Two individuals at a Border Patrol checkpoint on I-8 were directed to pull into the secondary inspection area. When the individuals did not consent to a search of the vehicle, an agent arrived with a service canine, which circled the vehicle and did not react in any way. After passing the vehicle, the dog alerted to a handbag in an adjacent vehicle, pulling the bag out of the open trunk. The Border Patrol supervisor then notified the individuals, "We need to search your car. The dog got a hit on your car." The individuals objected that the dog had not alerted on their vehicle but rather on an item in an adjacent vehicle. Nonetheless, both the supervisor and agent asserted that the dog had "hit a positive scent" in their vehicle, giving Border Patrol probable cause for a search. The individuals were patted down and detained in a holding cage for nearly an hour while the agent allegedly waited for a warrant to be issued. After they were released, it was apparent the agents had searched the entire vehicle.¹³
- b. A 19-year-old, Hispanic woman on her way home from work was stopped at the Tombstone checkpoint, questioned about her citizenship, and asked to hand over her driver's license. An agent walked around her vehicle with a service canine. The individual saw that the dog did not react to her vehicle and had begun to move to the car behind hers when the agent pulled on the dog and started tapping

on the trunk of the vehicle. The agent then stated the dog had “hit” on something in the car and directed the individual to pull into the secondary inspection area, where the vehicle was searched. This was the second incident for the individual in which a service canine was claimed to have “alerted” giving Border Patrol probable cause to search her car.¹⁴

- c. A family was stopped at a Border Patrol checkpoint on State Route 86 in Sells, Arizona and directed into the secondary inspection area. The family repeatedly requested an explanation and the agent responded that a service canine had alerted to the vehicle. The family stated they did not have anything in the vehicle that would cause the dog to alert and that no dog was nearby. The agent directed the family to exit the vehicle, at which point the family began to record the inspection. The agent yelled to turn off the phone and tried to grab the phone from the mother while poking her chest. The agent stated that the recording was not permitted because the search of the vehicle was “based on probable cause.” The family was eventually permitted to leave, but the experience has traumatized the young children.¹⁵

Additional examples of the improper use of service canines, drawn from ACLU intakes and DHS investigation and complaint records, are provided below.¹⁶ In none of these cases was contraband discovered; all of these individuals were eventually released.

- a. On January 1, 2015, a 65 year-old, retired police officer and former service canine handler, was stopped at an interior Border Patrol checkpoint while driving with his wife. An agent advised the couple that a dog had alerted to contraband in their vehicle and directed them to a secondary inspection area. There, they were separated, interrogated, and detained for more than 45 minutes before finally being released without explanation. Because there was no arrest, agents made no record of the couple’s detention or of the false alert.¹⁷
- b. In March 2013, the Nogales City Attorney’s Office submitted a complaint to Border Patrol alleging racial profiling and abuse of authority after agents at the I-19 interior checkpoint falsely relied on a non-existent service canine alert as a basis for prolonged detention and search. The complaint describes the agents’ actions as “egregious and illegal,” though not isolated, and refers to a Deputy City Attorney detained and searched on multiple occasions on the basis of claimed or false service canine alerts.¹⁸
- c. An off-duty agent departing the Highway 78 checkpoint was pursued, detained, and searched following a Border Patrol service canine’s false alert to his vehicle.¹⁹
- d. Following a false service canine alert, a disabled motorist was detained for over an hour at the Highway 95 checkpoint while Border Patrol agents searched his vehicle, damaging its contents.²⁰
- e. An individual on his way to work was sent to secondary inspection at the Arivaca Road checkpoint for traffic enforcement. When the individual questioned the agents’ authority to enforce traffic laws, the agent stated that a service canine had “alerted.” The agent proceeded to search the interior of the vehicle. The individual was detained for approximately 30 minutes before he was released.²¹

- f. A motorist was detained after a service canine falsely alerted to his vehicle at the I-19 interior checkpoint. After he was released, the individual realized Border Patrol agents had confiscated much of his prescription medication.²²
- g. An individual described being detained and interrogated for up to two hours following false service canine alerts on six separate occasions at interior Border Patrol checkpoints, several of them resulting in damage to the individual's vehicle.²³
- h. A motorist was detained and searched at the I-8 checkpoint after a service canine falsely alerted to the motorist's vehicle. The resulting search damaged an interior compartment. The driver described being detained with other motorists who were also searched and then released.²⁴
- i. A man was detained at the Highway 90 checkpoint after a service canine falsely alerted to his vehicle. When he attempted to record his checkpoint interaction, a Border Patrol agent forcibly confiscated the man's phone while a Huachuca Police Officer looked on.²⁵
- j. A man was detained for an hour because he refused to consent to a search of his trunk at the Highway 83 interior checkpoint. Agents threatened to "lock [him] in a cell" if he did not surrender his keys and empty his pockets. Border Patrol agents later claimed a service canine had alerted to his vehicle, but no contraband was discovered and the man was released.²⁶
- k. A motorist was detained and searched following a service canine alert at the I-8 checkpoint. After being released and returning home, the motorist discovered the dog had damaged the contents of the vehicle.²⁷
- l. Two separate motorists reported vehicle damage caused by a service canine at the I-19 checkpoint on the same day. A third motorist submitted a complaint about a nearly identical incident that occurred at the same checkpoint three days later.²⁸
- m. DHS records describe multiple false alerts at the same checkpoint on Highway 86 over two days: First, a woman was detained in secondary inspection following a false service canine alert. A Border Patrol agent told her to "put the fucking keys in the truck."²⁹ An hour and a half later, a woman and her brother were detained at the same checkpoint, following another false service canine alert; an agent forcibly removed the woman's cell phone from her hand and threatened her brother with an electroshock weapon before releasing them.³⁰ The next day, at the same checkpoint, agents attempted to prevent a different woman from videotaping them and allegedly spat on her following yet another false service canine alert.³¹

These problems are not limited to interior checkpoints. In December 2013, the ACLU filed a lawsuit on behalf of a U.S. citizen subjected to a strip search, multiple genital and cavity searches, a forced bowel movement, an X-ray, and a CT scan following a false alert by a Customs and Border Protection service canine.³²

III. Recommendations

In order to address the improper use of service canines by Border Patrol, the ACLU recommends that:

- a. Border Patrol record all service canine alerts, including false service canine alerts, resulting in detention and/or search of innocent travelers. Service canine performance data should be compiled and made publicly available.
- b. Service canine certification should be based on field performance as well as training. Service canines with unusually high false alert rates must be retrained and recertified or retired. Training of service canines and handlers should be improved as necessary.
- c. Border Patrol should have reasonable suspicion of immigration or criminal law violations before subjecting motorists to service canine searches.
- d. Border Patrol should discontinue or curtail the use of service canines in interior enforcement operations at least until adequate safeguards are in place.

IV. Conclusion

The ACLU commends the Committee for examining the use of service canines by DHS. In light of the recognized limitations of service canines in uncontrolled environments, as well as the many documented false alerts at Border Patrol checkpoints, we urge the Committee to examine the proper use of service canines and implement reforms to collect and disclose data on the use of service canines, and to ensure that transparent policies protecting motorists' rights are in place with meaningful redress when they are violated.

¹ On CBP's "100-mile zone," see generally ACLU, *The Constitution In the 100-Mile Border Zone*, <https://www.aclu.org/constitution-100-mile-border-zone> (last visited Mar. 3, 2016).

² ACLU OF ARIZONA, RECORD OF ABUSE (Oct. 2015), <http://www.acluaz.org/node/5415>.

³ ACLU OF ILLINOIS, RACIAL DISPARITY IN CONSENT SEARCHES AND DOG SNIFF SEARCHES: AN ANALYSIS OF ILLINOIS TRAFFIC STOP DATA FROM 2013 (Aug. 2014), <http://www.aclu-il.org/racial-disparity-in-consent-searches-and-dog-sniff-searches/>.

⁴ See generally Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 427, 430 (1997) (noting that "even a very high accuracy rate can produce an unreasonable amount of false positives" and that service canines are "least effective when they survey a random population.").

⁵ See, e.g., *United States v. Thomas*, 726 F.3d 1086, 1093 (9th Cir. 2013).

⁶ *Merrett v. Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995).

⁷ *Doe v. Renfrow*, 631 F.2d 91, 95 (7th Cir. 1980) (Fairchild, C.J., dissenting).

⁸ The government has confirmed in FOIA litigation with the ACLU that service canine certification is based on training, and is not related to field performance.

⁹ RECORD OF ABUSE, *supra* note 2, at 11.

¹⁰ *Id.*

¹¹ RECORD OF ABUSE, *supra* note 2.

¹² ACLU OF ARIZONA, COMPLAINT AND REQUEST FOR INVESTIGATION OF ABUSES AT U.S. BORDER PATROL INTERIOR CHECKPOINTS IN SOUTHERN ARIZONA, INCLUDING UNLAWFUL SEARCH AND SEIZURE, EXCESSIVE FORCE, AND RACIAL PROFILING (Jan. 2014), [hereinafter ACLU COMPLAINT], available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%20%202014%2001%2015.pdf>

¹³ *Id.* at 8.

¹⁴ *Id.* at 10.

¹⁵ *Id.* at 9.

¹⁶ More detailed information and additional examples are available in the Record of Abuse report, *supra* note 1, and ACLU Complaint, *supra* note 12.

¹⁷ RECORD OF ABUSE, *supra* note 2, at 11.

¹⁸ *Id.* at 23 (CBP 194-197).

¹⁹ *Id.* at 23 (CBP 785-797).

²⁰ *Id.* at 24 (CBP 811-823).

²¹ ACLU COMPLAINT, *supra* note 12, at 6.

²² RECORD OF ABUSE, *supra* note 2, at 19 (CBP 003-004).

²³ *Id.* (CBP 006).

²⁴ *Id.* (CBP 006-007).

²⁵ *Id.* (CBP 011-012).

²⁶ *Id.* at 20 (CBP 012-013).

²⁷ *Id.* at 21 (CBP 026-027).

²⁸ *Id.* at 22 (CBP 041-042).

²⁹ *Id.* at 24 (CBP 1073-1079).

³⁰ *Id.* at 24 (CBP 1081-1088).

³¹ *Id.* at 24 (CBP 1089-1098).

³² See Complaint, *Jane Doe v. El Paso County Hospital District, et al.*, No. 3:13-CV-00406-DB (W.D. Tx. Dec. 18, 2013), <http://www.aclu-nm.org/wp-content/uploads/2013/12/Complaint-Jane-Doe-v-Various-Defendants-12-18-13.pdf>.