



WRITTEN STATEMENT OF
THE SOUTHERN BORDER COMMUNITIES COALITION &
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

“Moving the Line of Scrimmage: Re-Examining the Defense-In-Depth Strategy”

**Submitted to the U.S. House of Representatives Border and Maritime Security Subcommittee of the
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Introduction

Advocates and residents throughout the border region comprise the Southern Border Communities Coalition (SBCC). SBCC brings together more than 60 organizations from San Diego, California, to Brownsville, Texas, to ensure that border enforcement policies and practices are accountable and fair, respect human dignity and human rights, and prevent loss of life in the region.

For nearly 100 years, the American Civil Liberties Union (ACLU), a member of SBCC, 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 laws of the United States guarantee everyone. 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. The ACLU of New Mexico's Regional Center for Border Rights (RCBR) stands with border communities to defend and protect America's constitutional guarantees of equality and justice for all families to live freely, safely, and with dignity. The RCBR works in conjunction with ACLU affiliates in California, Arizona, Texas, Michigan, Washington, New York, and Vermont.

SBCC and the ACLU submit this statement to provide the Subcommittee with an appraisal based on border residents' perspectives to describe the civil liberties and quality-of-life effects of the Border Patrol's "Defense-in-Depth" strategy that relies on roving patrols and numerous checkpoints far from the actual borders. CBP's checkpoints and patrols are massively intrusive yet ineffective *interior* enforcement operations. We are deeply concerned about how the Border Patrol conducts enforcement in the "100-mile-zone," often infringing rights in such a vast area of the United States.

Severely compounding this overreach is a lack of Border Patrol policies and practices that match best policing standards on matters ranging from body-worn cameras to data collection (see Appendix, Implementing Law Enforcement Best Practices for our Nation's Biggest Police Force).

SBCC and the ACLU oppose CBP's currently exorbitant spending on border enforcement, expenditures which occur without the requisite transparency and oversight, or a proper holistic analysis of border communities' quality-of-life. Spending on enforcement, particularly at the Southwest border, has increased dramatically this century without commensurate accountability measures, resulting in civilian deaths at the hands of CBP personnel, avoidable migrant deaths in the desert, and many other civil and human rights abuses at both our nation's southern and northern borders.

From FY2004 to FY2012, the budget for CBP increased by 94 percent to \$11.65 billion, a leap of \$5.65 billion; this following a 20 percent post-9/11 increase of \$1 billion.¹ By way of comparison, this jump in funding more than quadrupled the growth rate of NASA’s budget and was almost ten times that of the National Institutes of Health. For FY2017, the Administration’s budget request for CBP is about \$14 billion. U.S. taxpayers now spend more on immigration enforcement agencies (\$19 billion) than on the FBI, DEA, ATF, U.S. Marshals, and Secret Service—*combined*. Border and immigration enforcement has cost more than \$250 billion in today’s dollars since 1986. House Appropriations Committee Chairman Hal Rogers’ warning about the irrationality of border spending must be heeded: “It is a sort of a mini industrial complex syndrome that has set in there. And we’re going to have to guard against it every step of the way.”²

SBCC and the ACLU urge the Subcommittee to focus its efforts on ensuring that future border security is conducted humanely and in accordance with best police practices, leaving a greatly reduced footprint in border communities. Legislation and congressional oversight should bring transparency and accountability—not war equipment or more boots on the ground—to CBP, our nation’s largest law enforcement agency.

I. CBP is improperly acting as an interior law-enforcement agency within the unnecessarily large 100-mile zone, yet these activities are ineffective in apprehending unauthorized immigrants.

CBP’s excessive enforcement footprint and mission creep have made it an interior police agency that conducts unaccountable roving patrols far from any border and maintains intrusive checkpoints that hurt local economies, unjustifiably profile Latinos and other people of color, and make few immigration arrests. CBP has become an interior law-enforcement agency through its vast claimed authority to patrol within 100 miles of all land and sea borders, an assertion of power based on outdated regulations issued in the 1950s that have not faithfully implemented the Immigration and Nationality Act’s (INA) limitation to a “reasonable distance” from a border.³ Moreover, CBP’s practice of using its warrantless authority under the INA to enter private property (excluding dwellings) within 25 miles of a border is at times exercised irresponsibly, causing property owners uncompensated fence damage and other hardship like livestock lost through unclosed gates.

¹ Michele Mittelstadt et al., “Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11.” (Migration Policy Institute, Aug. 2011), 3, available at http://www.migrationpolicy.org/pubs/FS23_Post-9-11policy.pdf

² Ted Robbins, “U.S. Grows an Industrial Complex Along The Border.” NPR (Sept. 12, 2012), available at <http://www.npr.org/2012/09/12/160758471/u-s-grows-an-industrial-complex-along-the-border>

³ For more on the 100-mile zone please see <https://www.aclu.org/constitution-100-mile-border-zone> and <https://www.aclu.org/aclu-factsheet-customs-and-border-protections-100-mile-zone>

CBP's zone of claimed authority therefore has no statutory basis and originated without scrutiny 60 years ago in now-outdated regulations. The area includes two-thirds of the U.S. population, entire states like Florida and Maine, as well as almost all of the country's top metropolitan areas. The CATO Institute and Reason Magazine/reason.com have led libertarian critiques of the 100 and 25-mile zones.⁴ This breadth of authority has converted CBP, particularly Border Patrol, into an interior force that widely roams border communities. Other law enforcement agencies, such as Immigration and Customs Enforcement (ICE) and the Drug Enforcement Agency have responsibility for interior immigration and drug enforcement; CBP's enforcement far from any actual border is both duplicative and ineffective.

The agency's own data have shown that a majority of criminal prosecutions emanating from checkpoint operations are of U.S. citizens for small quantities of drugs, including marijuana, even though checkpoints are not general crime-control operations but constitutionally limited to brief immigration inquiries. Significantly, checkpoints also do not provide "bang for the buck" in terms of unauthorized immigrant apprehensions. Although CBP emphasizes that a negative cannot be proven with respect to deterrent effect, checkpoint numbers – which haven't been disclosed by the agency since 2013 – show that very few migrants are apprehended given the resources committed to these operations. Two years ago CBP Commissioner Kerlikowske committed to "a review to collect data on the number of arrests and drug seizures at each checkpoint to gauge how effective they really are,"⁵ but no public data or analysis have been released. Nor has the agency acted on the Government Accountability Office's 2009 recommendation to implement "quality of life measures . . . to evaluate the impact that checkpoints have on local communities,"⁶ a recommendation echoed and elaborated by the University of Arizona in 2014.⁷

Consider the last available agency data about the Tucson and Yuma sectors:

- For FY 2012 and FY 2013, combined checkpoint apprehensions for Tucson and Yuma Sectors accounted for just 0.74 percent of those sectors' total apprehensions. In FY 2013, Tucson Sector's 804 checkpoint apprehensions accounted for just 0.67 percent of the sector's total apprehensions.

⁴ See, e.g., Patrick G. Eddington, "Homeland Insecurity: Checkpoints, Warrantless Searches and Security Theater." *JustSecurity* (Feb. 2, 2015), <http://www.cato.org/publications/commentary/homeland-insecurity-checkpoints-warrantless-searches-security-theater>; Jacob Sullum, "The Border Patrol's Unconstitutional Drug Dragnet." *reason.com* (May 25, 2015), <http://reason.com/archives/2015/05/25/the-border-patrols-unconstitutional-drug>

⁵ Alan Gomez, "Border Commissioner, facing heat, promises changes." *USA Today* (Oct. 30, 2014), <http://www.usatoday.com/story/news/nation/2014/10/30/customs-and-border-commissioner-interview-body-cameras-use-of-force-checkpoints/18110249/>

⁶ <http://gao.gov/assets/300/294548.pdf> (p.78).

⁷ Jeffrey Jenkins, Jeffrey G. Proudfoot, Jim Marquardson, Judith Gans, Elyse Golob, and Jay Nunamaker, *Checking on Checkpoints: An Assessment of U.S. Border Patrol Operations, Performance, and Impacts*. Tucson: National Center for Border Security and Immigration (BORDERS), University of Arizona (2014), http://borders.arizona.edu/cms/sites/default/files/checking-on-checkpoints_2014-09-09.pdf

- While CBP reported that its FY 2012 nationwide checkpoint apprehensions accounted for two percent of total apprehensions, the data shows Tucson and Yuma Sectors' combined 882 checkpoint apprehensions represented only 0.7 percent of those sectors' total apprehensions during the same period.
- In calendar year 2013, nine out of 23 Tucson Sector checkpoints reported zero arrests of “deportable subjects.” Fifteen of those checkpoints reported fewer than 10 arrests of deportable subjects; only six reported more than 20 arrests, and only two reported more than 40—those two checkpoints accounted for 74 percent of the deportable subjects arrested at Tucson Sector checkpoints in 2013.
- The vast majority of those arrested at Yuma Sector checkpoints are U.S. citizens: in calendar year 2013, 1,535 “non-deportable subjects” were arrested as compared to only 197 deportable subjects, a nearly eightfold differential. In 2011, non-deportable subject arrests exceeded deportable subject arrests by a factor of more than 11, 1,822 to 161. (These numbers are consistent with FOIA data obtained by the Center for Investigative Reporting which showed approximately four out of five drug-related arrests by Border Patrol involved U.S. citizens.⁸)
- Yuma Sector’s Highway 95 checkpoint—the only checkpoint for which identifying information was not redacted—reported only one non-citizen apprehension in three years. The Highway 95 checkpoint is roughly 75 miles from the border and the subject of several abuse complaints.⁹

CBP has not published data to reflect the significant financial cost of Border Patrol interior operations, so taxpayers do not know the price tag, for example, for Yuma Sector’s 200-300 annual checkpoint apprehensions, nor does the agency attempt to quantify the checkpoints’ “deterrent” effect. Still, the agency’s data suggest that the limited enforcement gains of most interior checkpoints do not outweigh the many harms their operation inflicts upon border communities in the form of additional migrant deaths, widespread civil rights and civil liberties abuses, and negative impacts on local businesses and property values.

II. CBP’s interior enforcement activities lead to constitutional abuses and economic harm.

⁸ Andrew Becker, G.W. Schulz, and Tia Ghose, “Four of five Border Patrol drug busts involve US citizens, records show.” *Center for Investigative Reporting* (Mar. 26, 2013), <http://cironline.org/reports/four-five-border-patrol-drug-busts-involve-us-citizens-records-show-4312>

⁹ ACLU of Arizona, *Record of Abuse: Lawlessness and Impunity in Border Patrol's Interior Enforcement Operations* (2015), 14, <http://www.acluaz.org/node/5415>

CBP's interior enforcement activities are suboptimal uses of agency resources meant to further border-security goals, yet do enormous damage to the quality of life of those who live and work in the border region. Border community members report harassment, racial profiling, excessive force, and other unlawful treatment by CBP agents at checkpoints and during patrol stops.

To get a sense of these experiences, take two examples of individuals very familiar to the Subcommittee. In 2009, Representative Beto O'Rourke "then an El Paso city council member, says he was stopped and sent into secondary screening while driving to visit his sister in Carlsbad, New Mexico. 'I came through and was pulled over into secondary, which has never happened to me before. And then my 2-year-old son was put into a holding cell while they searched my truck. I didn't have anything worth searching for,' said O'Rourke. 'I remember how awful I felt being in that cell and how un-American that felt. I had not crossed an international border . . . yet was detained, questioned, and searched without probable cause. And that's a shitty feeling. And a lot of people experience that.'"¹⁰ Second, "Border Patrol agents stopped Senator Patrick Leahy, Democrat of Vermont, 125 miles south of the border, in New York. When Mr. Leahy asked what authority the agent had to detain him, the agent pointed to his gun and said, 'That's all the authority I need.'"¹¹

CBP conducts operations, including checkpoints and roving patrols, far removed from the border. Encounters with non-border crossers, including U.S. citizens and permanent residents, result in regular CBP enforcement experiences during their day-to-day lives. People residing within 100 miles of a border are subject to both fixed and roving checkpoints, ostensibly to confirm immigration status but often leading to other law enforcement actions. In some communities, residents must pass through Border Patrol checkpoints to reach work, school, medical appointments, or other daily activities. The ACLU has filed dozens of complaints on behalf of border residents regarding checkpoint activities and roving patrols, along with publishing numerous reports that details abuses that result from this interior enforcement.¹²

Away from standing inspection points where all vehicles are stopped, Border Patrol must have "reasonable suspicion" of an immigration violation or crime to pull someone over and

¹⁰ Daniel Denvir, "Curbing the Unchecked Power of the U.S. Border Patrol." *The Atlantic CityLab* (Oct. 30, 2015), <http://www.citylab.com/crime/2015/10/curbing-the-unchecked-power-of-the-us-border-patrol/413392/>

¹¹ Todd Miller, *War on the Border*, NY TIMES, Aug. 18, 2013, <http://nyti.ms/1DM0jSo>

¹² See, e.g., Arizona complaints (2013, <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%202013.pdf> ; 2014, <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Checkpoints%202014%2001%2015.pdf>; 2016, <http://www.acluaz.org/sites/default/files/documents/ACLU%20Complaint%20to%20CBP%20OPR%20June%202016.pdf>); ACLU of Arizona report, *Record of Abuse*, supra; ACLU of New Mexico report, *Guilty Until Proven Innocent: Border Patrol Discrimination in Southern NM* (2015), <https://www.aclu-nm.org/guiltyuntilproveninnocent/2015/05/>

probable cause to search vehicles. To send a person to “secondary” at a checkpoint for a non-immigration inquiry also requires reasonable suspicion. However, Border Patrol agents routinely ignore or misunderstand the limits of their legal authority.¹³ For example, “[i]n an interview, CBP and Border Patrol officials seemed unsure about what legal requirements, like probable cause, governed agents searching cars for possible immigration and general criminal violations. One finally stated that probable cause was not necessary to conduct an immigration-related search. According to James Lyall, [at the time] an attorney at the ACLU of Arizona, that is false: Probable cause, consent, or a warrant is always necessary for a vehicle search not conducted at a port of entry. ‘They have no idea what the rules are, in part because they can so easily ignore them,’ he says.”¹⁴

Northern border residents have reported Border Patrol agents conducting roving patrols near schools and churches and asking passengers for their documents on trains and buses that are traveling far from border crossings.¹⁵ Incidents, such as the brutal 2015 assault/Tasing of Jessica Cooke – a college criminology senior who had applied to work at CBP – at a checkpoint near Waddington, New York, have generated fear and distrust as well as millions of video views.¹⁶ The ACLU of Washington State brought and settled a class-action lawsuit to end the Border Patrol’s practice of stopping vehicles and interrogating occupants without legal justification. One of the plaintiffs in the case was an African American corrections officer and part-time police officer pulled over for no expressed reason and interrogated about his immigration status while wearing his corrections uniform.¹⁷

In the Lower Rio Grande Valley of Texas, residents in mixed-status families say they are scared to evacuate their homes in weather-related emergencies for fear they will be apprehended by Border Patrol. These checkpoints inhibit U.S. citizen children from receiving critical medical care, as reported last year by the New York Times¹⁸ and echoed in Flint, Michigan’s water crisis.¹⁹ Our colleagues in Brooks County, TX, contend with hundreds of tragic migrant deaths each year because the Falfurrias checkpoint is 57 miles from the actual border. Eduardo Canales, Director of the South Texas Human Rights Center, reports that “there has been a total of 45 bodies and remains recovered this year alone. These numbers only reflect what has been

¹³ For ACLU of Arizona's Know your Rights with Border Patrol advisory please see:

http://www.acluaz.org/sites/default/files/documents/ACLU%20Border%20Rights%20ENGLISH_1.pdf

¹⁴ Denvir, “Curbing the Unchecked Power,” supra.

¹⁵ https://www.aclu.org/files/assets/senate_hearing_ending_racial_profiling_in_america_written_statement_romero.pdf (pp. 16-18).

¹⁶ Chris Rickerd, “Border Patrol Violence Must Stop.” *Huffington Post* (June 5, 2015),

http://www.huffingtonpost.com/chris-rickerd/border-patrol-violence-must-stop_b_7523786.html

¹⁷ Complaint available at http://www.aclu-wa.org/sites/default/files/attachments/2012-04-26--Complaint_0.pdf

¹⁸ Manny Fernandez, “Checkpoints Isolate Many Immigrants in Texas’ Rio Grande Valley.” *New York Times* (Nov. 22, 2015) <http://www.nytimes.com/2015/11/23/us/checkpoints-isolate-many-immigrants-in-texas-rio-grande-valley.html>

¹⁹ Tina Vasquez, “Flint’s Undocumented Residents Go Without Care in Wake of Water Crisis.” *Rewire* (Sept. 8, 2016), <https://rewire.news/article/2016/09/08/flints-undocumented-residents-go-care-water-crisis/>

found. I would estimate that at least twice that number have also perished and remain scattered all over the brush terrain of Brooks County. These deaths are a result of Falfurrias checkpoint.”²⁰

III. CBP’s “vicinity of the border” exemption from the Department of Justice’s guidance on racial and other profiling by federal law enforcement must end, and CBP should collect data to evaluate whether it is engaging in biased policing.

We are dismayed that CBP and the Transportation Security Administration (TSA) obtained “exemptions” from the Department of Justice’s 2014 Guidance on the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity,²¹ and have not yet issued follow-up guidance of their own despite urging a year ago by the Congressional Progressive, Hispanic, and Asian Pacific American Caucuses.²² Often as a result of racial or religious profiling, innocent people are daily being stopped, interrogated and searched by Border Patrol without legal justification. As Jorge Rodríguez, a doctoral candidate in New Mexico whose young life has been filled with hostile checkpoint experiences, asks, “Why is Border Patrol permitted to treat me, a U.S. citizen, differently due to the color of my skin?”²³

The Caucuses’ letter emphasized that “[t]he 2014 DOJ Guidance stresses that profiling the public based on intrinsic characteristics is ‘simply not good law enforcement.’ It is also contrary to our constitutional principles. In *Montero-Camargo*, the Ninth Circuit noted that ‘[s]tops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone . . . that those who are not white enjoy a lesser degree of constitutional protection[,] assumed to be potential criminals first and individuals second.’ Profiling degrades the dignity of individuals and groups singled out based on immutable traits.”²⁴

Both northern and southern border communities are tired of CBP’s opacity; as the Caucuses’ letter makes clear, a profiling ban as well as data collection and publication are long overdue: “Border communities eagerly await these improvements, for example, a recent editorial in the Watertown (NY) *Daily Times* calls for proper CBP data collection and expresses surprise that protocols are not already in place: ‘Given the questions raised over the past few years about

²⁰ Correspondence with Eduardo Canales (Sept. 12, 2016) (on file with authors).

²¹ See SBCC, “Federal Reforms Usher Open Season for Racial Profiling in Border Communities.” (Dec. 8, 2014), available at <http://soboco.org/federal-reforms-ushers-open-season-for-racial-profiling-in-border-communities/>; Chris Rickerd, “A Dangerous Precedent: Why Allow Racial Profiling at or Near the Border?” (Dec. 8, 2014), available at <https://www.aclu.org/blog/immigrants-rights-racial-justice/dangerous-precedent-why-allow-racial-profiling-or-near-border>

²² Letter of October 9, 2015, <http://southernborder.org/cpc-chc-capac-urge-dhs-to-end-discriminatory-profiling/>

²³ Jorge Rodríguez, “Border Patrol Chief Must End Biased Policing to Restore Trust in Communities.” (Sept. 12, 2016), <https://www.aclu.org/blog/washington-markup/border-patrol-chief-must-end-biased-policing-restore-trust-communities>

²⁴ *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc).

racial and ethnic profiling by law enforcement agencies across the country, it's difficult to understand why documenting specific information about people who are stopped by border patrol personnel isn't being done. . . . Detailing who is being stopped, why they are being stopped and what resulted from the stop would go a long way toward ensuring CBP agents are staying within the law.' The *Arizona Republic* expressed concern that '[r]esidents of border communities south of Tucson have long complained about racial profiling and harassment at Border Patrol checkpoints. Their demands for information about the effectiveness of individual stops have been rebuffed.'"²⁵ Senator Kirsten Gillibrand has proposed a legislative response to this data-collection void after expressing dissatisfaction at CBP's lack of record-keeping.²⁶

Indeed, Border Patrol does not collect data on stops and searches that do not result in arrest, even though the President's Task Force on 21st Century Policing urges federal law enforcement agencies to "collect, maintain, and analyze demographic data on all detentions," and adds that "[t]o embrace a culture of transparency, law enforcement agencies should . . . regularly post on the department's website information about stops, summonses, arrests, reported crime, and other law enforcement data aggregated by demographics."²⁷ This data collection gap makes it difficult to detect and deter illegal or abusive treatment of the public at checkpoints and during patrol stops. CBP must also improve the effectiveness of Border Patrol service canines, which are not certified according to best law-enforcement standards and frequently issue false alerts.²⁸

IV. Case study: Checkpoints in and around Arivaca, Arizona

The communities of Arivaca and Amado, Arizona, located about 30 miles from the border, live with a substantial Border Patrol presence in their midst – surveillance towers, drones, helicopters, and dozens of agents on roving patrols.²⁹ Perhaps the most prominent feature of local Border Patrol operations is the four vehicle checkpoints located within forty miles of Arivaca and Amado, through which residents must pass to go about their daily business.

²⁵ "Write it up: Bill requiring border patrol to document stops is long overdue." *Watertown Daily Times* (June 6, 2015), <http://www.watertowndailytimes.com/opinion/write-it-up-bill-requiring-border-patrol-to-document-stops-is-long-overdue-20150606>; "You aren't above the law, Border Patrol." *Arizona Republic* (June 10, 2015), <http://www.azcentral.com/story/opinion/editorial/2015/06/10/you-arent-above-the-law-border-patrol/71036582/>

²⁶ David Sommerstein, "Gillibrand has 'serious concerns' about border patrol checkpoints." *North County Public Radio* (June 4, 2015), <http://www.northcountrypublicradio.org/news/story/28568/20150603/gillibrand-has-quot-serious-concerns-quot-about-border-patrol-checkpoints>

²⁷ PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 69 (2015), (Recommendation 2.6, Action Item 1.3.1, and Recommendation 7.1), available at http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

²⁸ ACLU Testimony for Senate Homeland Security and Governmental Affairs Committee Hearing on "Dogs of DHS: How Canine Programs Contribute to Homeland Security," (Mar. 3, 2016), 6, https://www.aclu.org/sites/default/files/field_document/senate_hsgac_canine_hearing_aclu_statement-final.pdf.

²⁹ Michel Marizco, *Living Life Under Federal Watch On The Border*, Fronteras/NPR, Aug. 5, 2013, <http://bit.ly/1EHuBaF>; Miller, *War on the Border*, supra (quoting an Amado rancher, "If you conduct business here, you live here, you're always being watched, you're always being stopped, and you're treated as if you're a criminal.")

Those checkpoints have been the source of numerous civil rights complaints, and one of them, the Arivaca Road checkpoint, led to a monitoring campaign by local residents demanding its removal. That campaign generated extensive media attention,³⁰ resulted in litigation,³¹ and produced what appears to be the first and only objective data available on systemic racial disparities in Border Patrol checkpoint operations.³²

In July 2013, the Arivaca, Arizona-based organization People Helping People (PHP) sponsored a forum for local residents to discuss the Border Patrol presence in their community and its impact on their lives. The discussion centered on the Arivaca Road checkpoint, with many describing routine harassment and abuse by agents. The group later reported: “[A]ll participants agreed on one point: that something is fundamentally wrong when the federal government enters a community and implements a policy by which no one, including children on their way to school, can leave without being stopped and questioned by armed federal agents—and under which all residents are suspects simply by virtue of where they live.”

PHP initiated a campaign to demand removal of the Arivaca Road checkpoint. The group began by documenting abuses of local residents.³³ A petition calling for removal, signed by nearly half of Arivaca’s residents and supported by Representative Raul Grijalva, was rejected by then-Tucson Sector Chief Padilla. Despite several statements by local Border Patrol officials that community concerns, including civil rights complaints, would be taken seriously, the agency has taken no public action in response to any such complaints. Those include a January 2014 ACLU complaint submitted to DHS oversight agencies on behalf of fifteen Arizona residents, including several from Arivaca, which is still pending.³⁴

In February 2014, PHP initiated a checkpoint-monitoring campaign to collect data on checkpoint operations and deter further abuses. Border Patrol immediately responded to the monitoring campaign by creating a roughly 350-foot wide buffer zone around the checkpoint; agents repeatedly claimed that exclusive authority within the “enforcement zone” was conferred by a county permit—this was unconvincing to advocates, as Border Patrol policies explicitly exempt checkpoints from local permitting requirements. After twice more writing to Chief Padilla seeking to resolve the dispute, members of PHP filed a lawsuit in November 2014.³⁵

³⁰ See, e.g., Fernanda Santos, *Border Patrol Scrutiny Stirs Anger in Small Town*, NY TIMES, June 27, 2014, <http://nyti.ms/1EY9oca>.

³¹ Bob Ortega, *Border Patrol Sued for Harassing at Arivaca Checkpoint*, AZ REPUBLIC, Nov. 26, 2014, <http://bit.ly/1Ec1k6n>.

³² Paul Ingram, *Residents Claim Racial Profiling at Border Patrol Checkpoint*, TUCSON SENTINEL, Oct. 19, 2014, <http://bit.ly/1B52CeR>.

³³ Community members’ descriptions of their experiences at the checkpoint are posted to the group’s website, http://phparivaca.org/?page_id=210.

³⁴ ACLU OF ARIZ., COMPLAINT AND REQUEST FOR INVESTIGATION OF ABUSES AT BORDER PATROL INTERIOR CHECKPOINTS IN SOUTHERN ARIZONA, INCLUDING UNLAWFUL SEARCH AND SEIZURE, EXCESSIVE FORCE, AND RACIAL PROFILING (Jan. 15, 2014), <http://bit.ly/1k73lqO>.

³⁵ *Jacobson et al. v. DHS et al.*, Case 4:14-cv-02485 (filed D. Ariz., Nov. 20, 2014), <http://bit.ly/1NKI99a>.

Prior to filing suit, PHP released the initial results of its monitoring campaign. Based on more than 100 hours of observation and 2,379 recorded vehicle stops, PHP's report found that Latino motorists were referred for secondary inspection twenty times more frequently than White motorists, and asked for identification twenty-six times more frequently.³⁶ Meanwhile, monitors observed no arrests or seizures of contraband; Border Patrol officials subsequently admitted that arrests at the Arivaca Road checkpoint are extremely rare, and that its primary purpose is "deterrence."³⁷

Two important lessons can be drawn from the experience of the Arivaca community. One is that CBP must expand its data collection to detect and deter abuse. To match best law-enforcement practices, such data must include critical information such as perceived race or ethnicity of those stopped, and the duration of and reasons for stops and searches. That information relates not just to the civil rights of border residents, but also has a direct bearing on the efficacy of operations (if agents are wasting time and resources violating the rights of innocent travelers, the agency's mission is compromised). As the PHP report concludes, "The fact that a small volunteer organization can document evidence of discriminatory and unlawful conduct by agents shows that the federal government can and should do the same, while holding agents accountable to the rule of law. The government's continued failure to do so implies that it condones these practices."

Secondly, CBP must be more transparent and responsive to community concerns, including allegations of civil rights abuses. Border Patrol's response to the PHP campaign – ignoring community complaints and then creating a checkpoint buffer zone, arbitrarily restricting residents from observing the treatment of friends and neighbors in their own community – demonstrates that the agency has a long way to go toward its promises of increased accountability and transparency.

Conclusion

CBP's interior enforcement operations run contrary to the reality of border communities, which are safe, diverse, and economically critical to this country. As Representative O'Rourke points out, "'El Paso is the safest city when you look at violent crime. There's no reason to cordon off the U.S. side of the U.S.-Mexico border from the rest of the country.'"³⁸ Border communities are forced to endure regular aggression, hostility, and intimidation from a significant percentage of CBP officers and agents. Border residents, like any community, should not have to live with fear and mistrust of law enforcement.

³⁶ *Community Report: Campaign Documents Systemic Racial Discrimination at Arizona Border Patrol Checkpoint*, Oct. 1, 2014, <http://bit.ly/1NKChNh>.

³⁷ *Jacobson Complaint*, *supra*, at 15 ¶78.

³⁸ Denvir, "Curbing the Unchecked Power," *supra*.

Border communities are a vital component of the trillion-plus dollars in trade between the U.S. and its neighbors, and the damaging effects of militarization on them must be addressed by serious oversight and accountability reforms to CBP. While the federal government has the authority to control our nation's borders and regulate immigration, CBP officials must do so in compliance with national and international legal norms and standards.

As employees of the nation's largest law enforcement agency, CBP officials should be trained and held to the highest law-enforcement standards. Systemic, robust and permanent oversight and accountability mechanisms for CBP must be the starting point for any discussion on border security:

- A DHS-wide ban on racial, religious and other offensive profiling that closes the “vicinity of the border” exemption to DOJ’s profiling guidance for federal law enforcement;
- Robust data collection and publication to ensure that CBP operations comport with anti-discrimination law and guidance;
- Equipping all CBP personnel with body-worn cameras, within a policy framework including robust privacy protections;³⁹
- Implementing enforceable CBP custody standards;⁴⁰
- Reforming DHS complaint systems to provide a transparent, uniform, efficient process for filing complaints;⁴¹ and
- Rolling back the antiquated 100-mile zone to properly define “reasonable distance” from the border as no more than 25 miles (10 miles for warrantless entry onto private lands).

³⁹ See, e.g., National Immigration Forum, *Body Cameras and CBP: Promoting security, transparency and accountability at our nation's borders* (2015), <http://immigrationforum.org/wp-content/uploads/2015/11/Body-Cameras-and-CBP-Report-11062015.pdf>

⁴⁰ Ed Pilkington, “Images from US Border Patrol facility reveal harsh conditions for immigrants.” *The Guardian* (Aug. 18, 2016), <https://www.theguardian.com/us-news/2016/aug/18/us-border-patrol-facility-images-tucson-arizona>

⁴¹ See Coalition Recommendations to DHS to Improve Complaint Processing (2014), https://www.aclu.org/files/assets/14_5_5_recommendations_to_dhs_to_improve_complaint_processing_final.pdf; see also American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* (2014), available at <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>

Such improvements would create a legacy of CBP reform in order to improve the quality of life and restore trust for this and future generations of border residents. We urge the Subcommittee to prioritize accountability at CBP that transforms border enforcement in a fiscally responsible manner, respects and listens to border residents before imposing policy, and upholds Constitutional rights and American values.