



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION, the
SOUTHERN BORDER COMMUNITIES COALITION, and the
NORTHERN BORDERS COALITION

For a Hearing on

“Open Borders: The Impact of Presidential Amnesty on Border Security”

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ACLU Washington Legislative Office

Laura W. Murphy, Director
Christopher Rickerd, Policy Counsel

ACLU of New Mexico, Regional Center for Border Rights

Vicki B. Gaubeca, Director
Brian Erickson, Policy Advocate

Southern Border Communities Coalition

Christian Ramirez, Director

Northern Borders Coalition

Ryan Bates, Executive Director, Michigan United
Rich Stolz, Executive Director, OneAmerica
Steve Choi, Executive Director, New York Immigration Coalition

I. Introduction

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. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. 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, regardless of race, religion, gender, sexual orientation, disability, or national origin. The ACLU's Washington Legislative Office (WLO) conducts legislative and administrative advocacy to advance the organization's goal of protecting border residents' and immigrants' rights, including supporting a roadmap to citizenship for aspiring Americans.

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. The RCBR works in conjunction with ACLU affiliates in California, Arizona, Texas, Michigan, Washington, and New York, as well as advocates throughout the border region who comprise the Southern Border Communities Coalition (SBCC) and the Northern Borders Coalition (NBC). 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. NBC is a union of organizations along the northern border working to stand up for civil and human rights together. The Coalition helps build shared strategies amongst members to address new border challenges, and collaborates with partners in the Southwest to share best practices.

The ACLU, SBCC, and NBC submit this statement to provide the Committee with an appraisal of the civil liberties implications of border security proposals. The ACLU, SBCC, and NBC oppose exorbitant spending on border enforcement, spending which is taking place without thoughtful consideration of current community and security needs. Current proposals to throw money, personnel, and equipment at the border would exacerbate the problems border communities face with militarization today and ignore that:

- Deployment of additional border security resources along the U.S.-Mexico border would not be rooted in true border security needs. Over more than a decade, the U.S. government has built a massive and comprehensive enforcement regime that has produced the most enforced border in U.S. history. Adding more resources would not only be wasteful and unnecessary, but would also be at odds with the top-of-the-charts safety, economic vitality, and diversity of border communities.
- Overall, border-wide apprehensions by U.S. Customs and Border Protection (CBP) are at their lowest levels in 40 years and net migration from Mexico at zero. This summer's migration of families and children fleeing violence in Central America and turning themselves in was correctly identified by CBP leadership as a humanitarian matter.
- Spending, with particular emphasis on the Southwest border, has increased dramatically over the last decade with no commensurate accountability measures, resulting in civilian deaths at the hands of CBP personnel, unnecessary migrant deaths in the desert, and many other civil and human rights abuses on both our nation's southern and northern borders.

The U.S. government cannot afford to throw money down the border-security drain, particularly because this spending has also damaged quality of life in border communities. The Committee must not, without transparent and broad-ranging metrics, uncritically adopt the erroneous conventional wisdom of

inadequate border security. Suggesting in a vacuum of information that more border enforcement resources are needed lacks fiscal responsibility and fails to give due attention to the true needs of border communities suffering from a wasteful, militarized enforcement regime. Moreover, justifying the additional deployment of border enforcement resources and family detention as an appropriate response to a humanitarian crisis in Central America contradicts our core values of compassion and justice for scared mothers and children.

The ACLU, SBCC and NBC urge the Committee to focus its efforts on ensuring that future border security is conducted humanely and in accordance with best police practices. Legislation should bring greater oversight and accountability—not war equipment or more boots on the ground—to CBP: our nation’s largest law enforcement agency.

I. Border-Security Proposals Must Reject the Misguided, Wasteful Approach of the Senate’s Corker-Hoeven “Border Surge” Amendment. Instead, Congress Should End the Abusive Militarization of Border Communities.

a. The “Mini-Industrial Complex” of Border Spending

The Committee has to this point, commendably, not followed the severely misguided approach incorporated last year in Senate Bill 744’s “surge” of border-security resources. Such proposals ignore the fact that border security benchmarks of prior proposed or enacted legislation (in 2006, 2007, and 2010) have already been met or exceeded.¹ In the last decade, the United States has relied heavily on enforcement-only approaches to address migration, using deterrence-based border security strategies that have continued and expanded to record levels under the Obama Administration:

- 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 unnecessary overreach based on outdated regulations issued in the 1950s.
- Because of “zero-tolerance” initiatives like Operation Streamline, the Department of Homeland Security (DHS) now refers more cases for federal prosecution than the Department of Justice’s (DOJ) law enforcement agencies. Under President Obama, immigration-related federal prosecutions have reached record levels at tremendous cost to U.S. taxpayers. Federal prisons are already more than 30 percent over capacity, due in large part to indiscriminate prosecution of individuals for crossing the border without authorization, often to rejoin their families.² The majority of those sentenced to federal prison in 2013 were Latinos, who are now held in large numbers in substandard private prisons.³
- Since 2003, the U.S. Border Patrol has doubled in size and now employs more than 21,400 agents, with about 85 percent of its force deployed at the U.S.-Mexico border. So many Border Patrol agents now patrol the southern border that if they lined up equally from Brownsville to San Diego, they would stand in plain sight of one another. This number does not include the thousands of other DHS officials, including CBP Office of Field Operations officers and one-fourth of all Immigration and Customs Enforcement (ICE) personnel

¹ Chen, Greg and Kim, Su. “Border Security: Moving Beyond Past Benchmarks,” AMERICAN IMMIGRATION LAWYERS ASSOCIATION, (Jan. 30, 2013), available at: <http://www.aila.org/content/default.aspx?bc=25667|43061>

² Carson, E. Ann. U.S. Department of Justice, BUREAU OF JUSTICE STATISTICS, “Prisoners in 2013” (Sept. 2014), available at: <http://www.bjs.gov/content/pub/pdf/p13.pdf>

³ U.S. Sentencing Commission, 2013 ANNUAL REPORT, Chapter 5, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/2013_Annual_Report_Chap5_0.pdf; see also ACLU of Texas and ACLU, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*. (June 2014), available at <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>

deployed at the same border. It also does not include 651 miles of fencing, 333 video surveillance systems, and at least 10 drones for air surveillance.

From a fiscal perspective, 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.⁴ 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 FY2015, the Administration's budget request for CBP was about \$12.8 billion.⁵ U.S. taxpayers now spend more on immigration enforcement agencies (\$18 billion) than on the FBI, DEA, ATF, U.S. Marshals, and Secret Service—*combined*.

CBP's spending runs directly counter to data on recent and current migration trends and severely detracts from the true needs of border security. Much attention has been paid to increased apprehensions of children and families in south Texas, many of whom are fleeing terrible violence in Central America. When analyzed border-wide and over time, however, migrant apprehensions remain lower than at any time since the 1970s. Between 2000 and 2010, apprehensions by the Border Patrol declined more than 72 percent to about 463,000. In FY2013, Border Patrol apprehended almost 421,000 illegal crossers in total—fewer than in 2010 and an equivalent of less than two apprehensions a month per agent.⁶

The costs per apprehension vary per sector, but are generally at an all-time high. The Yuma, Arizona sector, for example, has seen a 95 percent decline in apprehensions since 2005 while the number of agents has tripled. Each agent was responsible for interdicting fewer than seven immigrants in 2013, contributing to ballooning per capita costs: each migrant apprehension at the border now costs five times more, rising from \$1,400 in 2005 to over \$7,500 in 2011.⁷

The Committee should heed House Appropriations Committee Chairman Hal Rogers' warning about the irrationality of border spending: "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."⁸ The Committee's data-driven, bipartisan approach to border security, as embodied by H.R. 1417, the Border Security Results Act, is an improvement over proposals like the Corker-Hoeven "border surge." However, H.R. 1417's narrow focus on border security remains misplaced at a time when border enforcement is at an all-time high and continues to have a detrimental impact on border communities. It also sets flawed benchmarks in seeking a 90 percent "illegal crossing effectiveness rate" across the Southwest border without contemplating a thorough study of border needs, particularly greater oversight and accountability and cross-border economic exchange.

b. Congress Must Expand Oversight and Accountability to Mitigate CBP Corruption and Abuse.

⁴ 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

⁵ Department of Homeland Security. "Budget-in-Brief: Fiscal Year 2015," available at <http://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf>

⁶ U.S. Border Patrol, "Nationwide Illegal Alien Apprehensions Fiscal Years 1925-2013," available at: <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Apprehension%20Statistics%201925-2013.pdf>

⁷ Immigration Policy Center, *Second Annual DHS Progress Report*. (Apr. 2011), 26, available at http://www.immigrationpolicy.org/sites/default/files/docs/2011_DHS_Report_041211.pdf

⁸ 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>

Unprecedented investment in border enforcement without corresponding oversight mechanisms has led to an increase in human and civil rights violations, traumatic family separations in border communities, and racial profiling and harassment of Native Americans, Latinos, and other people of color – many of them U.S. citizens and some who have lived in the region for generations. Corruption and criminal conduct have also plagued the dramatically and recklessly expanded CBP force, which, as reported by *Politico Magazine*, had nearly one CBP officer or agent arrested for misconduct **every single day** from 2005 to 2012.⁹

Politico Magazine's exposé of CBP closely examines the now well-documented deficiencies in CBP's use-of-force policy and practice, which have led the agency to become one of our nation's "deadliest" and most "out-of-control" law enforcement agencies. Since January 2010, at least 31 individuals have died from lethal force by CBP officers and agents. These cases include 14 individuals who were U.S. citizens and 6 individuals who were shot and killed while standing in Mexico—three of whom were teenagers, ages 15, 16 and 17.

In numerous cases individuals were shot multiple times, including through the back, such as Jose Antonio Elena Rodriguez who was struck by at least eight bullets—all but one in the back—across the border fence in Nogales, Sonora by agents responding to alleged rock throwing.¹⁰ Also among the most well-known cases is that of Anastasio Hernandez Rojas who—by the happenstance of a witness video—was shown to be handcuffed and prostrate on the ground, contrary to the agency's incident reporting, when dozens of agents beat and Tased him to death. The San Diego coroner classified Mr. Hernandez's death as a homicide, noting in addition to a heart attack: "several loose teeth; bruising to his chest, stomach, hips, knees, back, lips, head and eyelids; five broken ribs; and a damaged spine." Both of these cases, and many more, illustrate common shortcomings in policy and practice that were criticized in an audit of CBP's use-of-force incidents conducted by the Police Executive Research Forum (PERF) and publicly released on May 30, 2014.

The *Arizona Republic* documented more than 46 deaths for which CBP is responsible since 2004-2005, and, as noted by the *Republic* in December 2013, in "none of [these] deaths has any agent or officer been publicly known to have faced consequences — not from the Border Patrol, not from Customs and Border Protection or Homeland Security, not from the Department of Justice, and not, ultimately, from criminal or civil courts."¹¹ Former head of CBP Internal Affairs James F. Tomsheck has flagged at least a quarter of 28 lethal force cases as "highly suspect," and alleged that "Border Patrol officials have consistently tried to change or distort facts to make fatal shootings by agents appear to be 'a good shoot' and cover up any wrongdoing." Perhaps most alarmingly of all, Tomsheck said he believes that thousands of employees hired by CBP during the agency's unprecedented expansion after 9/11 are potentially unfit to carry a badge and gun.¹² Lack of accountability for these unprofessional and dangerous personnel mars the reputations of officers and agents who conduct themselves properly.

CBP's failure to establish an institutional culture of accountability has far-reaching consequences for border communities, beyond excessive force. Numerous administrative complaints, legal claims, and reports documenting widespread CBP abuse in short-term custody facilities detail physical and verbal

⁹ Graff, Garrett M. "The Green Monster: How the Border Patrol became America's most out-of control law enforcement agency," *POLITICO MAGAZINE* (Nov./Dec. 2014), available at <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220.html#.VHdurlfF8Wk>

¹⁰ Skoloff, Brian. "Border Patrol Shot Mexican Teen Jose Antonio Elena Rodriguez 8 Times: Autopsy," *ASSOCIATED PRESS* (Feb. 8, 2013), available at http://www.huffingtonpost.com/2013/02/08/border-patrol-shot-mexican-teen-jose-antonio-elena-rodriguez-autopsy_n_2646191.html

¹¹ Crosby, Cherrill. "Change occurring after Republic's border investigation," *ARIZONA REPUBLIC* (Aug. 4, 2014), available at: <http://www.azcentral.com/story/news/politics/investigations/2014/08/02/border-force-republic-investigation-change/13534935/>

¹² Becker, Andrew. "Removal of border agency's internal affairs chief raises alarms," *CENTER FOR INVESTIGATIVE REPORTING* (June 12, 2014), available at: <http://cironline.org/reports/removal-border-agencys-internal-affairs-chief-raises-alarms-6443>

abuse, denial of medical care, failure to provide sufficient food and water, overcrowding, exposure to extreme temperatures, denial of communication with family and consular or legal support, failure to return personal belongings at the moment of repatriation, and use of coercion to pressure individuals into signing away legal rights. One New Mexican, Jane Doe, was held for hours by CBP officials who subjected her to repeated, invasive searches at a port of entry in El Paso, TX and subsequently a local hospital. After hours of humiliating searches she never consented to and which turned up no contraband, Ms. Doe was released with a hospital bill.¹³

CBP operates in an antiquated 100-mile zone extending toward the interior from any land or sea border, a distance that has no statutory basis and originated without scrutiny 60 years ago in now-outdated regulations.¹⁴ 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. This zone has converted CBP, particularly Border Patrol, into an interior enforcement agency that widely roams border communities.

By setting up interior checkpoints and conducting roving patrols many miles from the border, CBP does little to further border security goals but much to harm the quality of life of those who live and work in the border region. This includes communities like Arivaca, AZ, where residents have petitioned for the removal of one of three interior checkpoints that surround their community and have documented daily encounters between residents and agents. Their report found that Latino motorists were more than 26 times more likely to be asked to show identification, and 20 times more likely to be sent to secondary inspection.¹⁵ But even non-Latino residents like Clarisa Christiansen and her children live in fear of the Border Patrol after agents pulled her over on a rural stretch of road near her house, threatened to cut her out of her seatbelt with a knife, and slashed her tires—all because she asked to know the reason agents stopped her.¹⁶

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. 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

To expand border resources – particularly Border Patrol staffing – would badly worsen CBP's accountability crisis and compound the damage caused by prior hiring binges. It would also run contrary to the reality of border communities, which are safe,¹⁸ diverse, and economically critical to this country. Our communities are forced to endure regular aggression, hostility, and intimidation from a significant

¹³ Planas, Roque. "Woman's Lawsuit Alleges Horrifying Abuse By Border Officers, Including Cavity Searches And Forced Bowel Movements," HUFFINGTON POST (Mar. 6, 2014), available at http://www.huffingtonpost.com/2014/03/06/border-cavity-search_n_4907225.html

¹⁴ See ACLU, *The Constitution in the 100-Mile Border Zone* (2014), available at <https://www.aclu.org/immigrants-rights/constitution-100-mile-border-zone>

¹⁵ Echevarri, Fernanda. Group Alleges Border Patrol is Racial Profiling at Arivaca Checkpoint, NATIONAL PUBLIC RADIO (Oct. 20, 2014), available at: <https://www.azpm.org/p/top-news/2014/10/20/47393-group-alleges-border-patrol-is-racial-profiling-at-arivaca-checkpoint/>

¹⁶ See video at ACLU website "Border Communities Under Siege," available at <https://www.aclu.org/border-communities-under-siege-border-patrol-agents-ride-roughshod-over-civil-rights>

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

¹⁸ See, e.g., Frances Burns, "Rep. Cuellar: Texas cities on the Mexican border have less crime." UPI (Nov. 19, 2014) (quoting Congressman Cuellar: "Many people characterize the southern border as being unsafe but today's numbers paint a very different picture."), available at http://www.upi.com/Top_News/US/2014/11/19/Rep-Cuellar-Texas-cities-on-the-Mexican-border-have-less-crime/3971416406308/

percentage of CBP officers and agents. Border residents, like any community, should not have to live with fear and mistrust of law enforcement.

Border communities are a vital component of the half-trillion dollars in trade between the U.S. and Mexico, 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:

- Equipping all CBP personnel with body-worn cameras;¹⁹
- Implementing enforceable custody standards;
- Reforming DHS complaint systems to provide a transparent, uniform process for filing complaints;²⁰ and
- Rolling back the antiquated 100-mile zone.

Such improvements would create a legacy of CBP reform that would improve the quality of life and restore trust for this and future generations of border residents.

Conclusion

Congress should transform border enforcement in a manner that is fiscally responsible, respects and listens to border residents before defining their communities' needs, and upholds Constitutional rights and American values. The ACLU, SBCC, and NBC commend the House Committee on Homeland Security for its past commitments to define border security with precision before funneling more resources. We urge the Committee to prioritize reduction of CBP abuses in the currently-oppressive border and immigration enforcement system which has cost more than \$250 billion in today's dollars since 1986.²¹

¹⁹ See ACLU, "Strengthening CBP with the Use of Body-Worn Cameras." (June 27, 2014), available at <https://www.aclu.org/criminal-law-reform/strengthening-cbp-use-body-worn-cameras>

²⁰ See ACLU et al., Recommendations to DHS to Improve Complaint Processing (2014), available at https://www.aclu.org/sites/default/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>

²¹ Robbins, *supra*.