



Restoring Civil Liberties and Ending Militarization in Border Communities

Customs and Border Protection's (CBP) failed enforcement strategies and ever-expanding presence across the United States erodes constitutional protections, squanders taxpayer dollars, and harms communities at the border and beyond. In CBP, the Trump administration found the ideal vehicle to carry out its abusive policies, knowing the agency's lack of accountability and transparency would allow it to facilitate the worst of President Donald Trump's anti-immigrant agenda largely shielded from scrutiny. Righting Trump's wrongs and preventing future abuse under a new administration requires reining in CBP.

U.S. communities along the Southwest border are multinational, multicultural, and economically vibrant. Some 15 million residents call the Southwest borderlands home, a vital region for trade that bolsters the entire U.S. economy. CBP's vision of the border goes well beyond the Southwest or the border itself. CBP most frequently acts within a 100-mile border zone, defined as 100 air miles from any land or sea boundary, in which two-thirds of the U.S. population live. Commonly violating the Constitution, CBP has expanded its activities in the 100-mile zone to include over 40 permanent checkpoints that individuals must pass through every day, which further militarizes border communities and blocks border communities from free movement and access to essential services—all at the expense of U.S. taxpayers.¹

The hallmark effort of the Trump administration to build miles of wall on the U.S.-Mexico border goes beyond xenophobic campaign slogans—border walls destroy the environment, damage communities, kill migrants funneled into more dangerous crossings, and waste taxpayer money. Congress last allocated \$1.375 billion to finance construction of new border barriers.² This was despite the GAO previously concluding that DHS does not responsibly spend already allocated funds, finding that “DHS faces an increased risk that the Border Wall System Program will cost more than projected, take longer than planned, and not fully perform as expected.”³ The Trump administration has far exceeded even appropriated funds, spending billions via illegal money grabs from other agency budgets not allocated for border wall.

Beyond walls, the wasteful militarization of the border further terrorizes communities and normalizes the entrenchment of a security state in the border region. The Trump administration deployed, through various operations at various times, over 16,000 Department of Defense (DOD) personnel to the border. The administration also issued various memos and directives making deeply concerning expansions to permissible use of force guidelines for military personnel at the border, including permitting the use of deadly force by U.S. troops in certain

¹ See Melissa del Bosque, *Checkpoint Nation*, TEXAS OBSERVER, Oct. 8, 2018, <https://www.texasobserver.org/checkpoint-nation/>.

² See FY2020 DHS Appropriations Act, P.L. 116-93, Div. D, §209(a)(1).

³ Consolidated Appropriations Act of 2017; see also United States Government Accountability Office, *Southwest Border Security: CBP Is Evaluating Designs and Locations for Border Barriers but Is Proceeding Without Key Information*, July 2018, <https://www.gao.gov/assets/700/693488.pdf>.

circumstances.⁴ Retired generals have called these deployments “dangerous” and “wasteful,”⁵ and Border Patrol’s own union called past deployments a “colossal waste of time.”⁶

Before the Trump administration, CBP operated “the largest law enforcement air force in the world ... equivalent roughly to the size of Brazil’s entire combat air force.”⁷ By 2014, CBP’s massive budget had built up a fleet of around 250 planes, helicopters, and drones. Since then, CBP’s budget and fleet have only grown, and today the agency operates an air force across the entire United States capable of carrying out surveillance activities throughout the country.⁸ The agency also continues to pour significant resources into mobile surveillance systems, ground sensors, mobile X-ray technology, and a fleet of Predator B drones.

Surveillance technology justified in border security frequently spreads across border communities, degrading privacy rights of all individuals. Adopted and normalized by CBP, surveillance tactics have frequently spread to other law enforcement agencies both along the border and deep into the interior. One recent study identified nearly 230 instances of local law enforcement using advanced technologies in border communities, including “facial-recognition software, cellphone-tracking ‘sting ray’ towers, real-time crime centers, license-plate cameras, gunshot-detecting acoustic-surveillance devices, drones, and spy planes.”⁹ This patchwork of technologies can track where people travel, track who they call and text, and identify people without their knowledge or consent. Ranchers along the border have spoken out against invasive technology installed on their property, but the true harms of such surveillance are too often unknown, with border residents commonly targeted without ever being aware. Their rights are withered by normalized and consistent invasion of their privacy.

Drones are a major element of the border surveillance landscape, yet a recent Cato Institute study found that drone use resulted in just 0.5 percent of border apprehensions and only half of their deployments were actually in support of Border Patrol.¹⁰ Most recently, CBP deployed its surveillance capabilities over Black Lives Matter protests.

CBP’s use of face recognition technology at the border threatens the privacy rights of all. The technology is one of the most dangerous forms of biometric tracking and carries the potential for growth into a widespread tool for spying on people as they go about their daily lives. Despite studies showing the technology is racially biased, it can be used for surveillance through public

⁴ ACLU Letter To Secretary Of Defense & Acting Commissioner Morgan Regarding Military Deployment At Border (March 18, 2020), <https://www.aclu.org/letter/aclu-letter-secretary-defense-acting-commissioner-morgan-regarding-military-deployment-border>.

⁵ Greg Jaffe and Dan Lamothe, *Former generals worry that Trump’s border mission uses troops as a political tool*, WASHINGTON POST, Nov. 2, 2018, <https://wapo.st/38AiHbG>.

⁶ Todd South, *Border Patrol Union Head Calls National Guard Deployment ‘A Colossal Waste of Time,’* MILITARY TIMES, May 25, 2018, <https://bit.ly/2VZSbz5>.

⁷ Garrett M. Graff, *The Green Monster: How the Border Patrol Became America’s Most Out-of-Control Law Enforcement Agency*, POLITICO, Nov./Dec. 2014, <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220>.

⁸ U.S. CUSTOMS AND BORDER PROTECTION, AIR AND MARINE OPERATIONS OPERATING LOCATIONS, <https://www.cbp.gov/border-security/air-sea/oam-operating-locations>.

⁹ Sidney Fussel, *The Endless Aerial Surveillance of the Border*, THE ATLANTIC, Oct. 11, 2019, <https://www.theatlantic.com/technology/archive/2019/10/increase-drones-used-border-surveillance/599077/>.

¹⁰ David J. Bier and Matthew Feeney, *Drones on the Border: Efficacy and Privacy Implications*, CATO INSTITUTE, May 1, 2018, <https://www.cato.org/publications/immigration-research-policy-brief/drones-border-efficacy-privacy-implications>.

video cameras, mapping a person's movement without their knowledge or consent and raising serious constitutional concerns.

Recently, the Trump administration announced a new contract for hundreds of millions of dollars with a tech start-up to deploy hundreds of mobile surveillance towers across the border over the next five years, adding to the dragnet of cameras already in place across the region, including in neighborhoods close to the border. This is despite CBP spending \$1 billion on its last failed attempt to create a "virtual border fence." Again, this effort by the Trump administration does not come with any of the necessary privacy protections, nor does peppering sensitive lands with mobile surveillance towers properly respect border communities or the environment.

Further, CBP's history of turning invasive surveillance on domestic populations raises concerns that additional investment in "virtual" walls or technology will turn into vast surveillance. Oversight agencies have never reviewed or certified the efficacy of such technology or how rights will be protected. Absent such review and restrictions, a virtual border wall stands as nothing more than an extension of President Trump's monument to anti-immigrant xenophobia and a blatant disregard for the rights and civil liberties of border communities.

Reining in the nation's largest and least accountable law enforcement agency requires budget cuts and removing the nation's border agency from the interior. It is not enough to reverse Trump-era border policies. CBP requires core reforms. As President-elect Joe Biden has stated, "[t]he border between Mexico and the U.S. shouldn't be treated like a war zone."

Recommendations to the President

First 100 Days

Reform CBP in the 100-mile border zone and beyond. Issue an executive order that does the following:

1. Directs DHS to ensure that all CBP officials uniformly comply with full Fourth Amendment standards throughout the United States, including in any delineated border zone, and directs the attorney general to conduct all necessary investigations to assess needed steps to bring CBP policy and practices into full compliance with Fourth Amendment standards.
2. Eliminates all permanent interior Border Patrol checkpoints. At a minimum, the executive order should (1) direct DHS to adopt all necessary regulations and directives to limit the use of internal Border Patrol checkpoints to 10 air miles from any international land border, and (2) strictly limit questioning and stops at all such checkpoints to the narrow purpose permitted by the Supreme Court in *U.S. v. Martinez-Fuerte*, namely a "brief detention" to determine immigration status. The president and DHS should also commit to seek passage of legislation to remove DHS's authority to maintain internal checkpoints.
3. Commits to an immediate 50 percent reduction in the number of Border Patrol agents to a total maximum of 10,000 nationwide, and to working toward a reduction in agents to below 5,000 within two years, reflecting a return to pre-1994 staffing levels, prior to the implementation of the failed "prevention through deterrence" policy.
4. Directs the Department of Justice (DOJ) to revise guidance on use of racial profiling by federal law enforcement to eliminate existing border and national security loopholes and prohibit profiling based on actual or perceived race, religion, national origin, sexual orientation, or gender (including gender identity and expression), and instructs DHS to issue parallel guidance.

Beyond the First 100 Days

In furtherance of the president's executive order, DHS should issue regulations to do the following:

1. Revise 8 C.F.R. § 287.1(a)(2) to limit the term *reasonable distance* in 8 U.S. Code § 1357(a)(3) for Border Patrol agents to 10 air miles from any international land border and for CBP officials to 10 air miles from any international land or ocean border.
2. Amend 8 C.F.R. § 287.1 (a)(1) to define the term *external boundary* for U.S. Border Patrol agents to strictly international land boundaries and for CBP officials to international land or ocean borders.

In furtherance of the president's executive order, DHS should issue directives that instruct:

1. All ICE officers and CBP officials to comply fully with the Fourth Amendment within any delineated border zone, thereby requiring reasonable suspicion for all searches or seizures of any railway car, aircraft, conveyance, or vehicle and for all incursions on private property within any defined border zone, notwithstanding 8 U.S. Code § 1357(a)(3). Recognizing the unconstitutional nature of CBP's claimed authority to ignore constitutional protections within the border zone, the president and DHS should also indicate their intention to pursue statutory reform to clarify and limit CBP's authority.
2. CBP to collect and publish monthly incident data on all stops by Border Patrol roving patrols (not just arrests), internal checkpoint searches and seizures, and incursions on private property, including the factual basis for and the duration of each stop of people and each incursion onto private property; whether a search was conducted or force was used; whether an arrest was made; the race and ethnicity of the landowner or seized person(s); the badge number of any local, state, or federal law enforcement officer(s) present; and the legal justification for the agency's action each time. Personal identifying information of the person(s) stopped, searched, or seized should be redacted.
3. CBP to collect and publish quarterly the number and location of permanent and temporary CBP checkpoints, including a description of other local, state, or federal law enforcement agencies or resources utilized at each checkpoint.

Halt the Border Wall Construction and Remediate the Damage

First 100 Days

1. The White House should direct CBP, DOD, and any other agencies involved in wall projects to immediately halt all wall and barrier construction, and direct CBP to return the funds transferred from the Treasury Forfeiture Fund pursuant to 31 U.S.C. § 9705 used to pay for Trump's border wall.
2. DOD and CBP should develop and implement a plan to freeze or rescind border wall construction contracts that rely on funds that were not appropriated by Congress for the explicit purpose of building border barriers, including contracts financed by redirecting DOD appropriations or drawing on the Treasury Forfeiture Fund.
3. The administration should conduct a comprehensive assessment of the feasibility of dismantling existing border walls and barriers through consultation with environmental experts and border and tribal communities.

Beyond the First 100 Days

1. In collaboration with other agencies, and in consultation with local governments, communities, and stakeholders, CBP should develop and implement a plan to remediate environmental and other harmful consequences caused by existing border walls and other border barriers. The plan should include the restoration of national monuments,

cultural sites, and the integrity of protected lands destroyed or damaged by wall construction.

2. The White House should withdraw Proclamation 9844, the declaration of a national emergency issued by President Trump on February 15, 2019 (and subsequently extended) and affirm that there is no emergency at the southern border requiring the use of the armed forces.
3. DHS should commit that it will not invoke waiver authority under Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note (IIRIRA), which prior administrations have used to waive environmental, historical, cultural, and contracting laws and regulations in order to construct border barriers.
4. The administration should commit that it will not seize private property to build border walls. If it pursues any taking of private property, DOJ should ensure that displaced landowners are fully compensated prior to seizure, notwithstanding the transfer provisions of 40 U.S.C. § 3114.
5. The U.S. International Boundary and Water Commission should ensure that all construction along the southern border complies with U.S. international treaty obligations.
6. DHS should reject private efforts to construct border walls and refuse transfer of custody and responsibility of border barriers constructed by private funds.

End the Practice of Deploying Military Troops to Enforce Immigration Law

First 100 Days

The administration should commit to:

1. Not deploy military troops to the U.S. border for the purpose of engaging in or assisting in the enforcement of immigration law, which remains a civilian matter.
2. Withdraw all military personnel from the U.S.-Mexico border, as well as request that governors withdraw any National Guard units deployed to the border under state authority. Withdrawal should include the dismantling and removal of all border infrastructure put in place by military personnel, such as concertina wire and other border barriers.
3. Sign an order clarifying that no military troops can be sent to a border except by order of the president, transmitted to the secretary of defense for implementation, consistent with all legal obligations.

Beyond the First 100 Days

1. The DOD, the U.S. Coast Guard under DHS authority, CBP, and other DHS components should ensure maximum public transparency regarding past and current troop deployments to the border, to the extent they continue until full withdrawal is complete. The administration should conduct a declassification review of all currently classified documents related to military at the border to ensure maximum public disclosure.
2. The White House should commit to supporting legislative reforms to statutory provisions governing the domestic use of military force in order to strengthen the vital separation between the military and domestic civilian affairs and to guard against future abuses in the immigration policy context. Reforms should include tighter standards for military deployments and stronger restrictions on the activities that troops may perform.

Secure Privacy Protections for Border Communities

First 100 Days

A new administration's consideration of any additional surveillance technology should adhere to the following limitation and protections. No surveillance technology should be continued, expanded, or adopted unless:

1. An independent oversight body certifies that:
 - the technology is effective and serves a legitimate agency purpose
 - it is the least intrusive means of serving the stated purpose
 - it does not adversely impact the rights and civil liberties of border communities
 - the agency is complying with existing civil rights, civil liberties, and privacy laws, guidance, and principles
 - there is appropriate redress
 - any data collected is handled appropriately, limited in scope and use, and has appropriate cybersecurity protections
 - it is cost effective
 - the agency has appropriately consulted with stakeholders, including impacted communities, in the development of any plans. (The president and DHS should also support codification of such a review process in legislation.)
2. The technology is accompanied by strict limits on data collection, processing, sharing, and retention, including the following:
 - prohibiting large-scale suspicionless collection of personal information
 - prohibiting collection of personal information of border residents without consent
 - limiting use to its original purpose
 - requiring prompt purging of any data collected once its purpose has been fulfilled
 - limiting any data collection to the least intrusive means possible
3. In addition, prior to deployment, the agency should release its legal justification for the use of the technology, any memorandums of understanding with other agencies and accompanying justifications for each agreement, details about the capabilities of the technology, and its data collection and handling policies.
4. Invasive surveillance technology should not be considered a viable alternative to physical border barriers absent the strict protections delineated above. Specifically, CBP should abandon its use of drones. Other mass surveillance devices, including but not limited to tethered blimps, "surveillance towers," and wide-area aerial surveillance must never be used to surveil border communities or other interior areas of the United States.
5. International ports of entry are not Constitution-free zones, and invasive practices and technology at ports must be brought in line with constitutional norms, including the following:
 - CBP should update its current border device search policy to (1) require a warrant based on probable cause for any search of the contents of an electronic device, (2) prohibit searches for general law enforcement purposes and for vague "national security concerns," and (3) state that no traveler can be required to unlock a device or provide a password as a condition of entry. DHS should ensure that all other DHS agencies abide by these standards.
 - CBP and the Transportation Security Administration should halt their expansion and use of facial recognition because Congress has never explicitly authorized the use of facial recognition as part of entry/exit or domestic travel and issued rulemaking complying with the standards articulated by Congress.