



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

For a Markup of

**[H.R. 3548](#), the *Border Security for America Act*,  
introduced by Chairman Michael McCaul.**

**Submitted to the U.S. House Committee on Homeland Security**

October 4, 2017

**American Civil Liberties Union,  
National Political Advocacy Department**  
Faiz Shakir, National Political Director  
Lorella Praeli, Director of Immigration Policy and Campaigns  
Chris Rickerd, Policy Counsel  
Tyler Ray, Legislative Assistant

**ACLU of New Mexico, Regional Center for Border Rights**  
Brian Erickson, Interim Director

**Southern Border Communities Coalition**  
Christian Ramírez, Director  
Jenny Johnson, Border Policy Advisor  
Vicki Gaubeca, Policy and Communications Strategist

**Northern Borders Coalition**  
David Sanchez, Michigan United, Coordinator

## **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 Constitution and laws of the United States. With about two million members, activists, and supporters, the ACLU is a nationwide organization that advances its mission of defending the principles of liberty and equality embodied in our Constitution and civil rights laws. The ACLU of New Mexico's Regional Center for Border Rights (RCBR) stands with border communities to defend and protect equality and justice for all. The RCBR works in conjunction with ACLU affiliates in California, Arizona, Texas, Michigan, Washington, New York, and Vermont 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 in opposition to H.R. 3548, the Border Security for America Act, which takes the wrong, militarized approach to border security and ignores the relevant voices of border communities. The ACLU, SBCC, and NBC oppose exorbitant spending on border enforcement that fails to reflect current border-community and security needs, as well as the human cost of failing to expand oversight and accountability for our nation's largest police force—U.S. Customs and Border Protection (CBP).

Measures in this bill senselessly militarize communities that over 15 million people call home, including 20% of all DACA recipients. Cities such as San Diego and El Paso are among the safest in the country. H.R. 3548 doesn't take into account the true needs and views of border residents, like Dreamers who live there and are opposed to entangling their futures with a border security crackdown that threatens their families.

With apprehensions near historic lows, H.R. 3548 also willfully ignores current trends in migration and is out of step with the Department of Homeland Security's (DHS) own assessments. The DHS Office of Immigration Statistics recently concluded that "the southwest land border is more difficult to illegally cross today than ever before,"<sup>1</sup> and DHS's Office of

---

<sup>1</sup> U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, EFFORTS BY DHS TO ESTIMATE SOUTHWEST BORDER SECURITY BETWEEN PORTS OF ENTRY (Sept. 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0914\\_estimates-of-border-security.pdf](https://www.dhs.gov/sites/default/files/publications/17_0914_estimates-of-border-security.pdf).

Inspector General reported that DHS has failed to explain or justify President Trump’s request for additional deportation agents, including Border Patrol.<sup>2</sup> When measured against border realities—rather than political rhetoric—H.R. 3548 fails miserably.

## **II. Overview of H.R. 3548**

Prior iterations of border-security legislation passed by the House Homeland Security Committee, such as the unanimous Border Security Results Act of 2013, reflected bipartisan attempts not to throw good money after bad and to remember costly mistakes such as the failed virtual fence known as SBI.net. Investment is long overdue, but not on unnecessary “physical barriers” (a new euphemism for Trump’s Wall) and superfluous Border Patrol agents. Rather, Congress should focus investments on transparency initiatives like body-worn cameras to ensure that federal agents at the borders take no shortcuts that bypass legal rights, protections which are as much part of CBP personnel’s sworn obligations as immigration enforcement.

Chairman McCaul’s H.R. 3548 would severely exacerbate the problems border communities currently face with military-style, discriminatory policing and surveillance practices. It ignores recent, urgent warnings by peer law enforcement reviews that CBP, our nation’s largest law enforcement agency, lacks 21st century best practices that promote fair and bias-free policing, humane conditions of confinement, and accountability for abuses like excessive force.

On the positive side, H.R. 3548 would commendably make significant investments in upgrading ports of entry which are vital to trade and travel (see section 201), and are also a more serious drug-smuggling threat than points in between. It also addresses in section 115 a concern repeatedly expressed by Arizona Representative Martha McSally, who in September 2016, convened a hearing on interior Border Patrol checkpoints to question the efficacy of such operations far removed from any actual border. We submitted a detailed statement at the time describing civil rights abuses at checkpoints,<sup>3</sup> and SBCC Director Christian Ramírez testified at the hearing, “Moving the Line of Scrimmage: Re-examining the Defense-in-Depth Strategy,” on September 13, 2016, in front of the Border and Maritime Security Subcommittee of the House Homeland Security Committee.

The bill’s constructive features are far outweighed, however, by a wasteful and heavy-handed approach to border security. Ignoring the Chairman’s prior philosophy of refusing to put the “cart” of border-enforcement resources before the “horse” of supporting metrics and data analysis, H.R. 3548 would take billions of dollars that could be applied to disaster relief and

---

<sup>2</sup> U.S. DEPT’ OF HOMELAND SECURITY, OFFICE OF INSPECTOR GEN., SPECIAL REPORT: CHALLENGES FACING DHS IN ITS ATTEMPT TO HIRE 15,000 BORDER PATROL AGENTS AND IMMIGRATION OFFICERS (July 27, 2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-98-SR-Jul17.pdf>.

<sup>3</sup> ACLU & SBCC, STATEMENT FOR HOUSE HOMELAND SECURITY HEARING: MOVING THE LINE OF SCRIMMAGE: RE-EXAMINING THE DEFENSE-IN-DEPTH STRATEGY (Sept. 13, 2016), <https://www.aclu.org/hearing-statement/aclu-sbcc-statement-house-homeland-hearing-moving-line-scrimmage-re-examining>

instead showers spending on President Trump's wall, euphemistically called "physical barriers" in section 111. The wall - and the bill as a whole which eviscerates public lands protections by giving Border Patrol a free pass to trample on these pristine places - would waive generally applicable legal protections, seize property from U.S. border landowners, irreparably damage fragile ecosystems, harm international economic opportunities, cause life-threatening flooding in border communities, and infringe on tribal sovereignty.

Beyond physical barriers, H.R. 3548 proposes a further buildup of border surveillance, with no provisions to ensure that the rights of border residents and immigrants are protected. Border residents are already subject to invasive surveillance technologies with inadequate privacy protections.

Instead of addressing this problem, the bill proposes increased deployment of surveillance and detection technology, including aerial drones and unmanned cameras (section 102); requiring Air and Marine Operations to operate drones for not less than 24-hours per day for 5 days a week (section 103); specific deployments of surveillance technology to sectors and maritime regions (section 104); and full implementation of a biometric exit data system without addressing privacy concerns raised by existing biometric exit pilots (section 205). Unfortunately, despite this increase in technology, the bill contains no protections to ensure that use of such technologies does not impinge on Fourth Amendment rights, and that data is not collected, used, or disseminated inappropriately. Indeed, it does not even require basic public transparency regarding how the Department intends to collect and use data assembled by the new surveillance technology deployments, and contains an exemption to the Administrative Procedure Act and the Freedom of Information Act (section 112).

Section 131 would also massively expand President Trump's deportation force by adding 5,000 unneeded Border Patrol agents, despite CBP's failure to hire for thousands of already-authorized positions. Current agents, moreover, each now apprehend on average fewer than two people per month. The Border Patrol has instilled fear,<sup>4</sup> not trust, in border communities by harassing and deporting DACA recipients; detaining parents waiting in a hospital for their infant's emergency surgery; and arresting a domestic violence survivor in a courthouse seeking a protective order against her abuser (notably, the incident was falsified under oath by a Border Patrol agent).<sup>5</sup>

---

<sup>4</sup> *U.S. Border Patrol Southwest Border Apprehensions by Sector*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions> (last visited Oct. 3, 2017)

<sup>5</sup> See John Burnett, *Border Patrol Arrests Parents While Infant Awaits Serious Operation*, NPR, Sept. 20, 2017, available at <http://www.npr.org/2017/09/20/552339976/border-patrol-arrests-parents-while-infant-awaits-serious-operation>; Ted Hesson, *Travel Ban Set to expire*, POLITICO, Sept. 22, 2017, available at <http://www.politico.com/tipsheets/morning-shift/2017/09/22/travel-ban-set-to-expire-222432>; Jonathan Blitzer, *The Woman Arrested By ICE In A Courthouse Speaks Out*, NEW YORKER, Feb. 23, 2017, available at <https://www.newyorker.com/news/news-desk/the-woman-arrested-by-ice-in-a-courthouse-speaks-out>; Valeria Gonzalez, *Border patrol Memo States Procedures to Process All DACA Recipients*, KRGV, Sept. 25, 2017,

The ACLU, SBCC and NBC urge the Committee to oppose H.R. 3548 and any legislation allowing DHS to keep building the border wall, rush to hire Border Patrol deportation-force agents, deploy surveillance technologies and equipment designed for theaters of war, despoil public lands, and make local police forces agents of family separation by entangling them in federal immigration enforcement through initiatives like Operation Stonegarden.

Instead, we urge the Committee to focus its efforts on ensuring that border enforcement 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. We also urge Congress to immediately vote on a clean DREAM Act that respects both the tremendous contributions that one in five DREAMers bring to border communities and our moral obligation to find a lasting solution that preserves their families’ unity.

### **III. Congress Should End the Abusive Militarization of Our Nation’s Safest Communities by Rejecting Misguided, Fiscally Wasteful Border Security Proposals Like H.R. 3548**

While Congress has repeatedly failed to reform our nation’s immigration laws, border-security benchmarks of previously proposed or enacted legislation (in 2006, 2007, and 2010) have already been met or exceeded.<sup>6</sup>

Since 2003, Congress has doubled the size of the U.S. Border Patrol, appropriating enough funds to hire more than 21,400 agents, with about 85 percent of that force deployed at the U.S.-Mexico border. In recent years, so many Border Patrol agents patrolled our nation’s 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 deployed at the same border. It also does not include over 705 miles of pedestrian and vehicular fencing, 333 video surveillance systems, and a fleet of 250 planes, helicopters and Predator B drones for aerial surveillance.<sup>7</sup>

From a fiscal perspective, from FY2004 to FY2017, the budget for CBP increased by 124 percent to \$13.47 billion, a leap of \$7.47 billion.<sup>8</sup> By way of comparison, this jump in funding

---

available at <http://www.krgv.com/story/36450600/border-patrol-memo-states-procedures-to-process-all-daca-recipients>.

<sup>6</sup> Greg Chen and Su Kim, “Border Security: Moving Beyond Past Benchmarks,” AMERICAN IMMIGRATION LAWYERS ASSOCIATION, (Jan. 30, 2013), available at: <http://www.aila.org/content/default.aspx?bc=25667143061>

<sup>7</sup> Garrett M. Graff, “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>

<sup>8</sup> 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](http://www.migrationpolicy.org/pubs/FS23_Post-9-11policy.pdf)

more than quadrupled (4.5x) the growth rate of NASA’s budget and was almost ten times that of the National Institutes of Health. For FY2018, the Administration’s budget request for CBP is \$16.3 billion.<sup>9</sup> U.S. taxpayers now spend more on immigration enforcement agencies (\$19.6 billion) than on the FBI, DEA, ATF, U.S. Marshals, and Secret Service—*combined*.

The proposed hiring surge in H.R. 3548 of 5,000 Border Patrol agents runs directly counter to data on current migration trends and recent DHS reviews. Between 2000 and 2016, apprehensions by the Border Patrol declined more than 72 percent to about 463,000. In FY2016, Border Patrol is reported to have apprehended 451,816 unauthorized crossers in total.<sup>10</sup> Through August 31, 2017, with one month left in the fiscal year, apprehensions dropped to 281,390.

Moreover, to fully understand current and future enforcement needs, the Committee should also recognize the fundamental shift in the nature of migration at our southern border. Much attention has been paid to increased apprehensions of children and families from Central America, many of who are fleeing terrible violence *and turning themselves in* to border agents. When analyzed border-wide and over time, however, migrant apprehensions remain lower than at any time since the 1970s. This is due in large part to the consistent trend of net-zero migration from Mexico, attributed in large part by the Pew Hispanic Research Center to demographic shifts and an improved economy in Mexico.

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.”<sup>11</sup> Indeed, Chairman McCaul has previously cautioned that border security “demands a plan, verified by outside experts, before one dollar is spent on new resources.”<sup>12</sup>

Unfortunately, more than four years have passed since the Committee passed data-driven, bipartisan border-security legislation. H.R. 3548 instead proposes billions of dollars to build President Trump’s border wall at a time when we should be focused on disaster relief.

#### **IV. Recommendations: Congress Must Expand Oversight and Accountability to Mitigate Corruption and Abuse in the Nation’s Largest Police Force—U.S. Customs and Border Protection.**

---

<sup>9</sup> Department of Homeland Security. “Budget-in-Brief: Fiscal Year 2018,” available at <https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf>

<sup>10</sup> U.S. Border Patrol, Sector Profile-Fiscal Year 2016 (2016) <https://www.cbp.gov/sites/default/files/assets/documents/2017-Jan/USBP%20Stats%20FY2016%20sector%20profile.pdf> ,

<sup>11</sup> 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>

<sup>12</sup> Michael McCaul, Commentary, *Senate bill spends billions on cart-before-the-horse border security*, DALLAS NEWS, June 2013, available at <https://www.dallasnews.com/opinion/commentary/2013/06/30/michael-mccaul-senate-bill-spends-billions-on-cart-before-the-horse-border-strategy>.



CBP is facing staggering integrity and professionalism challenges with its current personnel, problems which should be addressed instead of H.R. 3548. Overdue reforms such as body-worn cameras, a properly functioning complaints system, and diversity initiatives to improve the hiring of women and other underrepresented groups should be prioritized. Unprecedented investment in border enforcement without corresponding oversight mechanisms has led to a sharp 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 part of families who have lived in the region for generations.

Corruption and criminal conduct have also plagued the already 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.<sup>13</sup>

#### A. Protect and Expand Use of Force Investigation and Public Reporting Reforms

*Politico Magazine*'s exposé of CBP also closely examined the now well-documented deficiencies in CBP's use-of-force policy and practice, which led the agency to become one of our nation's "deadliest" and most "out-of-control" law enforcement agencies. Since January 2010, at least 50 individuals have died from lethal force by CBP officers and agents. These cases include dozens of 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 an agent responding to alleged rock throwing.<sup>14</sup> Also among the most well-known cases is that of Anastasio Hernández Rojas who—by the happenstance of 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. Hernández'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.

---

<sup>13</sup> Garrett M. Graff, "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>

<sup>14</sup> Brian Skoloff, "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](http://www.huffingtonpost.com/2013/02/08/border-patrol-shot-mexican-teen-jose-antonio-elena-rodriguez-autopsy_n_2646191.html)

CBP for the first time publicly released reliable use-of-force data,<sup>15</sup> in the wake of a DHS Inspector General report concluding that the agency was not properly tracking uses of force.<sup>16</sup> Nevertheless, CBP has not correspondingly defined a reportable “use of force” in its Policy Handbook. The definition, and related data collection, should correspond to the Department of Justice’s standard in consent decrees like that reached with the Albuquerque Police Department: The DOJ standard states that, “‘Use of force’ means physical effort to compel compliance by an unwilling subject above unresisted handcuffing, including pointing a firearm at a person.”<sup>17</sup>

In addition to adding DOJ’s definition, the Policy Handbook must implement the CBP Integrity Advisory Panel’s recommendations on use of force (echoing the Police Executive Research Forum’s 2013 recommendations, which have not been fully adopted). These include that “CBP should revise its use of force policy guidelines, as follows: a. Emphasize that its overarching responsibility is to preserve human life. b. Implement specific restrictions on the use of firearms involving a moving vehicle and individuals throwing objects.”<sup>18</sup>

Moreover, the agency should include in the Policy Handbook what Congress, the press, and the public can expect after uses of force by officers or agents. CBP has not explained how it is implementing the Integrity Advisory Panel’s recommendation that “[p]olicies on use of force should clearly state what types of information will be released, when, and in what situation to maintain transparency.”<sup>19</sup> As a result, after one CBP shooting a national-newspaper journalist reported that: “For two weeks, citing ongoing investigations by the FBI and the Department of Homeland Security, the Border Patrol’s parent agency, Customs and Border Protection, would not say whether the suspect was alive or dead or disclose further details of the shooting.”<sup>20</sup> Such opacity is unacceptable for a 21<sup>st</sup>-century law-enforcement agency.

#### B. Ensure CBP’s Adoption of Body-Worn and Other Camera Recording

The use of body-worn cameras is a best practice among law enforcement agencies and, when paired with strong privacy and civil rights protections, is an effective tool to strengthen accountability and transparency. As noted in the Department of Homeland Security’s CBP Integrity Advisory Panel’s Interim Report, “law enforcement organizations are increasingly equipping their officers with body-worn cameras as a method of reducing complaints, de-

---

<sup>15</sup> <http://www.cbp.gov/newsroom/stats/cbp-use-force>

<sup>16</sup> DHS Office of Inspector General, CBP Use of Force Training and Actions To Address Use of Force Incidents. (Sept. 2013), [https://www.oig.dhs.gov/assets/Mgmt/2013/OIG\\_13-114\\_Sep13.pdf](https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-114_Sep13.pdf)

<sup>17</sup> See *United States v. City of Albuquerque* (Settlement, Nov. 14, 2014), 13, [http://www.justice.gov/sites/default/files/crt/legacy/2014/12/19/apd\\_settlement\\_11-14-14.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2014/12/19/apd_settlement_11-14-14.pdf).

<sup>18</sup> Interim Report of the CBP Integrity Advisory Panel, *supra*, 16-17.

<sup>19</sup> TASK FORCE ON 21ST CENTURY POLICING, *supra*, Action Item 1.3.2 (“When serious incidents occur, including those involving alleged police misconduct, agencies should communicate with citizens and the media swiftly, openly, and neutrally, respecting areas where the law requires confidentiality.”).

<sup>20</sup> Nigel Duara, “A Border Patrol agent shot a drug-running suspect, but the agency won’t reveal much more.” *Los Angeles Times* (Feb. 10, 2016), <http://www.latimes.com/nation/la-na-ff-border-shootings-20160209-story.html>



escalating volatile situations (thus enhancing officer/agent safety) and ensuring compliance with use of force policies.”<sup>21</sup> At a time when policing practices are under scrutiny across the country, CBP—the nation’s largest law enforcement agency—must seize this opportunity and lead by example in implementing this best practice along with strong policies and privacy protections.

In 2013, following its internal review of the agency’s use of force policies, CBP committed to pilot the use of body cameras (as well as vehicle-mounted cameras).<sup>22</sup> In July 2014, then-CBP Commissioner Kerlikowske established a Body Worn Camera Working Group to evaluate the feasibility of incorporating body-worn camera technology into CBP enforcement operations. In 2014 and 2015, CBP carried out a three-phase feasibility study of body-worn cameras that involved the following: phase 1) controlled environment evaluation; phase 2) field evaluation; and phase 3) data analysis and report creation. At the conclusion of this study in November 2015, Commissioner Kerlikowske affirmed that the expanded use of body-worn and other cameras “could have positive benefits for CBP.”<sup>23</sup> Congress has supported these efforts, urging CBP to complete its body-camera pilot program and provide a report.<sup>24</sup>

The *San Diego Union-Tribune* noted that “[i]f any agency could benefit from having body cameras be mandatory, it is one like the Border Patrol, which has exploded in size in recent years,”<sup>25</sup> while the *Arizona Republic* criticized “a disturbingly familiar approach from a secretive agency that has done little to dispel concerns about excessive use of force.”<sup>26</sup> CBP’s delay in implementing body-worn cameras is not only troubling to the millions of border residents and visitors who regularly come into contact with CBP personnel, but stalls efforts to build public trust and to provide much-needed, transparent accountability in response to longstanding congressional and community demands to address problems regarding excessive use of force, misconduct and corruption.

### C. Monitor and Evaluate the Civil Rights Impacts of Border Patrol’s Interior Enforcement

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,

---

<sup>21</sup> Interim Report of the CBP Integrity Advisory Panel, *supra*.

<sup>22</sup> U.S. Customs and Border Protection Use of Force Reviews, Recommendations and Next Steps, (Sep. 25, 2013), <http://www.cbp.gov/sites/default/files/documents/Use%20of%20Force%20Two%20Pager-FINAL.PDF>.

<sup>23</sup> “CBP Announces Way Forward on the Use of Body-Worn Cameras.” U.S. Customs and Border Protection. (November 12, 2015), <http://www.cbp.gov/newsroom/national-media-release/2015-11-12-000000/cbp-announces-way-forward-use-body-worn-cameras>

<sup>24</sup> <http://appropriations.house.gov/uploadedfiles/hrpt-114-hr-fy2016-hsecurity.pdf> (pg. 29); <https://www.congress.gov/114/crpt/srpt68/CRPT-114srpt68.pdf> (Pg. 18)

<sup>25</sup> “Border Patrol Needs to Join 21st Century.” (Nov. 9, 2015), <http://www.sandiegouniontribune.com/news/2015/nov/09/border-patrol-body-cameras-skepticism/>

<sup>26</sup> “Border Patrol’s ‘Move Along’ Act is Old...” (Nov. 10, 2015), <http://www.azcentral.com/story/opinion/editorial/2015/11/10/border-patrol-transparency/75486988/>

and are ineffective in making immigration arrests. CBP's zone of claimed authority 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.<sup>27</sup> This breadth of authority has converted CBP, particularly Border Patrol, into an interior enforcement agency that widely roams border communities.

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 allowed for 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 immigration apprehensions. Although CBP emphasizes that a negative cannot be proven with respect to deterrent effect, checkpoint numbers - publication of which hasn't occurred by the agency since 2013 - show that very few migrants are apprehended given the resources committed to these operations.

Consider the last available agency data about the Tucson and Yuma sectors, obtained via FOIA litigation by the ACLU. 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. 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.

CBP's interior enforcement activities are suboptimal uses of these resources to further border-security goals but do much to harm the quality of life of those who live and work in the border region. Border community members report harassment, abuses 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 Committee. 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.'"

---

<sup>27</sup> ACLU, The Constitution in the 100-mile Border Zone, <https://www.aclu.org/other/constitution-100-mile-border-zone>.

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.’”

CBP conducts operations, including checkpoints and roving patrols, far removed from the border where encounters with non-border crossers, including U.S. citizens and permanent residents, result in regular CBP enforcement encounters during their day-to-day lives. People living 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.

Northern border residents have also 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. 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. 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.

At this time, Border Patrol does not collect data on stops and searches that do not result in arrest, even though the 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.” This data collection gap makes it difficult to detect and deter illegal or abusive treatment of the public at checkpoints and during patrol stops.

#### D. Strengthen Oversight of CBP Detention Conditions in Short-term Custody

Conditions of confinement at CBP detention facilities are the subject of ongoing litigation and merit independent attention from the Subcommittee. CBP’s transparency with respect to its large-scale detention operations, including a failure to permit access by independent monitors, has been abysmal. In recent years, reports of extremely poor conditions for U.S. citizens and immigrants held in CBP short-term custody facilities have proliferated. These are designed to detain individuals for up to 72 hours but in practice are often used to hold people for up to two

weeks,<sup>28</sup> lack comprehensive standards like those that govern ICE facilities, and effective oversight. While CBP has released partial policies in October 2015,<sup>29</sup> these standards are minimal and often vague, lack the necessary accountability, oversight and training programs, and do not provide for key elements of care, such as soap or bedding.

As a result, immigrants in CBP custody report being denied food, water and medical aid, harsh conditions, overcrowding, lingering in custody for days or weeks, and improper and abusive treatment by CBP officials.<sup>30</sup> Unaccompanied minors apprehended by CBP are also held in these facilities, which are not designed for children. DHS itself has acknowledged “recurring problems”<sup>31</sup> and oversight failures.<sup>32</sup>

#### E. Restore Transparency in Complaint Investigations and FOIA Processing

Transparent law enforcement requires a responsive, effective, and publicly accountable process of redress for individuals and organizations alleging rights abuses. Although CBP has acknowledged shortcomings in its complaints system, particularly following the American Immigration Council’s report *No Action Taken*,<sup>33</sup> and the ACLU of Arizona’s report *Record of Abuse*,<sup>34</sup> based on CBP’s own records, the complaints system remains largely the same. While CBP has improved its Spanish-language capacity, comprehensive reform has not taken place. This despite AIC, ACLU, and other organizations’ detailed recommendations for improvement.

---

<sup>28</sup> Americans for Immigrant Justice, *The “Hieleras”: A Report on Human & Civil Rights Abuses Committed by U.S. Customs and Border Protection* (Aug. 7, 2013), <http://aijustice.org/the-hieleras-a-report-on-human-civil-rights-abuses-committed-by-u-s-customs-border-protection-2/>.

<sup>29</sup> <http://www.cbp.gov/newsroom/national-media-release/2015-10-05-000000/cbp-implements-agencywide-national-standards>

<sup>30</sup> Guillermo Cantor, *Hieleras (Iceboxes) in the Rio Grande Valley Sector*, American Immigration Council, (December 2015), <http://www.immigrationpolicy.org/special-reports/hieleras-iceboxes-rio-grande-valley-sector>.

<sup>31</sup> Press Release, Department of Homeland Security Office of Inspector General, Improvements Continue at Detention Centers (Oct. 6, 2014), available at <http://1.usa.gov/1oKw2Kq>; see also NATIONAL PUBLIC RADIO (NPR), Transcript: Commissioner Kerlikowske’s Full Interview, July 18, 2014, available at <http://n.pr/1kCh2wg> (In response to complaints characterized as “being put in excessively uncomfortable rooms, being left with the lights on all night so that they couldn’t sleep, being denied medical care,” Commissioner Kerlikowske acknowledged those complaints “about the facility[ies]” were “absolutely spot on. . . . I don’t disagree with those complaints at all.”).

<sup>32</sup> Memorandum to DHS Secretary Jeh C. Johnson from DHS Inspector General John Roth on Oversight of Unaccompanied Alien Children 2–3 (July 30, 2014), available at <http://1.usa.gov/1r3Myd1> (noting that CBP’s system for documenting compliance with guidelines for detaining unaccompanied children is “unreliable due to frequent system outages which have resulted in inconsistent reporting. As a result, [it] is not a reliable tool for CBP to provide increased accountability for [children’s] safety and well-being during all phases of CBP’s custody process.”).

<sup>33</sup> American Immigration Council, “No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse.” (May 4, 2014), <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>.

<sup>34</sup> ACLU of Arizona, “Record of Abuse: Lawlessness and Impunity in Border Patrol’s Interior Enforcement Operations.” (Oct. 2015), <http://www.acluaz.org/node/5415>

Indeed, AIC has recently released a second report, titled *Still No Action Taken*,<sup>35</sup> the Kino Border Initiative recounted its latest difficulties in *Intake Without Oversight*,<sup>36</sup> and the ACLU analyzed CBP records to reveal that of 408 complaints from detained children:

Only 2 percent of the investigative files indicate that the complainant was interviewed. Only 4 percent of case files contained indications that the accused agents were interviewed. Only a single investigative file contained indications that physical evidence was collected. Only one file noted that investigators made a site visit.<sup>37</sup>

Another cornerstone of open government lacking at CBP is compliance with the Freedom of Information Act (FOIA). The ACLU and other groups have repeatedly filed FOIA requests that go unanswered, requiring wasteful, delaying and unnecessary litigation.<sup>38</sup> CBP must overhaul its attitude toward and processes for responding to FOIA requests, as the statute requires.

## V. Conclusion

Congress should transform border enforcement in a manner that is fiscally responsible, respects and listens to border residents before imposing policy, and upholds constitutional rights and American values. We urge the Committee to reject H.R. 3548 and instead 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.<sup>39</sup>

---

<sup>35</sup> AMERICAN IMMIGRATION COUNCIL, *STILL NO ACTION TAKEN* (Aug. 2, 2017), <https://www.americanimmigrationcouncil.org/research/still-no-action-taken-complaints-against-border-patrol-agents-continue-go-unanswered>.

<sup>36</sup> KINO BORDER INITIATIVE, *INTAKE WITHOUT OVERSIGHT* (July 11, 2017), <https://www.kinoborderinitiative.org/new-kbi-complaint-report/>.

<sup>37</sup> John Carlos Frey, *Complaints: Border officers engaged in pattern of 'egregious' abuse against minors*, ABC NEWS, Sept. 14, 2017, available at <http://abcnews.go.com/US/complaints-border-officers-engaged-pattern-egregious-abuse-minors/story?id=49845697>. For recommendations see ACLU, *RECOMMENDATIONS TO DHS TO IMPROVE COMPLAINT PROCESSING*,

[https://www.aclu.org/files/assets/14\\_5\\_5\\_recommendations\\_to\\_dhs\\_to\\_improve\\_complaint\\_processing\\_final.pdf](https://www.aclu.org/files/assets/14_5_5_recommendations_to_dhs_to_improve_complaint_processing_final.pdf)

<sup>38</sup> Letter from ACLU to R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection (July 20, 2016), available at <https://www.aclu.org/letter/aclu-letter-cbp-re-foia-practices-july-2016>.

<sup>39</sup> Robbins, *supra* note 11.