

# WRITTEN STATEMENT SUBMITTED TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

## Hearing on “Militarization of Public Security in the Americas”

Submitted by:

American Civil Liberties Union of Texas Border Rights Center

December 6, 2018

The following statement is submitted on behalf of the American Civil Liberties Union of Texas Border Rights Center. The ACLU is committed to ensuring that the fundamental protections of due process, equal protection and the rights to human dignity, physical integrity and freedom from abuse and lethal use of force by authorities are extended to every person in the United States or subject to its effective control or power, regardless of immigration status. These rights, among others, are not only guaranteed to individuals without discrimination in accordance with international law and treaties ratified by the United States, but they are further protected for all persons under the Bill of Rights of the U.S. Constitution. While the federal government has the authority to control our nation’s borders and to regulate immigration, it must do so in compliance with national laws and international legal obligations. We commend this honorable Commission for convening this hearing on militarization of public security and appreciate the opportunity to offer this written testimony which focuses on the militarization of the U.S.-Mexico border.

As nations across the Americas entrench their commitments to “wars” on drugs and terrorism, a focal point of militarization of public security has emerged – international borders<sup>1</sup>. Arguments of sovereignty, threats to national security, and the border as a choke point for the continent’s wars on drugs, are used to justify incursions on individual rights and the massive build-up and militarization of some of the region’s largest law enforcement agencies. In many instances, such as the Trump Administration’s pre-election border spectacle, the militarization of public security forces and the use of military troops is not to address a real threat or increase true security. Rather, the increased presence of security forces serves primarily to fear monger, creating a false narrative for the need for further government intrusions on individual liberties and human rights in the name of keeping the citizenry safe from a false threat. Thus, militarization in the Americas, both at international borders and within nations, must be viewed through both a rights protection and political lens. Our response must therefore address both the resulting civil and human rights violations *and* the politically expedient use of security as a tool for scaring citizens into the acquiescence to the consolidation of governmental un-checked power.

As the largest civil liberties organization in the United States, the American Civil Liberties Union (ACLU) has witnessed and fought the U.S. government’s increased attacks on immigrants and

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<sup>1</sup> Adam Isacson, Maureen Mayer & Gabriela Morales, Mexico’s Other Border: Security, Migration, and the Humanitarian Crisis at the Line with Central America, The Washington Office on Latin America (WOLA), June 2014, available at <https://www.wola.org/files/mxgt/report/>; John Otis, Emma Graham-Harrison & Carmen Fishwick, “Columbia and Brazil Clamp Down on Borders as Venezuela Crisis Spurs Exodus,” The Guardian, February 9<sup>th</sup>, 2018, available at <https://www.theguardian.com/world/2018/feb/08/venezuela-migrants-colombia-brazil-borders>.

communities of color through the militarization of domestic law enforcement agencies and the use of the military in our communities. Nowhere is the United States' militarization more pronounced than on its southern border with Mexico and throughout border communities.

Since the early 1990s, the United States has institutionalized a "prevention through deterrence" strategy to curb unauthorized migration across the border with Mexico. Post-September 11<sup>a</sup>, the federal government incorporated 22 agencies to create the U.S. Department of Homeland Security (DHS), making it the third-largest cabinet-level federal department. DHS's primary stated mission is protecting Americans "from terrorist threats,"<sup>2</sup> and protecting the border, a task carried out by DHS's Customs and Border Protection (CBP).

Since its creation, the federal government has invested unprecedented resources to DHS, particularly CBP, to little result other than the militarization of the border and its communities. Specifically, U.S. Border Patrol (BP), part of CBP, reported 21,444 agents on duty in FY 2011, more than double the 9,212 agents from FY 2000 and more than five times the 4,028 agents on duty in FY 1993.<sup>3</sup> In FY 2017, the year President Trump took office, CBP reported 19,437 BP agents on staff nationwide. Of those agents, 85 percent are tasked with patrolling the U.S. southwest border, amounting to 8.5 agents per linear mile. Yet, on average, each BP agent in FY 2017 apprehended just 1.1 unlawful border crosser per month.<sup>4</sup>

The rise in BP agents does not include the over 20,000 CBP officers, tasked with staffing ports of entry along the Southwest border, nor does it include representatives of other federal agencies deployed to the U.S.-Mexico border, including one-fourth of all Immigration and Customs Enforcement (ICE) personnel and thousands of agents of the Drug Enforcement Agency (DEA), the Federal Bureau of Investigation (FBI), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

Just days after his inauguration, despite serious concerns over lack of safeguards in hiring procedures, past corruption and criminality among border agents,<sup>5</sup> President Trump ordered the hiring of 7,500 additional border agents (CBP, BP, and Air and Marine Operation agents) and 10,000 additional Immigration Customs Enforcement (ICE) officers.<sup>6</sup>

Regarding the deployment of military troops: although far from the first to deploy military troops to the U.S. Southwest border,<sup>7</sup> the scale and lack of justification sets President Trump's deployment of

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<sup>2</sup> Department of Homeland Security, Prevent Terrorism and Enhance Security, U.S. Department of Homeland Security, May 6, 2016, available at <https://www.dhs.gov/prevent-terrorism-and-enhance-security>

<sup>3</sup> U.S. Customs and Border Protection, BP Staffing FY1992-FY2017, U.S. Customs and Border Protection, 2017, available at <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Staffing%20FY1992-FY2017.pdf>

<sup>4</sup> Alex Nowrarteh, "Two Reasons Not to Hire More Border Patrol Agents," CATO Institute, November 16, 2017, available at <https://www.cato.org/blog/two-reasons-not-hire-more-border-patrol-agents>

<sup>5</sup> Josiah McC. Heyman, Why Caution is Needed Before Hiring Additional Border Patrol Agents and ICE Officers, American Immigration Council, April 24, 2017, available at <https://www.americanimmigrationcouncil.org/research/why-caution-needed-hiring-additional-border-patrol-agents-and-ice-officers>

<sup>6</sup> U.S. Government Accountability Office, Border Security and Immigration: Initial Executive Order Actions and Resource Implications, Government Accountability Office, July 12, 2018, available at <https://www.gao.gov/products/GAO-18-470>

<sup>7</sup> Former presidents, Barack Obama, George W. Bush, George H.W. Bush, Woodrow Wilson and William Howard Taft, all issued orders deploying military troops to the U.S. southwest border for reasons from George H.W. Bush's "war on drugs" to the 1,200 National Guard troops deployed by Obama in 2010 to support Border Patrol agents in apprehensions and drug seizures. See William Cummings, "Trump is Not the First President to Deploy the National

troops apart in distinctly concerning ways. In early 2018, President Trump authorized the deployment of some 4,000 National Guard troops to the border, a move the Border Patrol union itself called “a colossal waste of time.”<sup>8</sup> Most recently, Trump deployed 5,900 military troops to the Southwest border as part of his fear mongering campaign ahead of the mid-term elections - under the false pretense of defending against the migrant “caravan” that, at the time of deployment, was over 1,000 miles away.<sup>9</sup> At a cost of over \$210 million,<sup>10</sup> experienced military leaders have called the political stunt a “profound betrayal of our military.”<sup>11</sup> The administration has also attempted to expand the military’s authority to use force, including lethal force, along the border.<sup>12</sup>

In a further move to amass law enforcement at the border, DHS recently issued a request to other federal agencies to send civilian law enforcement officers to the border.<sup>13</sup>

Beyond personnel, the deployment of technology and substantial infrastructure has entrenched the militarized border complex. The U.S. Congress has invested significant resources into mobile surveillance systems, ground sensors, mobile X-ray technology, a fleet of six Predator B unmanned aerial drones.<sup>14</sup> Moreover, the deployment of the military brought Blackhawk helicopters, combat vehicles, and razor wire to the streets and skies of border communities.<sup>15</sup>

The current centerpiece of President Trump’s xenophobic and politically expedient fear mongering, border walls have long been a pawn in enforcement-focused immigration policy, under the guise of necessary security measures. The reality is border walls cause migrant deaths and more human suffering, devastate the environment, waste taxpayer dollars, and damage border communities. Legislation in 1996 and 2000 provided layered border barriers in California and 60 miles of border fencing in urban areas. Referred to as fencing, such barriers have the same impact as those termed

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Guard to the U.S-Mexico Border,” USA Today, April 5, 2018, available at <https://www.usatoday.com/story/news/politics/onpolitics/2018/04/05/history-troop-deployments-mexico-us-border/491317002/>

<sup>8</sup> Todd South, “Border Patrol Union Head Calls National Guard Deployment ‘A Colossal Waste of Time,’” Military Times, May 25, 2018, available at <https://www.militarytimes.com/news/your-military/2018/05/25/border-patrol-union-head-calls-national-guard-deployment-a-colossal-waste-of-time/>

<sup>9</sup> Barbara Starr, Ryan Browne & Zachary Cohen, “Number of US Troops at Border Has ‘Peaked’ at 5,900,” CNN, November 15, 2018, available at <https://www.cnn.com/2018/11/15/politics/us-troop-level-border-deployment/index.html>

<sup>10</sup> Robert Burns, “Pentagon: Troops Deployed at US-Mexico Border to Cost About \$210 Million,” USA Today, November 21, 2018, available at <https://www.usatoday.com/story/news/politics/2018/11/20/pentagon-troops-migrant-caravan-united-states-mexico-border/2076399002/>

<sup>11</sup> Gordon Adams, Lawrence B. Wilkerson & Isaiah Wilson III, “Trump’s Border Stunt Is a Profound Betrayal of Our Military,” The New York Times, November 19, 2018, available at <https://www.nytimes.com/2018/11/19/opinion/president-trump-border-military-troops.html>

<sup>12</sup> Tara Golshan, “What Trump’s ‘Lethal Force’ Authorization Mean at the Border,” Vox, November 27, 2018, available at <https://www.vox.com/policy-and-politics/2018/11/27/18112610/trump-lethal-force-caravan-migrant-border-military>

<sup>13</sup> Richard Gonzales, Tom Bowman, Bill Chappell, “DHS Asks Other Federal Agencies to Send Civilian Law Enforcement Officers to Border,” National Public Radio, November 30, 2018, available at <https://www.npr.org/2018/11/30/672243414/u-s-troops-at-border-4-000-active-duty-personnel-expected-to-remain-through-jan>

<sup>14</sup> American Civil Liberties Union, “Border Security Technologies,” available at <https://www.aclu.org/other/border-security-technologies>

<sup>15</sup> Carson Frame, “Fear and Calm: Rio Grande Valley Residents React to Border Troops,” Texas Public Radio, November 12, 2018, available at <http://www.tpr.org/post/fear-and-calm-rio-grande-valley-residents-react-border-troops>

walls. In 2006, on promises of comprehensive immigration reform, President George W. Bush signed the Secure Fence Act to fund 700 miles of fencing. Reform efforts failed but nearly 700 miles of fence construction was completed by 2009.<sup>16</sup> In 2017, Customs and Border Protection (CBP) received additional funding to replace barriers in high-priority areas.<sup>17</sup> In 2018, CBP was given \$1.34 billion to erect new barriers where fencing currently exists in the Rio Grande Valley and San Diego sectors and requested another \$1.6 billion for construction of a “wall system” in the Rio Grande Valley.

A lack of political will to create a common-sense and humane immigration system that acknowledges the economic and cultural contributions of immigration and prioritizes the human right to family unity has furthered the ongoing investment in border security resources. Coupled with President Trump’s use of the border and immigration issues to drum up racial animosities among voters, the United States continues its slide towards a fully militarized border region that will further the degradation of constitutional and human rights protections in our borderlands.

## **Military Deployments**

The deployment of military troops to the U.S.-Mexico border dates back to the Mexican-American war of 1846 and extended to tactics of the Obama Administration, deployments of National Guard troops that lacked transparency and justification.<sup>18</sup> In 2014, Texas Governor, Rick Perry, deployed 1,000 Texas National Guard troops to the Rio Grande Valley in South Texas in a political stunt surrounding the humanitarian crisis of unaccompanied minors crossing the border, taking valuable resources away from an appropriate humanitarian response.<sup>19</sup> On April 4, 2018, President Trump announced the deployment of U.S. military troops to the border until his border wall was constructed.<sup>20</sup> The next day Trump signed a memo to deploy between 2,000 and 4,000 National Guard troops to the southwest border.<sup>21</sup>

On October 29, 2018, President Trump announced the deployment of 5,900 troops to the border, ostensibly to address the arrival of the so called migrant “caravan”. President Trump’s recent military deployment is a significant escalation of the government utilizing military troops to respond to border concerns and generate a political theater to influence elections. At the time, just one week before the mid-term elections, the caravan was over 1,000 miles from the U.S. border and the number of unauthorized border crossers was one-third the level seen over a decade ago. There was

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<sup>16</sup> David Bier, “Why The Wall Won’t Work,” CATO Institute, May 2017, available at <https://www.cato.org/publications/commentary/why-wall-wont-work>

<sup>17</sup> Consolidated Appropriations Act of 2017; *see* 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, available at <https://www.gao.gov/assets/700/693488.pdf>

<sup>18</sup> American Civil Liberties Union, “Deployment Erodes Longstanding Separation Between Civilian and Military Government,” October 21, 2018, available at <https://www.aclu.org/news/aclu-demands-information-military-deployment-within-us-borders>

<sup>19</sup> American Civil Liberties Union, “ACLU Comment on Gov. Perry’s Deployment of 1,000 National Guard Troops to Rio Grande Valley,” ACLU, July 22, 2014, available at <https://www.aclutx.org/en/press-releases/aclu-comment-gov-perrys-deployment-1000-national-guard-troops-rio-grande-valley>

<sup>20</sup> American Civil Liberties Union, “ACLU Comment on Gov. Perry’s Deployment of 1,000 National Guard Troops to Rio Grande Valley,” ACLU, July 22, 2014, available at <https://www.aclu.org/en/press-releases/aclu-comment-gov-perrys-deployment-1000-national-guard-troops-rio-grande-valley>

<sup>21</sup> Leif Reigstad, “Trump’s Deployment of Troops to the Border: What You Need to Know,” Texas Monthly, April 5, 2018, available at <https://www.texasmonthly.com/news/trumps-deployment-troops-border-need-know/>

no border crisis requiring a military presence. In fact, the vast majority of apprehensions were family units and unaccompanied children, who, when crossing in-between ports of entry, commonly seek out U.S. Border Patrol agents and turn themselves in expressing intentions to seek asylum.

The recent military deployment to our southern border, labeled “Operation Faithful Patriot”, is not only a huge waste of taxpayer money, but an unnecessary course of action that will further terrorize and militarize our border communities. Military personnel are legally prohibited from engaging in immigration enforcement, and there is no emergency or cost-benefit analysis to justify this sudden deployment.<sup>22</sup>

Once deployed, troops began further “hardening” ports of entry, principally through the use of concertina wire and installation of additional barriers.<sup>23</sup> The laying of concertina wire along the border not only achieves no legitimate end (most was deployed some distance from the international boundary, meaning any asylum seeker crossing the border would reach U.S. soil prior to encountering the wire, triggering the United States’ obligation to consider their petition for protection), it furthers the perception that the country was preparing for an invasion, one that even with the arrival of the migrant “caravan” to Tijuana, was never to come to fruition.<sup>24</sup>

The increase in law enforcement in the border region, via deployment of military troops, further denigrates public trust. For decades, CBP has targeted communities of color along the border, as racial profiling facilitated the stopping and harassing of local residence. The increased presence of military further adds to the militarized environment of the borderlands and undercuts local trust in law enforcement broadly.

On November 28, 2018, several United Nations human rights experts expressed deep concern over the U.S. government decision to send military personnel to secure the southern border of the United States. The U.N. experts rightly noted that “[e]xperience shows that when armed forces are used to perform tasks that they are not trained to do, this usually leads to serious violations of human rights.”<sup>25</sup>

## Use of Force

The lack of transparency, accountability, and a culture cruelty within Customs and Border Protection’s (CBP) has long been punctuated by impunity for the agency’s use of excessive force and commitment to policies that cause migrant deaths. In 2014, CBP rejected changes to its use-of-force policies recommended by law-enforcement experts and refused to release those recommendations publicly.<sup>26</sup> A government review also concluded that many CBP agents do not understand the use-

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<sup>22</sup> American Civil Liberties Union, “ACLU Comment on Trump Administration Sending Army to Southern Border,” October 29, 2018, available at <https://www.aclu.org/news/aclu-comment-trump-administration-sending-army-southern-border>

<sup>23</sup> Alex Ward, “The US is Sending 5,000 Troops to the Border. Here’s What They Can and Can’t Do,” Vox, October 31, 2018, available at <https://www.vox.com/2018/10/29/18026646/military-border-caravan-immigrants-trump-caravan>

<sup>24</sup> Susan Montoya Bryan, “Razor Wire is Most Visible Result of \$210M Troop Deployment to the US-Mexico Border,” Military Times, November 21, 2018, available at <https://www.militarytimes.com/news/pentagon-congress/2018/11/22/razor-wire-is-most-visible-result-of-210m-deployment/>

<sup>25</sup> United Nations Human Rights Office of the High Commissioner, “Migrant Caravan: States Have Duty to Protect Rights,” OHCHR, November 28, 2018, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23941&LangID=E>

<sup>26</sup> Brian Bennett, “Border Patrol’s Use of Deadly Force Criticized in Report,” Los Angeles Times, February 27, 2014, available at <https://www.latimes.com/nation/la-na-border-killings-20140227-story.html>

of-force policies. Most recently, the Trump Administration has coupled ongoing unaddressed concerns around CBP's use of force policies with attempts to grant military personnel authority to use force, including deadly force, in "defense" of federal agents at ports of entry.

Although border crossings remain far below historic highs, crossing-related deaths remain high. Part of the early strategy to militarize and wall off the border was to push migrants into more dangerous crossings as a means of deterrence. Then-INS Commissioner Doris Meissner called the deadly terrain an "ally". A resulting study by the GAO found that migrant deaths doubled between 1995 and 2006, the period of initial wall construction and increased agent deployments. Between 2006 and 2017, death rates in the Tucson sector rose over 400%, while death rates in the Laredo skyrocketed by nearly 700 percent.<sup>27</sup> In 2017, migrant deaths increased even as the number of border crossers dramatically fell.<sup>28</sup>

Since January 2010, at least 89 civilians have died following lethal encounters with CBP personnel. Such encounters include shootings, car chases ending in deadly crashes, and CBP agents forcing a young man to drink liquid methamphetamine.<sup>29</sup> These 89 cases also include six cases of individuals being shot in the back, across international borders, and in response to alleged rock throwing. One-fourth of the victims were U.S. citizens. In August 2018, a U.S. court of appeals issued a landmark decision in *Rodriguez v. Swartz*, confirming the Constitution does not end at the border and agents who kill across the international boundary are not entitled to qualified immunity.<sup>30</sup>

On May 23, 2018, 20-year old Claudia Patricia Gómez González was shoot in the head by a Border Patrol agent shortly after crossing into the United States. Only following the release of a bystander video did CBP admit to the facts surrounding the deadly encounter, illustrating the need for accountability measures, such as body worn cameras, to accurately document all encounters with the agency's agents.<sup>31</sup> In further setback for justice and accountable, an Arizona jury found Border Patrol agent Lonnie Swartz not-guilty of manslaughter in the cross border killing of 16-year-old Jose Antonio Elena Rodriguez in November 2018.<sup>32</sup>

On November 20, 2018, President Trump signed a memo written by Chief of Staff, General John Kelly, granting U.S. military personnel the ability to use force, including lethal force, crowd control,

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<sup>27</sup> See ACLU Border Rights Center, et al., "Death, Damage, and Failure: Past, Present, and Future Impacts of Walls on the U.S.-Mexico Border," September 2018, page 49, available at <https://www.aclu.org/report/death-damage-and-failure> (citing Border Patrol fact sheets on border deaths 1925-2016)

<sup>28</sup> "US-Mexico Border Migrant Deaths Rose in 2017 Even as Crossings Fell, UN Says," The Guardian, February 6, 2018, available at <https://www.theguardian.com/us-news/2018/feb/06/us-mexico-border-migrant-deaths-rose-2017>

<sup>29</sup> Kristine Phillips, "Video Shows U.S. Border Officers Telling Mexican Teen to Drink the Liquid Meth That Killed Him," The Washington Post, July 29, 2017, available at [https://www.washingtonpost.com/news/post-nation/wp/2017/07/29/video-shows-u-s-border-officers-telling-mexican-teen-to-drink-the-liquid-meth-that-killed-him/?utm\\_term=.3259941bf52c](https://www.washingtonpost.com/news/post-nation/wp/2017/07/29/video-shows-u-s-border-officers-telling-mexican-teen-to-drink-the-liquid-meth-that-killed-him/?utm_term=.3259941bf52c)

<sup>30</sup> American Civil Liberties Union, "ACLU Comment on Landmark Ruling in Cross-Border Shooting Case," August 7, 2018, available at <https://www.aclu.org/news/aclu-comment-landmark-ruling-cross-border-shooting-case>

<sup>31</sup> Daniel Altschuler & Natalia Aristizabal, "Claudia Gomez Gonzalez Wasn't Killed by a Rogue Border Agent – She Was Killed by a Rogue Agency," The Nation, May 29, 2018, available at <https://www.thenation.com/article/claudia-gomez-gonzalez-wasnt-killed-by-a-rogue-border-agent-she-was-killed-by-a-rogue-agency/>; <https://www.theguardian.com/us-news/2018/may/25/woman-shot-dead-border-patrol-rio-bravo-texas-identified>

<sup>32</sup> Molly Olmstead, "Border Patrol Agent Acquitted in Deadly Shooting of Mexican Teenager Who Allegedly Threw Rocks," Slate, November 26, 2018, available at <https://slate.com/news-and-politics/2018/11/border-agent-acquitted-killing-jose-antonio-elena-rodriguez.html>

temporary detention, and cursory searches, to protect federal agents at ports of entry.<sup>33</sup> General Kelly's memo follows this grant of authority with a caveat without distinction: "the deployed military shall not, without further direction from [President Trump], conduct traditional civilian law enforcement activities, such as arrest, search, and seizure in connection with the enforcement of the laws." General Kelly is attempting sidestep the long standing prohibition in U.S. law on military personnel conducting domestic law enforcement activities – known as *posse comitatus*. No reports of military personnel have yet been documented asserting this new authority, nor has Secretary of Defense, General Mattis, confirmed troops would assert this new authority granted by President Trump.<sup>34</sup> Any assertion of this authority would likely face legal challenges.

Notwithstanding the legal limitation on the military's ability to conduct law enforcement activities, CBP has taken steps to militarize its own agents. For example, on November 15, 2018, CBP issued an urgent purchase order for riot gear.<sup>35</sup> Such gear was used by the agency in conducting so-called "crowd control" exercises and "readiness exercises" at and near ports of entry in Arizona, Texas, and California<sup>36</sup>

In a disturbing show of force and lack of restraint, CBP officers on November 24, 2018 threw Triple-Chaser tear gas grenades at a crowd of a few hundred largely peaceful men, women and children. Under international human rights law, CBP agents may only use force that is both necessary and proportionate to the threat faced. By CBP's own account only four of their agents were struck by rock thrown over a border barrier between Tijuana and Southern California and their protective gear ensured the agent's safety. CBP's reaction to hurl tear gas grenades, outlawed in warfare, into a crowd of several hundred migrants, was a disproportionate response violating international human rights law.<sup>37</sup>

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<sup>33</sup> Tara Golshan, "What Trump's 'Lethal Force' Authorization Means at the Border," Vox, November 27, 2018, available at <https://www.vox.com/policy-and-politics/2018/11/27/18112610/trump-lethal-force-caravan-migrant-border-military>

<sup>34</sup> Missy Ryan & Paul Sonne, "Troops Approved to Use Force at the Border, but Mattis Says the Mission Hasn't Changed," The Washington Post, November 21, 2018, available at [https://www.washingtonpost.com/world/national-security/troops-approved-to-use-force-at-the-border-but-mattis-says-the-mission-hasnt-changed/2018/11/21/7b9e5e34-edbc-11e8-96d4-0d23f2aaad09\\_story.html?utm\\_term=.2df2ab403163](https://www.washingtonpost.com/world/national-security/troops-approved-to-use-force-at-the-border-but-mattis-says-the-mission-hasnt-changed/2018/11/21/7b9e5e34-edbc-11e8-96d4-0d23f2aaad09_story.html?utm_term=.2df2ab403163)

<sup>35</sup> Justin Rohrlich, "CBP Has an 'Urgent' Need for Riot Gear, According to Contracting Documents," Government Executive, November 19, 2018, available at <https://www.govexec.com/contracting/2018/11/cbp-has-urgent-need-riot-gear-according-contracting-documents/152933/>

<sup>36</sup> Robert Moore, "Border Patrol Cancels El Paso Crowd-Control Exercise Amid Concerns About Voter Suppression," The Washington Post, November 6, 2018, available at [https://www.washingtonpost.com/politics/border-patrol-to-conduct-a-crowd-control-exercise-in-el-paso-on-election-day/2018/11/06/147dd678-e18f-11e8-8f5f-a55347f48762\\_story.html?utm\\_term=.9b1450557b18](https://www.washingtonpost.com/politics/border-patrol-to-conduct-a-crowd-control-exercise-in-el-paso-on-election-day/2018/11/06/147dd678-e18f-11e8-8f5f-a55347f48762_story.html?utm_term=.9b1450557b18); *see also* U.S. Customs and Border Protection, "CBP to Conduct Large-Scale Operational Readiness Exercise at San Ysidro Port of Entry," November 21, 2018, available at <https://www.cbp.gov/newsroom/travel-advisory/cbp-conduct-large-scale-operational-readiness-exercise-san-ysidro-port>; *see also* U.S. Customs and Border Protection, "Port of Nogales Conducts Readiness Exercises," November 28, 2018, available at <https://www.cbp.gov/newsroom/local-media-release/port-nogales-conducts-readiness-exercises>; Justin Glawe, "DHS Agents in Riot Gear Close U.S.-Mexico Border for Caravan That's 1,500 Miles Away," Daily Beast, October 30, 2018, available at <https://www.thedailybeast.com/dhs-agents-in-riot-gear-close-us-mexico-border-for-caravan-thats-1500-miles-away>

<sup>37</sup> Jamil Dakwar, "Tear Gas Should Never Have Been Used at the Border. It Doesn't Belong at Protests, Either," The Washington Post, November 28, 2018, available at [https://www.washingtonpost.com/outlook/2018/11/28/tear-gas-should-never-have-been-used-border-it-doesnt-belong-protests-either/?noredirect=on&utm\\_term=.661ac7b1df5f](https://www.washingtonpost.com/outlook/2018/11/28/tear-gas-should-never-have-been-used-border-it-doesnt-belong-protests-either/?noredirect=on&utm_term=.661ac7b1df5f)

## 100 Mile Border Zone

Two-thirds of the U.S. population lives within 100 air miles of an international boundary (sea or land), where the nation's largest law enforcement agency, CBP, claims greater legal leeway to intrude in the daily lives of some 200 million residents.<sup>38</sup>

Congress has given CBP incredible amount of power, such as the authority to stop and conduct searches on vessels, trains, aircraft, or other vehicles anywhere within "a reasonable distance from any external boundary of the United States."<sup>39</sup> CBP agents can also even enter private property without a warrant (excepting dwellings) within 25 miles of any border. CBP has also claimed extra-constitutional powers. For example, Border Patrol claims the authority to operate immigration checkpoints. Agents, nevertheless, cannot pull anyone over without "reasonable suspicion" of an immigration violation or crime. Similarly, courts have determined that outside of ports of entry Border Patrol cannot search vehicles in the 100-mile zone without a warrant or "probable cause" (a reasonable belief, based on the circumstances, that an immigration violation or crime has occurred). In practice, Border Patrol agents routinely ignore or misunderstand the limits of their legal authority, violating the constitutional rights of innocent people. Although the 100-mile border zone is not literally "Constitution-free," CBP frequently acts like it is.<sup>40</sup>

Based on regulations interpreting the statute granting CBP's border zone authority, CBP can and does conduct operations far removed from the border and on roads with no immediate border access, where encounters with non-border crossers, including U.S. citizens and permanent residents, are the norm. These non-border operations force residents to encounter CBP enforcement regularly while moving about their home county, including on their way to and from work. Allowing CBP to divert its attention from the border, results in widespread violations of Americans' rights to property and liberty, including Fourth Amendment and other constitutional violations.

In 2014, the Department of Justice issued updated guidelines on racial profiling by law enforcement but specifically exempted CBP at or in the vicinity of the border - an admission that racial profiling is an inherent aspect of the agency's tactics.<sup>41</sup> Racial profiling, combined with the agency's expansive interpretation of their authority within 100 miles of the border, engenders the circumstances ripe for disproportionate levels Constitutional violations inflicted on populations of color.

## Border Walls

For border communities, the ongoing construction and expansion of border barriers signifies a distinct form of border militarization. Barriers divide historic communities, cut off access to private lands, devastate the environment and wildlife, and cause the death of thousands of migrants.

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<sup>38</sup> American Civil Liberties Union, "The Constitution in the 100-Mile Border Zone," available at <https://www.aclu.org/other/constitution-100-mile-border-zone>

<sup>39</sup> 8 U.S.C. § 1357(a)(3)

<sup>40</sup> American Civil Liberties Union, "ACLU Factsheet on Customs and Border Protection's 100-Mile Zone," available at <https://www.aclu.org/other/aclu-factsheet-customs-and-border-protections-100-mile-zone?redirect=immigrants-rights/aclu-fact-sheet-customs-and-border-protections-100-mile-zone>

<sup>41</sup> American Civil Liberties Union, "ACLU Response to Revised DOJ Guidance on The Use of Race by Federal Law Enforcement Agencies," December 8, 2014, available at <https://www.aclu.org/news/aclu-response-revised-doj-guidance-use-race-federal-law-enforcement-agencies>



Border walls do not increase security, nor reduce smuggling or immigration. In 2017, the GAO found that CBP could not demonstrate whether or not border walls had a measurable impact on border security. The agency had “not developed metrics for this assessment.”<sup>42</sup> Total border apprehensions decreased from a high of over 1.6 million in 2000 to over 500,000 in 2009 and have held largely steady since. The bulk of current border walls were not built until early 2009.<sup>43</sup> Annually, approximately twenty-five to fifty percent of undocumented immigrants enter or are smuggled through U.S. ports of entry.<sup>44</sup>

Border walls devastate the environment and wildlife. The wall places more than 93 endangered species at risk, including jaguars, Mexican wolves, Quino checkerspot butterflies, and several migratory birds and bats. Border barriers cut through sensitive ecosystems, disrupt animal migration patterns, create damaging floods, and divide communities and tribal nations.<sup>45</sup> Over 2,800 scientists from 47 countries published a paper objecting to Trump’s border wall due to the catastrophic impact on biodiversity and massive blow to the environment<sup>46</sup> The Trump administration is already pushing forward with construction plans in Texas that are likely to cause deadly flooding.<sup>47</sup>

Border walls inflict serious damage on border communities, property owners, and local economies. The administration is aggressively using a “Great Depression-era law originally designed to fast-track public-works projects” to seize private land from Texas landowners along the Rio Grande, some whose deeds date back centuries.<sup>48</sup> Thirty-six communities in California, Arizona, New Mexico, and Texas have already passed resolutions opposing the border wall, including 16 cities and all three border counties in the Rio Grande Valley, where wall construction proceeds without a single public meeting.<sup>49</sup>

Border walls exacerbate the humanitarian crisis of migrant deaths. Part of the early strategy around border walls was to push migrants into more dangerous crossings as a means of deterrence. Then-INS Commissioner Doris Meissner called the deadly terrain an “ally”. A resulting study by the GAO found that migrant deaths doubled between 1995 and 2006, the period of initial wall construction.

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<sup>42</sup> ACLU Border Rights Center, et al., “Death, Damage, and Failure: Past, Present, and Future Impacts of Walls on the U.S.-Mexico Border,” September 2018, page 43, available at <https://www.aclu.org/report/death-damage-and-failure>

<sup>43</sup> *Id.* at page 45

<sup>44</sup> *Id.* at page 48

<sup>45</sup> *See id.* at pages 23-42

<sup>46</sup> “The border wall would be a ‘massive blow’ to the ecosystem and ‘truly affect the human communities[.]’” Kate Furby, “Thousands of Scientists Object to Trump’s Border Wall,” *The Washington Post*, July 24, 2018, available at [https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/24/thousands-of-scientists-object-to-trumps-border-wall/?utm\\_term=.40798d98848b](https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/24/thousands-of-scientists-object-to-trumps-border-wall/?utm_term=.40798d98848b); *see also* “Nature Divided, Scientists United: U.S.-Mexico Border Wall Threatens Biodiversity and Binational Conservation,” available at <https://defenders.org/border-wall-report/view-signatories>

<sup>47</sup> Melissa del Bosque, “Trump’s Border Wall Could Cause Deadly Flooding in Texas. Federal Officials Are Planning to Build It Anyway,” November 7, 2018, available at <https://www.texasmonthly.com/news/trumps-border-wall-cause-deadly-flooding-texas-federal-officials-planning-build-anyway/>

<sup>48</sup> Bryan Logan, “The Feds Are Moving Ahead with Private-Land Seizures to Make Room for Trump’s Border Wall,” *Business Insider*, June 21, 2018, available at <https://www.businessinsider.com/government-seizing-private-land-for-trump-border-wall-when-where-2018-6>

<sup>49</sup> The full list of community resolutions is as follows: Arizona: Flagstaff, Inter-Tribal Association, Pima County, Tohono O’odham Nation, Tucson; New Mexico: Las Cruces; California: Berkeley, Los Angeles, Oakland, San Diego; Texas: Alton, Alamo, Austin, Brownsville, Brewster County, Cameron County, Edinburg, El Paso, Hidalgo County, La Joya, Laguna Vista, Los Fresnos, McAllen, Mercedes, Mission, Palmview, Pharr, Port Isabel, Presidio, San Juan, Starr County, Sullivan City, and Weslaco. *See* list available at <https://noborderwalls.org/opposition/>.

Between 2006 and 2017, when most border walls and barriers were deployed, death rates in the Tucson sector rose over 400%, while death rates in the Laredo skyrocketed by nearly 700 percent.<sup>50</sup> In 2017, migrant deaths increased even as the number of border crossers dramatically fell.<sup>51</sup>

On May 17, 2017, the U.N. Committee on the Elimination of Racial Discrimination asked the U.S. Government provide information on the Trump administration's expansion of the border wall and its effects on indigenous peoples living along the U.S.-Mexico border.<sup>52</sup> Under its early warning and urgent action procedure, the UN Committee requested that the U.S. provide the information to address concerns that the expansion of the wall—as outlined in the Trump Administration's executive order issued January 25th—will discriminate against indigenous groups living in the border region. This information has yet to be furnished to the UN Committee.<sup>53</sup>

## Recommendations

We respectfully call on the Inter-American Commission on Human Rights to:

- Conduct an official fact-finding visit to the United States and investigate the human rights implications of the militarization of the U.S.-Mexico border and the impact on border communities, immigrant communities, migrants, asylum seekers, Indigenous Peoples, refugees and their families.

ACLU makes the following policy recommendations to the U.S. government:

- Immediately withdraw military troops from the U.S. southwest border.
- CBP agents, including Border Patrol, should be held accountable for human rights abuses at the border, which should include a policy to address abuses and publicly-release investigations and disciplinary actions for agents who commit lethal and non-lethal abuse.
- The U.S. Congress should establish a permanent external, independent oversight commission that is charged with investigating and responding to complaints about CBP abuses.
- The U.S. Congress should not allocate any additional funds for “border security” or border walls. It should conduct robust oversight of existing funding and demand DHS provide a full accounting of funds previously allocated for border security infrastructure, and require ongoing community consultations that include in-person community meetings and open comment periods for all construction proposals, as well as Congressional reporting requirements on the outcomes of such consultation.

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<sup>50</sup> See ACLU Border Rights Center, *supra* note 27 at page 49 (citing Border Patrol fact sheets on border deaths 1925-2016).

<sup>51</sup> “US-Mexico Border Migrant Deaths Rose in 2017 Even As Crossings Fell, UN Says,” The Guardian, February 6, 2018, available at <https://www.theguardian.com/us-news/2018/feb/06/us-mexico-border-migrant-deaths-rose-2017>

<sup>52</sup> Anastasia Crickley, Office of The High Commissioner for Human Rights, May 17, 2017, available at [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT\\_CERD\\_ALE\\_USA\\_8210\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_ALE_USA_8210_E.pdf)

<sup>53</sup> Fall 2008 Human Rights Advocacy Class, “USA: Advocating Human Rights in the Southern Border of Texas,” 2008, The University of Texas at Austin School of Law, available at <https://law.utexas.edu/clinics/2015/04/24/borderwall/>