

Subcommittee on Oversight and Investigations

Bruce Westerman, Chairman

Hearing Memorandum

February 9, 2018

To: All Subcommittee on Oversight and Investigations Members

From: Majority Committee Staff – John Strom
Subcommittee on Oversight and Investigations (x5-7107)

Hearing: **Oversight hearing on “*The Costs of Denying Border Patrol Access: Our Environment and Security*”**
February 15, 2018 at 10:00 a.m. in 1324 Longworth House Office Building

This oversight hearing will focus on the access challenges faced by Border Patrol agents on federal borderlands and the environmental impact of illegal border crossings and drug smuggling.

Policy Overview

- The remote location of large portions of federally owned borderland make them a popular location for cross border violators (CBVs), such as drug and human smugglers, foreign nationals, and terrorists and terrorist organizations.¹ Many stretches of federally owned borderland have minimal security infrastructure and poor roads, making it difficult for Border Patrol agents to effectively patrol dangerous terrain.²
- Environmental laws and varied jurisdictional responsibility among land management agencies further complicate border security efforts. Although a 2006 Memorandum of Understanding (MOU) executed by the Department of Homeland Security (DHS), the Department of the Interior (DOI), and the Department of Agriculture (USDA) intended to facilitate cooperation and communication between agencies, its practical effects can restrict Border Patrol’s security efforts. For example, approval processes per the MOU can take months, robbing Border Patrol the necessary operational flexibility and access to effectively respond to evolving CBV routes and drug cartel operations.
- While Border Patrol agents must balance environmental concerns and law enforcement access to protect our borders, CBVs and their accomplices completely disregard our natural resources and environmental protection laws. Cross border violations on federally owned borderland cause extensive ecological and environmental damage

¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-38, SOUTHWEST BORDER: MORE TIMELY BORDER PATROL ACCESS AND TRAINING COULD IMPROVE SECURITY OPERATIONS AND NATURAL RESOURCE PROTECTION ON FEDERAL LANDS 4, 29 (2010), available at <https://www.gao.gov/products/GAO-11-38>; see also *Canada’s Fast-Track Refugee Plan: Unanswered Questions and Implications for U.S. National Security: Hearing Before the S. Comm. on Homeland Sec. & Gov’t. Affairs*, 114th Cong. 9 (2016) [hereinafter *S. Hearing*] (testimony of David B. Harris, Director, International Intelligence Program, Insignis Strategic Research Inc.).

² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-38, *supra* note 1 at 28–31.

ranging from wildland fires, soil erosion, habitat destruction, and the accumulations of human waste and garbage.

- U.S. residents living and working in and around federal borderlands may face fatal chance encounters with drug smugglers or groups of desperate illegal immigrants. This concern is particularly acute for isolated ranchers.

Witnesses Invited (in alphabetical order):

The Honorable Andrew R. Arthur
Resident Fellow in Law and Policy
Center for Immigration Studies
Washington, D.C.

Mr. Dan Bell
President
ZZ Cattle Corporation
Nogales, Arizona

Mr. Brandon Judd
President
National Border Patrol Council
Tucson, Arizona

Mr. Scott Nicol
Co-Chair, Sierra Club Borderlands Campaign
The Sierra Club
McAllen, Texas

Background

Federal and Indian owned land represent approximately 693 miles, or about 35 percent, of the Southern border, the overwhelming majority of which, is managed by the Department of the Interior (DOI) and the Forest Service (USFS).³ The rugged, isolated character of most federally owned borderland⁴ makes patrolling and the installation and maintenance of security infrastructure difficult. Regulatory delays and reliance on federal land managers for appropriate access to federally owned borderland further hampers Border Patrol's efforts to adequately patrol, as well as, build and maintain border security infrastructure. The same factors that hinder Border Patrol's operations make federally owned borderland a popular, but dangerous, crossing point for CBVs, such as illegal immigrants and drug traffickers.

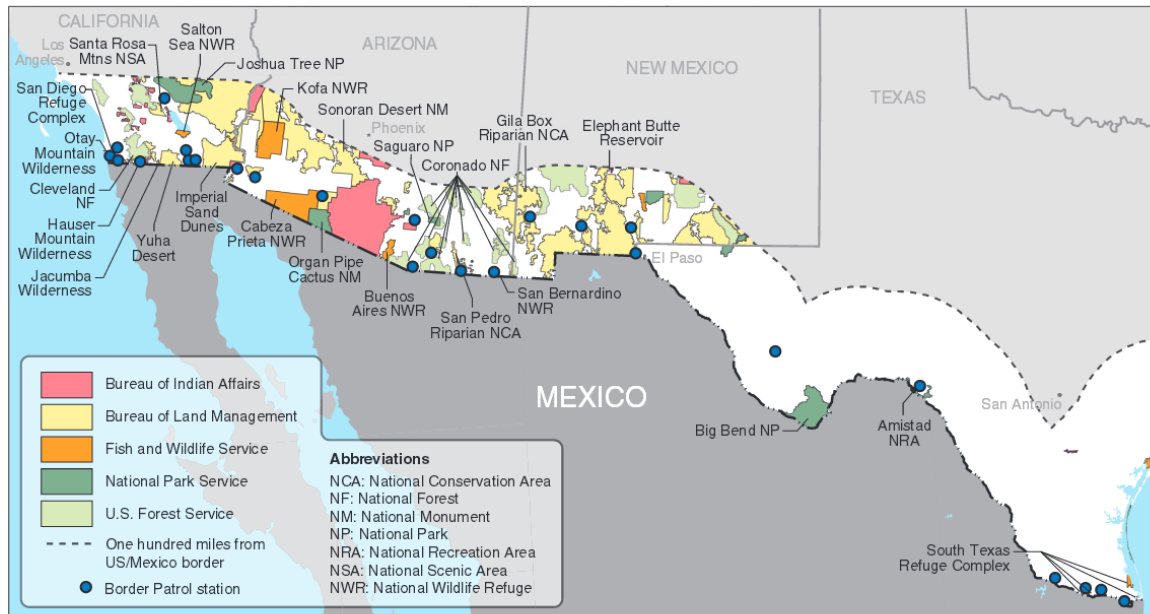
³ Memorandum from Carol Hardy Vincent, Specialist in Natural Resources Policy, Congressional Research Service, to Staff, Oversight and Investigations Subcomm., H. Comm. on Natural Resources (Nov. 9, 2017) (on file with H. Comm. on Natural Resources); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-38, *supra* note 1 at 4.

⁴ The borderlands region encompasses the area extending from the United States-Mexico border north to 100 miles.

Regulatory Obstacles to Border Patrol Access

The Border Patrol is tasked with gaining “operational control” of the international borders of the United States. Operational control is statutorily defined as “the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.”⁵ In the years since September 11, 2001, Congress has authorized large increases in manpower and equipment for the Border Patrol.⁶

Federal Lands on U.S. – Mexico Border



Sources: United States Geological Survey and GAO.

The REAL ID Act of 2005 granted the Secretary of Homeland Security authority to waive all legal requirements deemed necessary to “ensure expeditious construction of [border] barriers and roads” in areas of high illegal entry.⁷ While this waiver authority applies to border barrier construction, maintenance of existing infrastructure or roads can become a challenge for Border Patrol. Except for this waiver authority, Congress has largely left in place regulatory obstacles that can deter obtaining operational control of the border.

In August 2006, the Department of Homeland Security (DHS), DOI, and the Department of Agriculture (USDA) entered into a Memorandum of Understanding (MOU) to establish “consistent goals, principles, and guidance related to border security,” between the three

⁵ 8 U.S.C. § 1103 note (Section 102(b)(1) and (b)(3)); *see also* Exec. Order No. 13767, 82 Fed. Reg. 8793, 8794 (Jan. 30, 2017) *available at* <https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>.

⁶ U.S. Border Patrol Fiscal Year Budget Statistics (FY 1990 – 2017), U.S. CUSTOMS AND BORDER PROTECTION, DEP’T OF HOMELAND SECURITY (Dec. 12, 2017), *available at* <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Budget%20History%201990-2017.pdf>

⁷ 8 U.S.C. § 1103 note; *see also* *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 129-30 (D. D.C. 2007), *cert. denied*, 554 U.S. 918 (2008) (finding waiver authority constitutional).

departments.⁸ The MOU “provides guidance in the development of individual agreements, where appropriate, between [Customs and Border Protection (CBP)] and the land management agencies”⁹ While the MOU allows for Border Patrol to conduct motorized pursuits in exigent or emergency situations within wilderness or wilderness study areas, Border Patrol must file a report with the federal land manager after each instance.¹⁰ Otherwise, Border Patrol agents can generally patrol by foot or by horseback without prior authorization from the federal land manager.¹¹

Any additional Border Patrol access to federal lands is “subject to such terms and conditions that are mutually developed” by the Border Patrol and federal land managers.¹² In practice, this gives federal land managers a veto over Border Patrol activities. For instance, Border Patrol must receive permission to patrol areas not designated for off-road use and to install tactical security infrastructure, such as roads, motion sensors, cameras, and vehicle barriers.

Under the MOU, after receiving Border Patrol’s request, federal land managers have ninety days to execute a local agreement after receiving a written request.¹³ Negotiating a mutually accepted agreement, however, can cause delays, which would ultimately disadvantage Border Patrol from successfully executing their mission, more so than the missions of the land managers. The power disparity between Border Patrol and federal land management agencies is further exemplified through the numerous instances where DHS has agreed to fund environmental mitigation projects on land managed by USDA and DOI.¹⁴

Border Patrol agents are oftentimes most constrained in federally designated wilderness areas. In general, the Wilderness Act prohibits using motor vehicles, motorized equipment, landing of aircraft, and any form of mechanical transport in designated areas.¹⁵ Therefore, even when the Border Patrol is authorized by the National Park Service to patrol or erect infrastructure in wilderness areas, transportation, equipment, and tools can be limited to non-motorized or non-mechanical devices.¹⁶ Undoubtedly, as professional drug or human smugglers, CBVs, do not observe such Wilderness Act restrictions to leave such areas unimpaired for the future use and enjoyment of others or share desires to preserve and protect natural conditions.

Therefore, the MOU robs Border Patrol agents of the operational flexibility essential to their mission of securing our borders. Border Patrol agents have expressed frustration due to

⁸ Memorandum of Understanding Among U. S. Department of Homeland Security and U. S. Department of the Interior and U. S. Department of Agriculture Regarding Cooperative National Security and Counterterrorism Efforts on Federal Lands along the United States' Borders 1 (Mar. 2006) (on file with author).

⁹ *Id.* at 2.

¹⁰ *Id.* at 6.

¹¹ *Id.* at 4.

¹² *Id.* at 6.

¹³ *Id.* at 5.

¹⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-38, *supra* note 1 at 56; *see also* Press Release, National Park Service, Dep’t of the Interior, DHS and DOI Sign Agreement for Mitigation of Border Security Impact on the Environment, (Jan. 15, 2009) (*last edited Apr. 4, 2016*), available at https://www.doi.gov/news/pressreleases/2009_01_15_releaseB.

¹⁵ 16 U.S.C. § 1133(c).

¹⁶ *Id.*

delayed approvals from federal land managers to remediate drug trafficking tunnels, repairing existing roads, and installing tactical security infrastructure.¹⁷ At times, Border Patrol agents working with land management agencies can experience long delays in approval of tactical infrastructure road maintenance and repair projects.¹⁸

Section 1118 of the Securing America's Future Act of 2018 (H.R. 4760) resolves many of the access concerns experienced by Border Patrol agents due to the MOU. Section 1118 waives certain federal environmental laws to provide Border Patrol improved access to all federally owned borderlands.

Environmental Damage caused by an Unsecured Border

Human Waste and Garbage

Illegal migrants, human traffickers, and drug smugglers, whether crossing by foot or using vehicles cause substantial damage to the natural and cultural resources found on federal lands. Tremendous amounts of human waste and garbage are left on borderlands every year. Medical supplies, diapers, clothing, and even broken-down cars are all left behind on federal borderlands.¹⁹ Throughout the borderlands, trash strewn lay-up points, staging areas where illegal immigrants and smugglers discard waste in preparation for being picked up by vehicles, are a common sight in dry river beds and washes.²⁰

In Arizona's southern region alone, the Bureau of Land Management reportedly collected and removed 794,320 pounds of trash between FY2011-2016.²¹ The Arizona Department of Environmental Quality estimates that each year 2,000 tons of diapers, plastic bottles, and other garbage is left behind by CBVs.²² Garbage and human waste from CBVs has been identified as one of the major contributors to pollution in the San Pedro River, where volunteers cleaned up more than thirty temporary camps set up by CBVs in 2008 alone.²³

¹⁷ Discussions with various Border Patrol agents, Congressional Delegation Bishop in Tucson Sector, Arizona. (Feb. 2018).

¹⁸ *Id.*

¹⁹ Position Statement, Public Lands Foundation, *Public Lands Being Destroyed by Illegal Immigration 2* (Jul. 18, 2010), available at https://publicland.org/wp-content/uploads/2016/08/PLF_Position_Statement_2010-08_Public_Lands_Being_Destroyed_by_Illegal_Immigration.pdf.

²⁰ Leo Banks, *Trashing Arizona: Illegal Immigrants Dump Tons of Waste in the Wilderness every day – and it's Devastating the Environment*, TUCSON WEEKLY (Apr. 2, 2009), <https://www.tucsonweekly.com/tucson/trashing-arizona/Content?oid=1168857>.

²¹ BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, SOUTHERN ARIZONA PROJECT 2016 BORDER REPORT (Apr. 20, 2017), available at <https://www.blm.gov/node/11584>.

²² Tim Gaynor, *Migrant Trash Piles up at Remote U.S. – Mexico Border Areas*, REUTERS (Jan. 29, 2012), <https://www.reuters.com/article/us-immigration-usa-trash/migrant-trash-piles-up-at-remote-u-s-mexico-border-areas-idUSTRE80S0QB20120129>.

²³ CORONADO RESOURCE CONSERVATION & DEVELOPMENT, *San Pedro River Targeted Watershed E. coli Reduction Improvement Plan 34* (June 2013), available at https://legacy.azdeq.gov/environ/water/watershed/download/usp_wip.pdf.

Wildland Fires

CBVs are also responsible for man-made wildland fires started on the border. According to the Government Accountability Office (GAO), between 2006 and 2010, illegal immigrants and drug traffickers were likely responsible for 30 out of 77 investigated wildland fires on federal lands.²⁴ High levels of CBVs complicate fire suppression efforts and forces firefighters to change tactics. For example, nighttime firefighting activities may be reduced due to firefighter safety concerns of encountering armed drug and human traffickers.²⁵ Moreover, coordinating aerial firefighting operations along the border is more difficult because CBVs often use the same radio frequencies as firefighters.²⁶

Threat to Habitats

In addition to the massive volume of trash and dangerous man-made wildfires, illegal border crossings inflict serious damage to vegetation and species habitats. Like the loss of life and threat to public safety, the environmental cost of illegal immigration and smuggling is a constant concern. The Public Lands Foundation's states that "the smuggling of controlled substances and people into the United States from Mexico is increasingly causing substantial and oftentimes irreparable damage to natural and cultural resources on federal, tribal, and private lands along America's southwest border."²⁷

The U.S. Fish and Wildlife Service (FWS) identified mass illegal immigration as a likely contributing factor in the 79 percent decline in the U.S. Sonoran pronghorn population between 2000 and 2002 at the Organ Pipe Cactus National Monument.²⁸ FWS's report on the Cabeza Prieta National Wildlife Refuge, which shares 56 miles of border with Mexico, used high resolution aerial photography to map 7,968 miles of vehicular trails associated with illegal border crossings in the refuge.²⁹

²⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-73, ARIZONA BORDER REGION: FEDERAL AGENCIES COULD BETTER UTILIZE LAW ENFORCEMENT RESOURCES IN SUPPORT OF WILDLAND FIRE MANAGEMENT ACTIVITIES 23 (Nov. 2011), available at <https://www.gao.gov/assets/590/586139.pdf>.

²⁵ *Id.* at 29.

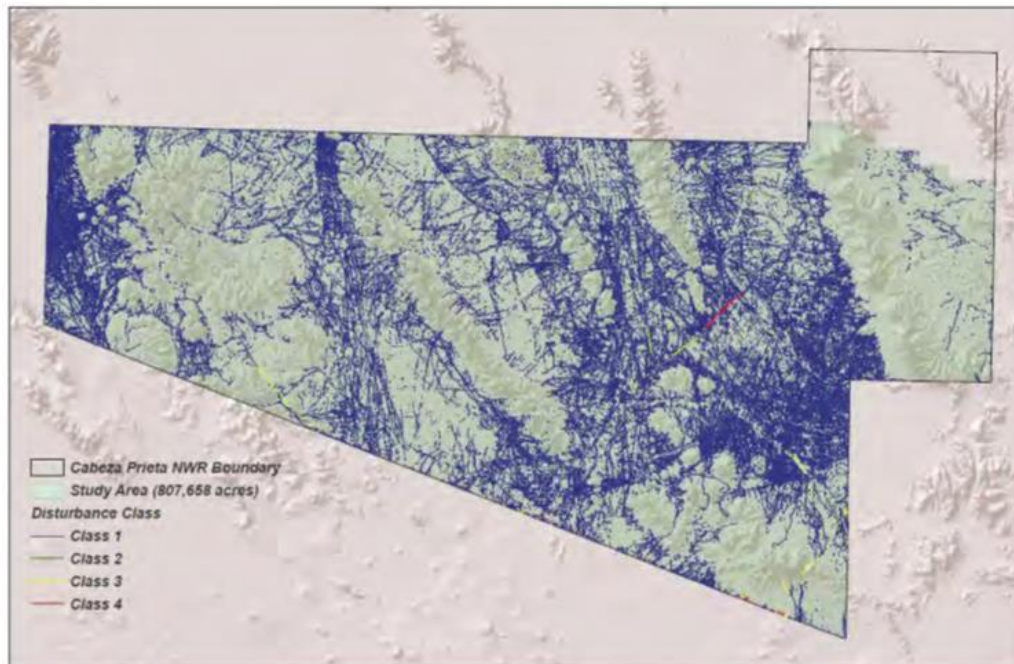
²⁶ *Id.* at 27-30.

²⁷ Public Lands Foundation, *supra* note 19 at 3.

²⁸ U.S. FISH & WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, CABEZA PRIETA NATIONAL WILDLIFE REFUGE: VEHICLE TRAILS ASSOCIATED WITH ILLEGAL BORDER ACTIVITIES ON CABEZA PRIETA NATIONAL WILDLIFE REFUGE – JULY 2011 2 (Oct. 2011) available at http://rewilding.org/rewildit/images/Cabeza-Prieta-Vehicle-Trails_2011July.pdf.

²⁹ *Id.*

Digitized map of off-road trails in Cabeza Prieta National Wildlife Refuge, October 2008



Source: USFWS

FWS also found that “the amount of damage from off-road activities [in Cabeza Prieta] may be significantly impacting the natural quality of wilderness character . . .” through erosion, changing plant distribution, destruction of wildlife habitat, and soil compaction.³⁰ Given the environmental threats of CBVs, FWS recommended increasing personnel and horse patrols as well as deploying more technological assets in Cabeza Prieta.³¹

Violence and the National Security Risk of an Unsecured Border

Gaps in border security are used by drug smugglers, human traffickers, and even potential terrorists³² to gain undocumented entry into the United States. Remote federal lands are a popular border crossing location, making encounters between those crossing the border illegally and park rangers, forestry officers, and other field-level land management employees inevitable.³³ On August 9, 2002, Park Ranger Kris Eggle was killed while pursuing drug cartel members in Organ Pipe Cactus National Monument.³⁴ Following Ranger Eggle’s murder, large sections of Organ Pipe Cactus National Monument were closed to the public because of rampant

³⁰ *Id.* at 10.

³¹ *Id.* at 11-12.

³² *S. Hearing, supra* note 1 at 9.

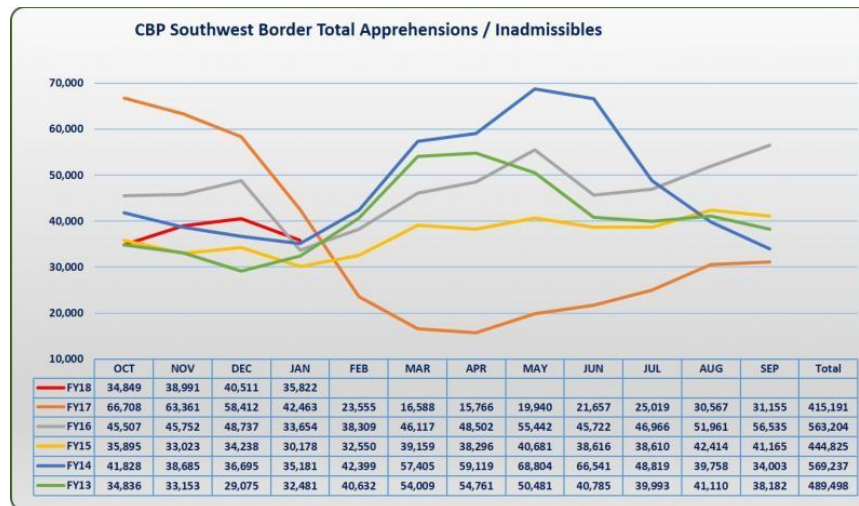
³³ U.S. DEP’T OF AGRICULTURE, PERSONAL SAFETY OF FEDERAL LAND-MANAGEMENT FIELD EMPLOYEES WORKING ALONG THE MEXICAN BORDER (2006), available at <https://www.fs.fed.us/t-d/pubs/pdfpubs/pdf06672802/pdf06672802dpi300.pdf>.

³⁴ NATIONAL PARK SERVICE, DEP’T OF THE INTERIOR, ORGAN PIPE CACTUS NATIONAL MONUMENT: WHO WAS KRIS EGGLE? (May 24, 2016), <https://www.nps.gov/orpi/learn/historyculture/kris.htm>.

CBVs.³⁵ The National Monument did not fully reopen to the American public until 12 years after Eggle’s death.³⁶

In Fiscal Year (FY) 2017, the Border Patrol made 415,191 apprehensions along the Southern border.³⁷ Border Patrol has made 109,544 apprehensions in the current, 2018 fiscal year.³⁸ Despite a trend of fewer apprehensions, in FY 2017 there were 847 more assaults against Border Patrol personnel, a 45% increase from FY 2016.³⁹ Border Patrol agents, while trained and equipped to interdict illegal crossings, typically patrol alone⁴⁰ and are therefore at high risk of being attacked on the job.

Southwest Border Apprehensions



Source: U.S. Customs and Border Patrol, Dep’t. of Homeland Security

The Southern border remains the most popular entry point for drug smugglers. Last year, CBP seized 9,346 pounds of cocaine, 953 pounds of heroin, 861,231 pounds of marijuana, 10,328 pounds of methamphetamines, and 181 pounds of fentanyl.⁴¹ During the same time frame, CBP encountered 8,531 criminal aliens, of whom, 2,675 were criminal aliens with

³⁵ NATIONAL PARK SERVICE, DEP’T OF THE INTERIOR, ORGAN PIPE CACTUS NATIONAL MONUMENT: FREQUENTLY ASKED QUESTIONS (Sept. 17, 2017), <https://www.nps.gov/orpi/opening-frequently-asked-questions.htm>.

³⁶ Press Release, National Park Service, Dep’t of the Interior, *Organ Pipe Cactus National Monument Increases Area Available for Public Access* (Sept. 17, 2017), available at <https://www.nps.gov/orpi/learn/news/public-access-increases.htm>.

³⁷ CBP Southwest Border Migration Statistics, FY 2017, U.S. CUSTOMS AND BORDER PROTECTION, DEP’T OF HOMELAND SECURITY (Jan. 10, 2018), available at <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017>.

³⁸ CBP Southwest Border Migration Statistics, FY 2018, U.S. CUSTOMS AND BORDER PROTECTION, DEP’T OF HOMELAND SECURITY (Jan. 10, 2018), available at <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

³⁹ CBP Use of Force Statistics FY 2017, U.S. CUSTOMS AND BORDER PROTECTION, DEP’T OF HOMELAND SECURITY (Jan. 10, 2018), available at <https://www.cbp.gov/newsroom/stats/cbp-use-force>.

⁴⁰ John C. Moritz, Aileen B. Flores, Brandon Loomis, et. al., *A USA Today Network Special Report: The Wall, USA TODAY*, <https://www.usatoday.com/story/us-border-patrol-control-mexico/633139001/>.

⁴¹ CBP Enforcement Statistics FY2018, U.S. CUSTOMS AND BORDER PROTECTION, DEP’T OF HOMELAND SECURITY (undated), available at: <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

outstanding warrants and arrested “536 illegal aliens who are affiliated with a gang,” including 228 of whom were affiliated with MS-13.⁴²

Rural communities in the Southwestern United States inevitably bear a disproportionate amount of the violence and public safety risks stemming from CBVs. Residents, such as ranchers, living and working near the border are particularly vulnerable and contend daily with the very real risk of a violent chance encounter with drug cartel members or desperate illegal immigrants.⁴³ The unsolved murder of Arizona rancher, Robert Krentz, who was fatally shot while attempting to render aid to a distressed migrant, vividly illustrates the risks ranchers on the Southern border face.⁴⁴

The violence is not limited to attacks against U.S. citizens. Migrants are frequently victims of the criminals they pay to lead them across the border and of the harsh terrain of some of the most used illegal border crossing routes. Professional smugglers, known as “coyotes,” sometimes abandon the people they are leading mid-way⁴⁵ or require kidnapped migrants to transport illegal drugs.⁴⁶ Refusal to work for a drug cartel can often mean death.⁴⁷ Thousands of migrants have died in attempts to cross the border.⁴⁸ Some sources indicate a strong concentration of deaths occurring on isolated federal lands.⁴⁹

⁴² CBP Border Security Report, FY 2017, U.S. CUSTOMS AND BORDER PROTECTION, DEP’T OF HOMELAND SECURITY (Dec. 5, 2017), at 3, available at: <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/cbp-border-security-report-fy2017.pdf>.

⁴³ Demetri Sevastopulo, *Ranchers Fear Drug Cartels More Than Immigrants at US-Mexico Border*, FINANCIAL TIMES, Sept. 9, 2016, <https://www.ft.com/content/d181cc8c-765e-11e6-bf48-b372cdb1043a>; see also NATIONAL PARK SERVICE, U.S. DEP’T OF THE INTERIOR, STATE OF THE PARK REPORT: ORGAN PIPE CACTUS NATIONAL MONUMENT (Jan. 24, 2018), available at <https://www.nps.gov/stateoftheparks/orpi/index.cfm>.

⁴⁴ William La Jeunese, *Illegal Immigrant Suspected in Murder of Arizona Rancher*, FOX NEWS, Mar. 30, 2010, <http://www.foxnews.com/us/2010/03/30/illegal-immigrant-suspected-murder-arizona-rancher.html>.

⁴⁵ Press Release, U.S. Customs and Border Protection, Dep’t of Homeland Security, *Sonoita Agents Rescue Mexican Man with Broken Ankle* (Feb. 2, 2018), available at <https://www.cbp.gov/newsroom/local-media-release/sonoita-agents-rescue-mexican-man-broken-ankle>; see also Alex Hannaford, *Missing in the US Desert: Finding the Migrants Dying on the Trail North*, THE GUARDIAN, Aug. 20, 2017, available at <https://www.theguardian.com/world/2017/aug/20/finding-migrants-who-died-crossing-the-us-border>.

⁴⁶ David Luhnnow, *Mexico Killings Shows Migrants’ Plight*, THE WALL STREET JOURNAL, Aug. 27, 2010, available at <http://online.wsj.com/article/SB10001424052748704913704575454033356912888.html>.

⁴⁷ *Id.*

⁴⁸ Joel Rose, *Death at the Southern Border an Increasing Risk for Migrants*, July 25, 2017, <https://www.npr.org/2017/07/25/539263390/death-at-the-southern-border-an-increasing-risk-for-migrants>.

⁴⁹ *Map of Migrant Mortality*, Arizona Open GIS Initiative for Deceased Migrants, <http://www.humaneborders.info/app/map.asp> (last visited Feb. 2, 2018).