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Identity Activities at the Southwest Border

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“I have the honor to inform you, that I have arrived on the Line as near as has been ascertained that divides the two States of North America and that of Mexico, with two hundred Troops of the U.S. Army.”

*- Brevet Major Bennet Riley (July 10, 1829)
to his Excellency, the Governor of Santa Fe*

EXECUTIVE SUMMARY

Identity activities at the Southwest Border (SWB) are an important part of overall government activities designed to stem the flow of illegal drugs, criminals, and terrorists who often make their way from third countries through Mexico, taking advantage of the long and semi-porous border separating the two nations. To determine the appropriate disposition of border crossers, it is necessary to first determine their identities, legal status, and relationship to fellow travelers. The military has recently been called upon to assist in SWB operations, a task which is not novel in the history of U.S-Mexican relations. Recent events, including executive threats to close the border completely and transfer undocumented immigrants exclusively to sanctuary cities, have alarmed some who question the authority of the executive as well as the role of the military to conduct or assist with border activities generally. This paper will outline some of these concerns and show that identity activities are an important part of overall border activities and are within the authority of the executive.

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I. AN HISTORICAL VIEW OF THE BORDER

Since the mid–nineteenth century, the U.S. has frequently employed the military (mainly the Army) at its southern border to perform various mission including outright war, patrolling the border, chasing bandits, and securing persons and property. More recent efforts have consisted of defense support to civil authority (DSCA) and antidrug operations. The recent deployment of National Guard Soldiers to the Mexican border is the latest manifestation of a long tradition. Between 1846 and the early decades of the twentieth century, the Army carried out its security missions under a variety of hardships imposed by the massive length (nearly 2000 miles) and ruggedness of the border. Mexican domestic politics and U.S.–Mexican international relations have greatly affected the Army’s operations, and the challenges continue even today with heated rhetoric on both sides of the border.²

Between 1848 and 1917, the Army stationed troops along the border in small outposts and physically patrolled the area in order to discourage Indian movements, cross-border banditry, and criminal activities. The Army quickly learned that it could not adequately protect against incursions and raids with such limited manpower, as the distances were too great and the terrain too difficult. From its earliest attempts, the Army discovered that static patrolling measures could not stop determined adversaries from penetrating the border; the border continues to be breached to this day.

After World War I, nearly 20,000 Army troops were stationed along the border. The goal was to defeat General Pancho Villa, who had captured the Mexican city of Juarez in June 1919 and appeared prepared to attack El Paso. The final cross-border attack of the Mexican Expedition

² On April 4, 2019, Andres Manuel Lopez Obrador, the President of Mexico responded to President Donald Trump’s accusation that he was “doing nothing” to stop illegal immigration into the U.S. southern border by stating “We respect president Trump’s position, and we are going to help.” He stipulated that “this is a problem of the United States, or it’s a problem of the Central American countries. It’s not up to us Mexicans, no.”

by the Army was against General Villa's base. The Army successfully drove him out of Juarez, and Villa never again posed a threat to the border. By the 1920s, the direct role of the Army in securing the nation's southern border had come to an end. For the next sixty years, the United States confronted a large-scale immigration of Mexicans. Army leadership, however, was typically unenthusiastic when directed to secure the border.³

In 1954, arguably the height of modern tensions, Attorney General Herbert Brownell launched Operation Wetback. In a major coordinated effort to round up and expel illegal aliens, Brownell turned to the Army to reinforce the Border Patrol but was rejected due to issues of force strength.⁴ Army generals opposed the idea because an entire division (10,000 to 20,000 Soldiers) would be needed just to control the Mexican influx, while completely sealing off the border would require even more troops at a time when the Army was demobilizing from the conflict in Korea. General Joseph Swing disliked the idea of placing Soldiers on the border and felt that it would "destroy relations with Mexico."⁵

A similar negative sentiment was recently expressed by former Customs and Border Patrol (CBP) Commissioner, R. Gil Kerlikowske, who stated that the military may not stop asylum seekers who show up at border crossings seeking protection. He further expressed that agents had no trouble apprehending illegal border crossers. According to Kerlikowske, military involvement is a "political stunt, a waste of military resources, and waste of tax dollars."⁶

³ Matt M. Matthews, *THE US ARMY ON THE MEXICAN BORDER: A HISTORICAL PERSPECTIVE* ARMY UNIVERSITY PRESS (2007), https://www.armyupress.army.mil/Portals/7/combat-studies-institute/csi-books/Matthews_op22.pdf (last visited Apr 4, 2019).

⁴ The Army claimed such an operation would "seriously disrupt training programs at a time when the administration's economy slashes were forcing the service to drastically cut its strength."

⁵ Juan Ramon Garcia, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* (Westport, CT: Greenwood Press, 1980), 169, 171.

⁶ Astrid Galvan, *THIS FEDERAL LAW LIMITS WHAT US TROOPS DEPLOYED AT THE BORDER CAN DO* MILITARY TIMES (2018), <https://www.militarytimes.com/news/your-military/2018/10/31/federal-law-limits-what-us-troops-deployed-at-the-border-can-do/> (last visited Apr 28, 2019).

However, President Trump views the situation differently and has described the situation as “an invasion of our country with drugs, with human traffickers, with all types of criminals and gangs.”⁷ On May 11, Acting Defense Secretary Patrick Shanahan announced that “[w]e’re not going to leave until the border is secure.” The statement comes as the Department of Defense (DoD) is transferring \$1.5 billion from numerous defense projects to a Pentagon counterdrug fund that will help finance construction of barriers on the U.S.–Mexico border. This supplements \$1 billion the Pentagon transferred for wall construction in March.⁸

II. OPERATION GUARDIAN SUPPORT AND ADDITIONAL BORDER ASSISTANCE

Operation Guardian Support (formerly Operation Faithful Patriot) originally involved 2,100 National Guard personnel who deployed to the Southwest Border to assist with U.S. Customs and Border Protection (CBP) border security operations.⁹ The troop deployment was to allow Border Patrol agents and CBP officers to return to enforcement duties while service members assisted with non-frontline duties such as camera operations, radio communications, and fleet management. Operation Guardian Support is slated to extend through fiscal year 2019 with up to 4,000 National Guard personnel augmenting CBP operations through support roles similar to those performed during FY18.¹⁰

⁷ Damian Paletta, Mike DeBonis & John Wagner, TRUMP DECLARES NATIONAL EMERGENCY ON SOUTHERN BORDER IN BID TO BUILD WALL THE WASHINGTON POST (2019), https://www.washingtonpost.com/politics/trumps-border-emergency-the-president-plans-a-10-am-announcement-in-the-rose-garden/2019/02/15/f0310e62-3110-11e9-86ab-5d02109aeb01_story.html?noredirect=on&utm_term=.3c64271ee4b7 (last visited Apr 15, 2019).

⁸ Robert Burns, SHANAHAN SAYS MILITARY WON’T LEAVE UNTIL US-MEXICO BORDER IS SECURE MILITARY TIMES (2019), <https://www.militarytimes.com/news/your-military/2019/05/12/shanahan-says-military-wont-leave-until-border-is-secure/> (last visited May 13, 2019).

⁹ CBP Border Security Report Fiscal Year 2018, CUSTOMS AND BORDER PATROL (2019), <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/CBP-Border-Security-Report-FY2018.pdf> (last visited Apr 3, 2019).

¹⁰ *Ibid.*

In support of ongoing efforts, on April 4th of last year, President Trump issued a Presidential Memorandum¹¹ directing the Department of Homeland Security (DHS) and the DoD to address national security threats along the SWB. The operation was to be conducted as a domestic deployment and civil contingency operation of the armed forces at the Southwest Border to block a potential border crossing of thousands of migrants originating from Central America. U.S. Northern Command (USNORTHCOM) is the lead for providing Defense Support to Civil Authorities (DSCA), which consists of planning assistance, engineering support (e.g., temporary barriers, barricades, fencing), aviation support, medical triage teams, command and control facilities, border infrastructure repair, temporary housing for CBP personnel, and personal protective equipment.¹² Military support enables CBP to focus on immigration enforcement and narcotics seizures.¹³

The military has been shoring up security at the Ports of Entry (POE). The troops have been performing tasks such as laying concertina wire and emplacing vehicle barriers, which helps CBT shape and maintain an orderly flow as opposed to allowing masses of asylum seekers to potentially overrun a POE.¹⁴ Recently, claims have been rising, placing additional strain on border personnel.

¹¹ Donald J. Trump, PRESIDENTIAL MEMORANDUM FOR THE SECRETARY OF DEFENSE, THE ATTORNEY GENERAL, AND THE SECRETARY OF HOMELAND SECURITY THE WHITE HOUSE (2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-attorney-general-secretary-homeland-security/> (last visited Mar 6, 2019).

¹² DOD Statement on Support to DHS, UNITED STATES DEPARTMENT OF DEFENSE (2018), <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1674387/dod-statement-on-support-to-dhs/> (last visited Mar 2, 2019).

¹³ During FY18, Operation Guardian Support resulted in more than 23,000 arrests and the seizure of more than 35,700 pounds of illicit drugs across the Southwest Border sectors.

¹⁴ Asylum is a protection granted to people who have already made it into the U.S. and parallels protections for refugees who are applying from outside the country. Stephen Dinan, FEDS CHARGE IMMIGRATION LAWYER WITH FILING 180 BOGUS ASYLUM CLAIMS THE WASHINGTON TIMES (2018), <https://www.washingtontimes.com/news/2018/mar/28/feds-charge-immigration-lawyer-bogus-asylum-claims/> (last visited May 13, 2019).

CBP has reiterated that immigration enforcement still remains the “exclusive responsibility of civilian law enforcement personnel.”¹⁵ CBP explained that the military will provide support for the mission that civilian law enforcement personnel carry out, “as it has in the past.”¹⁶ Scott Anderson, a contributor to *Lawfareblog*, writes that most activities of military personnel fit comfortably within existing statutory authorizations, but an important exception is “military protective activities” which permit deployed servicemembers to use force to defend CBP personnel from threats posed by the migrant caravans.¹⁷

On November 20, 2018, President Trump endorsed a memo discussing “[c]redible evidence and intelligence” that migrant caravans originating from Central America “may prompt incidents of violence and disorder” that could threaten CBP and other government personnel and “prevent them from performing the Federal functions necessary to secure and protect the integrity of the southern border.”¹⁸ Explaining the role of the military, then Defense Secretary James Mattis said the military is “not doing law enforcement” and lacks “arrest authority.” He stated that, if someone were to attack a CBP officer and troops were asked to respond, it would be difficult because most troops do not carry weapons and might take custody of individuals for “minutes, not even hours.”¹⁹ This statement is supported by DoD policy where—with the exceptions of law enforcement, force protection, and security personnel carrying an issued

¹⁵ Operation Guardian Support Begins for Del Rio Border Patrol Sector, CUSTOMS AND BORDER PATROL (2018), <https://www.cbp.gov/newsroom/local-media-release/operation-guardian-support-begins-del-rio-border-patrol-sector> (last visited Apr 7, 2018).

¹⁶ *Id.*

¹⁷ Scott R. Anderson, THE CONSTITUTIONAL QUANDARY ALREADY AT THE BORDER LAWFARE (2019), <https://www.lawfareblog.com/constitutional-quandary-already-border> (last visited Mar 7, 2019).

¹⁸ Donald J. Trump, DEPARTMENT OF DEFENSE SUPPORT TO BORDER SECURITY (2018).

¹⁹ Missy Ryan & Paul Sonne, TROOPS APPROVED TO USE FORCE AT THE BORDER, BUT MATTIS SAYS THE MISSION HASN'T CHANGED THE WASHINGTON POST (2018), 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=.5a78669807da (last visited Mar 18, 2019).

firearm for duty on a routine basis—DoD personnel are not authorized to carry individual service weapons during DSCA mission unless authorized by the Secretary of Defense (SecDef).²⁰

III. IMMIGRATION AND THE SOUTHERN BORDER

According to Pew Research Center estimates, there were twelve million Mexican immigrants living in the U.S. in 2016, and 45% were in the country illegally, with Mexicans making up 26.6% of all U.S. immigrants.²¹ Mexicans and Central Americans are estimated to account for roughly two-thirds (67% or 7.6 million) of the unauthorized immigrants in the U.S. during the period 2012-16.²² To put this in context, nearly thirty-four million lawful immigrants live in the U.S. Many live and work in the country after receiving lawful permanent residence (LPR) or “green card” status, while others receive temporary “nonimmigrant” visas available to students and workers. In addition, approximately a million unauthorized immigrants have temporary permission to live and work in the U.S. through the Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS) programs.²³

Recent attention has been focused less on Mexican immigrants and more on “other-than-Mexicans,” or OTMs, who originate in third countries and travel to the U.S. through Mexico. Although the journey is long, dangerous, and expensive, individuals and family groups remain

²⁰ Chairman of the Joint Chiefs of Staff, DEFENSE SUPPORT OF CIVIL AUTHORITIES (2018). The execute order (EXORD) further states that the supported commander retains authority to establish and change the arming posture and weapons status. The supported commander may also issue guidance on the carrying and use of non-lethal weapons.

²¹ Ana Gonzalez-Barrera et al., WHAT WE KNOW ABOUT ILLEGAL IMMIGRATION FROM MEXICO PEW RESEARCH CENTER (2018), <https://www.pewresearch.org/fact-tank/2018/12/03/what-we-know-about-illegal-immigration-from-mexico/> (last visited Mar 19, 2019).

²² Jie Zong et al., FREQUENTLY REQUESTED STATISTICS ON IMMIGRANTS AND IMMIGRATION IN THE UNITED STATES MIGRATION POLICY INSTITUTE (2019), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Refugees> (last visited Apr 20, 2019).

²³ Jens Manuel Krogstad et al., KEY FACTS ABOUT U.S. IMMIGRATION POLICIES AND PROPOSED CHANGES PEW RESEARCH CENTER (2018), <https://www.pewresearch.org/fact-tank/2018/02/26/key-facts-about-u-s-immigration-policies-and-proposed-changes/> (last visited Mar 19, 2019).

largely undeterred.²⁴ Until recently, the majority of apprehended aliens were Mexican nationals who could be quickly returned across the border. Today, the time in processing has increased from eight hours to seventy-eight hours in sectors where the majority of aliens apprehended are OTM family groups. These OTMs require additional processing time for several reasons, including: determining the route of travel, collecting biometric data,²⁵ adjudicating results, and determining who will be placed into removal proceedings.

There is concern that terrorists can infiltrate migrant flows, that human traffickers can exploit existing drug smuggling routes, and that dangerous drugs like fentanyl can make their way to the interior. A troubling development is the recruitment of minors to skirt existing laws and policies and delay prosecution.²⁶ Under a 2008 anti-human trafficking law,²⁷ minors from noncontiguous countries have the right to a deportation hearing before being returned to their home countries.²⁸ The additional processing time comes at a cost and takes resources away from the Border Patrol's national security mission.²⁹

²⁴ Associated Press, MEXICO IS CRACKING DOWN ON MIGRANTS, SO THEY'RE ONCE AGAIN USING 'THE BEAST' TO GET TO THE US BUSINESS INSIDER (2019), <https://www.businessinsider.com/migrants-in-mexico-using-the-beast-train-to-get-to-us-border-2019-5> (last visited May 13, 2019).

²⁵ In addition to fingerprints, *WIRED* recently reported that DHS will soon begin piloting a DNA testing program at the US-Mexico border intended to expose immigrants suspected of posing as families. The program will be conducted jointly by CBP and ICE at two undisclosed locations over the course of several days. It will employ a new form of genetic testing, known as Rapid DNA technology, that makes it possible to process a DNA sample and produce results in approximately 90 minutes. See <https://www.wired.com/story/how-dna-testing-at-the-us-mexico-border-will-actually-work/>

²⁶ Kameron Korte, LAUNCH OF OUTREACH AND EDUCATION CAMPAIGN TO COMBAT CARTELS USING YOUTH TO SMUGGLE DRUGS DRUG ENFORCEMENT AGENCY (2018), <https://www.dea.gov/press-releases/2018/07/16/launch-outreach-and-education-campaign-combat-cartels-using-youth-smuggle> (last visited May 14, 2019).

²⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, UNITED STATES DEPARTMENT OF STATE (2008), <https://www.state.gov/j/tip/laws/113178.htm> (last visited Apr 2, 2019).

²⁸ Claire Felter & Danielle Renwick, THE U.S. IMMIGRATION DEBATE COUNCIL ON FOREIGN RELATIONS (2018), <https://www.cfr.org/backgrounder/us-immigration-debate-0> (last visited Apr 12, 2019).

²⁹ Andrew R. Arthur, BORDER PATROL'S EXPENSIVE NEW MISSION CENTER FOR IMMIGRATION STUDIES (2019), <https://cis.org/Arthur/Border-Patrols-Expensive-New-Mission> (last visited May 8, 2019).

Most SWB crossers are economic migrants and are not eligible for asylum but may nevertheless attempt to apply.³⁰ Those coming across the southern border who are eligible for asylum may, along with a spouse and children, apply at no cost and potentially be permitted to remain in the United States.³¹ Individuals seeking asylum at POEs are currently placed in expedited removal proceedings by the CBP. They are then referred for a credible fear screening interview, which is conducted by an asylum officer.³² Unlike refugee admission claims, U.S. immigration laws do not set a limit on the number of people who can be awarded asylum each year. The number of asylum grants varies, depending on how many apply (either of their own volition or as a defense to deportation) and how many are successful in their asylum claims.³³

The Border Patrol apprehended more than 66,000 migrants at the SWB in February, the highest total for a single month in almost a decade. The majority of those arrested were migrant families or children traveling alone or without a parent who have indicated that they are fleeing criminal gangs and poverty in Central America to seek asylum in the U.S.³⁴ The Trump administration has been attempting to reduce the number of successful asylum claims, stating that “[i]llegal migrants with meritless claims have used our asylum system to enter our country illegally and remain here indefinitely.”³⁵ CBP agrees; the thinking is that legitimate asylum

³⁰ Asylum is for those who have suffered persecution or have credible fear due to race, religion, nationality, membership in a particular social group, or political opinion.

³¹ Learn About the Asylum Application Process, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (2015), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum> (last visited May 13, 2019).

³² Zuzana Cepla, FACT SHEET: U.S. ASYLUM PROCESS NATIONAL IMMIGRATION FORUM (2019), <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/> (last visited May 13, 2019).

³³ Nolo, HOW MANY PEOPLE CAN GET U.S. ASYLUM? WWW.ALLLAW.COM (2015), <https://www.alllaw.com/articles/nolo/us-immigration/how-many-people-can-get-asylum.html> (last visited May 13, 2019).

³⁴ Joel Rose & John Burnett, MIGRANT FAMILIES ARRIVE IN BUSLOADS AS BORDER CROSSINGS HIT 10-YEAR HIGH NATIONAL PUBLIC RADIO (2019), <https://www.npr.org/2019/03/05/700428069/migrant-families-arrive-in-busloads-as-border-crossings-hit-10-year-high> (last visited May 13, 2019).

³⁵ President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis, THE WHITE HOUSE (2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/> (last visited May 13, 2019).

seekers should present themselves at embassies abroad or at legitimate entry points rather than wait until they are apprehended at non-ports of entry. “If you’re going to come to this country and make a claim of credible fear, you need to present yourself properly at a port of entry,” said Michael Hyatt, deputy incident commander for CBP’s emergency operations center in Washington, D.C.³⁶

As part of a crackdown on false asylum claims, the federal government recently announced charges against Andreea Dumitru, an immigration lawyer, who prosecutors say filed more than 180 bogus asylum applications dating back to 2012, lying about her clients’ criminal pasts and fabricating other details in order to pave the way for them to obtain legal status.³⁷ Other zealous immigration activists and attorney coach immigrants³⁸ prior to or upon arrival. Trump critics, meanwhile, claim that immigration activists are being targeted for deportation³⁹ and that their free speech rights are being violated.

The immigration issue is complex and requires cooperation between the legislative and executive branches. For example, each year the President, in consultation with Congress, sets the annual refugee admissions ceiling and allocations by region of origin. For fiscal year 2019, the annual ceiling was 30,000, the lowest since 1989 when the program began.⁴⁰ For its part, the administration claims to favor adoption of an immigration system that “serves the national

³⁶ CBP Works with Military to Harden Border Security Ahead of Caravan Arrival, CUSTOMS AND BORDER PATROL (2018), <https://www.cbp.gov/newsroom/spotlights/cbp-works-military-harden-border-security-ahead-caravan-arrival> (last visited Mar 25, 2019).

³⁷ *Supra* note at 22.

³⁸ Will Racke, ACTIVISTS SEND LAWYERS TO BORDER TO COACH 'CARAVAN' ASYLUM SEEKERS THE DAILY CALLER (2018), <https://dailycaller.com/2018/04/25/lawyers-coach-illegal-immigrant-caravan/> (last visited May 14, 2019).

³⁹ John Burnett, SEE THE 20 IMMIGRATION ACTIVISTS ARRESTED UNDER TRUMP NATIONAL PUBLIC RADIO (2018), <https://www.npr.org/2018/03/16/591879718/see-the-20-immigration-activists-arrested-under-trump> (last visited May 14, 2019).

⁴⁰ Jie Zong et al., FREQUENTLY REQUESTED STATISTICS ON IMMIGRANTS AND IMMIGRATION IN THE UNITED STATES MIGRATION POLICY INSTITUTE (2019), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Refugees> (last visited Apr 17, 2019).

interest” and will “restore rule of law.”⁴¹ President Trump campaigned and committed to construct a border wall in addition to “ensuring the swift removal of unlawful entrants.”⁴² The President expressed desire to end chain migration, eliminate the Visa Lottery, and move the country to a merit-based entry system, claiming these reforms will “advance the safety and prosperity of all Americans while helping new citizens assimilate and flourish.”⁴³

Democratic opponents have pushed back on executive action related to border control and immigration more broadly. In a February 15th joint statement, House Speaker Nancy Pelosi and Senate Democratic Leader Chuck Schumer commented on Trump’s declaration of a national emergency at the border. They stated that, “[t]he President’s unlawful declaration over a crisis that does not exist does great violence to our Constitution and makes America less safe, stealing from urgently needed defense funds for the security of our military and our nation.” The senior Democrats called his actions a “power grab” by a “disappointed President” who went outside the bounds of the law to “try to get what he failed to achieve in the constitutional legislative process.”⁴⁴ Democrats claim the actions “clearly violate the Congress’s exclusive power of the purse” and they vowed to “defend [their] constitutional authorities in the Congress, in the Courts, and in the public, using every remedy available.”⁴⁵ The immigration debate is also figuring prominently this 2020 presidential election cycle as a broad field (twenty-three current Democrat candidates) often references Trump’s policies in an effort to motivate potential voters.

⁴¹ Immigration, THE WHITE HOUSE (2019), <https://www.whitehouse.gov/issues/immigration/> (last visited May 13, 2019).

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Pelosi, Schumer Joint Statement on the President's Unlawful Emergency Declaration, SPEAKER NANCY PELOSI (2019), <https://www.speaker.gov/newsroom/21519-2/> (last visited Feb 18, 2019).

⁴⁵ *Ibid.*

Democrats have long been proponents of DACA, TPS, and other programs which benefit those coming across the southern border illegally. However, since taking office, the Trump administration has been systematically ending,⁴⁶ or attempting to end, programs that temporarily protect select groups of undocumented immigrants from deportation. For example, the administration announced the end of the DACA program, which protected more than 800,000 undocumented immigrants brought to the country as children. Federal judges ultimately blocked the decision, and the Justice Department is appealing. The administration is also phasing out TPS, which protected more than 300,000 people from ten countries⁴⁷ plagued by violence and natural disasters. The Justice Department is also currently appealing a federal judge's decision⁴⁸ on the TPS issue.⁴⁹

It is important to note that the SWB struggle is symbolic and representative of the national posture with regard to the treatment of visitors and immigrants. The wall is also symbolic, signifying strength and the ability to dictate who is allowed to come in. What is actually needed is a strategy and a national discussion with regard to who should be coming to the country for what purpose and who should be allowed to stay. Do we want only the rich to gain legal permanent residence? Maybe we only want the wealthy to visit, spend money, and then return. Maybe we want more economically disadvantaged individuals who are willing to

⁴⁶ Brennan Weiss, THE TRUMP ADMINISTRATION HAS ENDED PROTECTIONS FOR IMMIGRANTS FROM 4 COUNTRIES - HERE'S WHEN THEY WILL HAVE TO LEAVE THE US BUSINESS INSIDER (2018), <https://www.businessinsider.com/trump-has-ended-temporary-protection-status-for-4-countries-2018-1> (last visited Feb 20, 2019).

⁴⁷ El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen.

⁴⁸ On Oct. 3, 2018, in *Ramos, et al. v. Nielsen, et al.*, No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018), the U.S. District Court for the Northern District of California enjoined DHS from implementing and enforcing the decisions to terminate Temporary Protected Status for Sudan, Nicaragua, Haiti, and El Salvador, pending further resolution of the case.

⁴⁹ Alan Gomez, HUNDREDS OF LIBERIANS LEGALLY IN U.S. FACE DEPORTATION FOLLOWING TRUMP DECISION USA TODAY (2019), <https://www.usatoday.com/story/news/politics/2019/03/27/liberians-face-deportation-trump-deferred-enforced-departure-ded-expire/3278573002/> (last visited Apr 8, 2019).

work for low wages. Should we admit those with incurable diseases? What about people with minor criminal records who lie on their visa applications but are not flagged until a decade later? Forget the southern border. What about visa overstays and Canadian checkpoints? None of these questions will be answered by shouting at each other or slandering those in opposition. The SWB is a flashpoint and is symbolic of larger more complex issues we must address as a nation.

IV. DEFENSE SUPPORT TO CIVIL AUTHORITIES

The military consists of active duty, reserve, and National Guard troops, any or all of whom can be activated to support various mission under various authorities. 10 U.S. Code Section 12304a,⁵⁰ amended by the 2012 National Defense Authorization Act, provides new authority for the active and reserve components (Title 10) to assist communities during domestic emergencies to save lives and mitigate property damage.⁵¹ Defense Support of Civil Authorities (DSCA) is a total force effort by all federal military forces, to include DoD civilians, contract personnel, and reserve component forces and assets, in response to domestic emergencies.⁵² It is a process by which the U.S military assets and personnel can be used to assist in missions normally carried out by civil authorities. Support is provided when the SecDef, in coordination with the governors of the affected States, elects and requests to use forces in response to requests

⁵⁰ Title 10 § 12304a. Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve: order to active duty to provide assistance in response to a major disaster or emergency, UNITED STATES GOVERNMENT PUBLISHING OFFICE, <https://www.govinfo.gov/content/pkg/USCODE-2015-title10/pdf/USCODE-2015-title10-subtitleE-partII-chap1209-sec12304a.pdf> (last visited Apr 15, 2019).

⁵¹ Defense Support of Civil Authorities: Inside the Army Reserve, UNITED STATES ARMY RESERVE (2019), <https://www.usar.army.mil/DSCA/> (last visited May 12, 2019).

⁵² Defense Support of Civil Authorities, UNITED STATES ARMY (2018), <https://www.army.mil/standto/2018-10-15> (last visited Mar 3, 2019).

for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities.⁵³

DSCA support may be provided by military forces in coordination with governors of affected states who request to use forces in Title 32 status⁵⁴ where the respective governors have command and control of National Guard forces.⁵⁵ Requests for assistance (RFA) from civil authorities include domestic emergencies, law enforcement support, and other domestic activities. DSCA traditionally includes support to prepare, prevent, protect, respond, and recover from domestic incidents including terrorist attacks, major disasters (both natural and man-made), and planned domestic special events. Included in a category of “other DSCA missions” is “mass migration,”⁵⁶ which may be applicable in the case of SWB operations.

As will be illustrated through several examples in this section, the military can and does provide direct assistance to civilian law enforcement agencies. When requested, federal military forces may provide support to federal, state, local, and tribal law enforcement organizations who are reacting to civil disturbances, conducting border security and counterdrug missions, preparing for antiterrorism operations, and participating in other related law enforcement activities.⁵⁷ There are several forms of direct assistance permitted under what is known as the Military Purpose Doctrine. The doctrine provides that law enforcement actions that are performed primarily for a military purpose, even when incidentally assisting civil authorities,

⁵³ Defense Support of Civil Authorities (DSCA), EXECUTIVE SERVICES DIRECTORATE (2018), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/302518p.pdf?ver=2019-02-05-090338-707> (last visited Apr 24, 2019).

⁵⁴ National Guard Soldiers serving under Title 32, U.S. Code are federally funded yet remain commanded and controlled by state authorities.

⁵⁵ *Supra* note 31.

⁵⁶ Joint Publication 3-28 Defense Support of Civil Authorities, JOINT CHIEFS OF STAFF (2018), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_28.pdf (last visited Mar 3, 2019).

⁵⁷ *Ibid.*

will not violate the Posse Comitatus Act (PCA),⁵⁸ which is always a concern and will be discussed in the next section. The Military Purpose Doctrine requires a legitimate, independent military purpose for participating in law enforcement activities against civilians.⁵⁹ Current military operations at the SWB are in support of federal law enforcement (DHS and subordinate agencies) and are not for an “independent military purpose.”

There is a tradition of non-interference by the Federal Government in state and local matters that impacts how military forces are used domestically. The Tenth Amendment⁶⁰ helps to define the concept of federalism and a federalist form of government, which is a tiered system of federal, state, and local, each with distinct authorities, responsibilities, and functions.⁶¹ But as federal activity has increased, so too has the problem of reconciling state and national interests as they apply to the federal police powers.⁶² The U.S. military has been called upon over 100 times in support of civilian law enforcement, going back to the very beginning of the nation when George Washington used a federalized state militia in 1794 to put down the Whiskey Rebellion in Western Pennsylvania.⁶³ In 1894, President Grover Cleveland deployed troops to restore order following the Chicago Pullman strike. Five years later, in 1899, President William McKinley deployed troops to reestablish order following mining strikes in Idaho.⁶⁴ More recently, George

⁵⁸ Black’s Law Dictionary defines Posse Comitatus as “The power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases as to aid him in keeping the peace, in pursuing and arresting felons, etc.”

⁵⁹ *Supra* note 54.

⁶⁰ “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

⁶¹ Craig E. Merutka, USE OF THE ARMED FORCES FOR DOMESTIC LAW ENFORCEMENT DEFENSE TECHNICAL INFORMATION CENTER (2013), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a589451.pdf> (last visited Apr 9, 2019).

⁶² Tenth Amendment, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/constitution/tenth_amendment (last visited May 12, 2019).

⁶³ *Supra* note 59.

⁶⁴ John R. Longley, MILITARY PURPOSE ACT AN ALTERNATIVE TO THE POSSE COMITATUS ACT: ACCOMPLISHING CONGRESS'S INTENT WITH CLEAR STATUTORY LANGUAGE ARIZONA LAW REVIEW (2007), <http://www.arizonalawreview.org/pdf/49-3/49arizrev717.pdf> (last visited Apr 18, 2019).

H.W. Bush utilized the 7th Infantry Division to quell violence during the 1992 Los Angeles race riots.⁶⁵

Control and authority over DoD forces and capabilities are maintained by the President, as Commander-in-Chief, through the SecDef and the chain of command as established by law. Military units tasked to support civil authorities during domestic disasters enable rapid and effective response operations.⁶⁶ A challenge exists with regard to execution of relief operations and integration of military and civil capabilities within a disaster-stricken operating environment when very little infrastructure remains intact. When emergency conditions dictate, and when time does not permit approval from higher headquarters, local military commanders and responsible DoD component officials are authorized to respond to requests from local authorities and to initiate immediate response actions to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions.⁶⁷

V. THE POSSE COMITATUS ACT

Civilian control of the military has held as an important historical tenet in the U.S. as other societies have fallen to internal military coups⁶⁸ or suffered under oppressive centralized regimes. The Founding Fathers experienced oppression first hand, as the English king was endowed with the power not only to initiate war but to raise and maintain armies and navies. Historically aware that these powers had been used to the detriment of the liberty and well-being

⁶⁵ *Supra* note 59.

⁶⁶ Joint Officer Handbook (JOH) Staffing and Action Guide, UNITED STATES AIR FORCE AIR UNIVERSITY (2011), http://www.au.af.mil/au/awc/awcgate/dod/joh_aug2011.pdf (last visited Mar 18, 2019).

⁶⁷ *Ibid.*

⁶⁸ Charles J. Dunlap, WELCOME TO THE JUNTA: THE EROSION OF CIVILIAN CONTROL OF THE U.S. MILITARY WAKE FOREST LAW REVIEW (1994), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5204&context=faculty_scholarship (last visited May 1, 2019).

of Englishmen and also aware that in the English Declaration of Rights of 1688, it was insisted that standing armies not be maintained without the consent of Parliament; the Framers vested these basic powers in Congress.⁶⁹ Even today, President Trump is compared to a king⁷⁰ or a dictator, and some in Congress and elsewhere have expressed concern that the broadly interpreted Article II inherent powers held by the President are too open-ended, allowing the Commander in Chief to operate without check-and-balance by Congress.

Some scholars have argued that civilian control of America's sizeable military is slowly eroding.⁷¹ Military involvement in domestic affairs has historically been contentious and led to annual (rather than biennial) military appropriations intended to alleviate concerns regarding a standing army referenced in Article 1, Section 8, Clause 12 of the Constitution. The PCA has been in place since 1878 and prohibits any part of the Army or Air Force from “execut[ing] the laws.”⁷² The PCA,⁷³ as amended, limits direct military participation in civilian law enforcement activities unless it is authorized by U.S. statute or the U.S. Constitution. However, there are numerous exceptions to the PCA that allow for military support of civilian law enforcement agencies,⁷⁴ and several examples have previously been discussed dating back to the very founding of the nation.

⁶⁹ Clause XI, Clause XII, Clause XIII, Clause XIV, LEGAL INFORMATION INSTITUTE (2019), <https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-11-14> (last visited May 13, 2019).

⁷⁰ Terrence Dopp, TRUMP WANTS TO BE 'KING' AND CONGRESS CAN'T ALLOW IT, NADLER SAYS FORTUNE (2019), <http://fortune.com/2019/05/08/trump-barr-contempt-of-congress/> (last visited May 14, 2019).

⁷¹ *Supra* note 66.

⁷² Mark Nevitt, UPDATE: THE MILITARY, THE MEXICAN BORDER AND POSSE COMITATUS JUST SECURITY (2019), <https://www.justsecurity.org/61364/update-military-mexican-border-posse-comitatus/> (last visited May 1, 2019).

⁷³ 18 U.S. Code § 1385 prohibits the use of the military to aid civil authorities in enforcing the law or suppressing civil disturbances unless expressly ordered to do so by the President.

⁷⁴ DoD Manual 3025.01, Vol. 3, Defense Support of Civil Authorities: Pre-Planned DoD Support of Law Enforcement Agencies, Special Events, Community Engagement, and Other Non-DoD Entities, EXECUTIVE SERVICES DIRECTORATE (2016), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/302501_vol03.pdf (last visited Apr 8, 2019).

Posse Comitatus is a perennial issue often raised whenever troops are observed conducting domestic training missions,⁷⁵ assisting at the SWB, etc. However, there are several Posse Comitatus exceptions, including the following: 1) National Guard forces operating under the state authority of Title 32 (state rather than federal or “Title 10” service); 2) pursuant to the presidential power to quell domestic violence; 3) aerial photographic and visual search and surveillance by military; 4) a drug exception created by Congress; 5) Judge Advocates acting as a special assistant prosecutors while retaining a dual role participating in the investigation, presentation to the grand jury, and prosecution; and 6) the Coast Guard during peacetime.⁷⁶ The requested support must be consistent with the limits Congress placed on military support to law enforcement through the PCA and other laws.⁷⁷ A PCA violation might occur when the military performs tasks assigned to civil government or for solely civilian government purposes.⁷⁸

It is worth noting that recent additional support troops include Title 10 active-duty military personnel under federal control rather than Title 32 troops under the authority of the governors of the contributing states (e.g., California, Texas, Arizona). William Banks, former director of the Institute for National Security and Counter-terrorism at Syracuse University’s College of Law referred to military deployment at the southern border, stating that Posse Comitatus is “always looming in the background” and that one should “never invoke it as such because it is such a background principle.”⁷⁹

⁷⁵ Kyle Rempfer, ARMY SPECIAL OPS EXERCISE SPOOKS NEARBY RESIDENTS, AND CITY OFFICIALS PROMISE IT WON’T HAPPEN AGAIN ARMY TIMES (2019), <https://www.armytimes.com/news/your-army/2019/04/01/army-special-ops-exercise-spoons-raleigh-residents-causing-city-officials-to-apologize/> (last visited May 1, 2019).

⁷⁶ Preparing the U.S. Army for Homeland Security: Overview of the Posse Comitatus Act, RAND CORPORATION, https://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1251/MR1251.AppD.pdf (last visited Mar 19, 2019).

⁷⁷ *Ibid.*

⁷⁸ Charles Doyle & Jennifer K. Elsea, Cong. Research, Serv., R42659, The Posse Comitatus Act and Related Matter: The Use of the Military to Execute Civilian Law, at Summary (2012), <http://www.fas.org/sgp/crs/natsec/R42659.pdf>

⁷⁹ William C. Banks Discusses Posse Comitatus & the US Military’s Southern Border Deployment, WILLIAM C. BANKS DISCUSSES POSSE COMITATUS & THE US MILITARY’S SOUTHERN BORDER DEPLOYMENT | SYRACUSE

VI. OPERATIONAL IDENTITY ACTIVITIES AND IDENTITY INTELLIGENCE

For national security and related purposes, it is important to know who is entering and leaving the country, via the SWB or otherwise. The language surrounding identity has evolved from “Identity Dominance” to “Identity Operations” to now “Identity Activities.” As per Joint Doctrine Note 2-16, “[i]dentity activities provide essential information, assessments, and estimates to enhance military activities that protect personnel, facilities, and equipment; provide security for vulnerable populations, resources, critical infrastructure, and cultural properties; and support the establishment of rule of law and legitimate and stable governance structures. When required, identity activities can prove instrumental in accounting for and tracking displaced persons, aid, and resources over time and space.”⁸⁰

The term Identity Activities (aka, “IA,” “IDAct,” or “IDActs”) is used mainly by DoD to describe a collection of functions and actions that appropriately recognize and characterize an entity from another entity to support decision making. Activities include the collection (as well as processing and exploitation) of identity attributes and captured materials, all-source analytic efforts, and production and dissemination of identity intelligence (I2) products to inform policy and strategy development, operational planning and assessment, and appropriate action at the point of encounter.⁸¹ IDActs help inform military commanders by providing a greater understanding of the adversary and key threat personnel as well as their capability, capacity, and support structures. IDActs also provide robust, scalable, and sharable mechanisms to map and

UNIVERSITY COLLEGE OF LAW (2018), http://law.syr.edu/news_events/news/william-c.-banks-discusses-posse-comitatus-the-us-militarys-southern-border (last visited May 1, 2019).

⁸⁰ Joint Doctrine 2-16 Identity Activities, JOINT CHIEFS OF STAFF (2016), https://www.jcs.mil/Portals/36/Documents/Doctrine/jdn_jg/jdn2_16.pdf (last visited Apr 28, 2019).

⁸¹ DoD Directive 8521.01E DoD Biometrics, EXECUTIVE SERVICES DIRECTORATE (2018), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/852101E.pdf?ver=2019-04-11-094409-307> (last visited Apr 5, 2019).

monitor the human terrain⁸² (both within the physical domains and the information environment) and identify network nodes and centers of gravity. Similarly, IDActs provide a rational means of assessing operational effectiveness by monitoring the resilience of threat networks after an attack or maneuver. In general, IDActs provide greater situational awareness of the operational environment.⁸³

DoD describes I2 as “intelligence resulting from the processing of identity attributes concerning individuals, groups, networks, or populations of interest.”⁸⁴ I2 operations combine the synchronized application of biometrics, forensics, and document and media exploitation (DOMEX) capabilities with intelligence and identity management processes to establish identity, affiliations, and authorizations in order to deny anonymity to the adversary and protect U.S. and partner nation assets, facilities, and forces. I2 operations process results in discovery of true identities, link identities to events, locations and networks, and reveal hostile intent. These outputs enable tasks, missions, and actions that span the range of military operations.⁸⁵ There is debate whether I2 is a subset of IDActs or a separate discipline, and this will eventually determine structure⁸⁶ and resourcing within DoD.

Biometrics is “the process of recognizing an individual based on measurable anatomical, physiological, or behavioral characteristics”⁸⁷ and is a critical element of both I2 and IDActs.

DoD Directive 8521.01E⁸⁸ outlines responsibilities and procedures for the collection, storage,

⁸² Marine Corps Major Sean M. Hankard discusses human terrain mapping in the context of counterinsurgency operation in Afghanistan at <https://apps.dtic.mil/dtic/tr/fulltext/u2/a603258.pdf>

⁸³ *Supra* note 77.

⁸⁴ Joint Publication 2-0 Joint Intelligence, JOINT CHIEFS OF STAFF (2013), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp2_0.pdf (last visited Mar 18, 2019).

⁸⁵ *Ibid.*

⁸⁶ For example, who will be assigned the roles of Executive Agent, Single Manager, or Principal Staff Assistant.

⁸⁷ *Supra* note 78.

⁸⁸ *Supra* note 78 at 10.

and use of biometric data by the DoD, much of which is for operational purposes.⁸⁹ Collecting biometrics for the sake of collecting biometrics will yield few if any positive results. The key to success lies in the ability to match and share biometric data with partners who encounter persons of interest. After a positive match is obtained, officials can determine the disposition of the individual.

VII. BIOMETRICS AND THE BORDER

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act called for the creation of an automated system to record arrivals and departures of non-U.S. citizens at all air, sea, and land POEs. Border crossing identification cards were to include a biometric identifier (such as the fingerprint or handprint of the alien) that was machine readable. The act also outlined new document fraud offenses and new civil penalties for document fraud.⁹⁰ An alien presenting a border crossing identification card was not to be permitted to cross over the border “unless the biometric identifier contained on the card matche[d] the appropriate biometric characteristic of the alien.” For those who cross the SWB legally, previously collected biometrics are verified against e-Passport information, as applicable. An e-Passport contains an electronic chip with the holder's name, date of birth, and other biographic information in addition to a biometric identifier. The U.S. also requires that the chip contain a digital photograph of the passport holder.⁹¹

⁸⁹ This policy includes procedures to maximize interoperability and effectiveness, while also considering privacy implications related to the collection and storage of biometric data.

⁹⁰ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, UNITED STATES CONGRESS (1996), <https://www.congress.gov/104/crpt/hrpt828/CRPT-104hrpt828.pdf> (last visited Apr 14, 2019).

⁹¹ e-Passports, DEPARTMENT OF HOMELAND SECURITY (2016), <https://www.dhs.gov/e-passports> (last visited May 1, 2019).

DHS has a strong legislative mandate⁹² that enables biometrics at the border. For example, the 2002 Enhanced Border Security and Visa Entry Reform Act, the Intelligence Reform and Terrorism Prevention Act of 2004, and the Implementing Recommendations of the 9/11 Commission Act of 2007 all called for the creation of a nationwide biometric entry-exit system, including the creation of exit records for individuals departing the U.S. In addition, the Consolidated Appropriations Act of 2016 authorized CBP (part of DHS) to expend up to one billion dollars in certain visa fee surcharges collected and deposited into the recently created 9/11 Response and Biometric Exit Account for biometric entry and exit implementation. Finally, Executive Order (E.O.) 13780⁹³ required DHS to “expedite the completion and implementation of a biometric entry-exit tracking system for in-scope travelers to the U.S.”⁹⁴ The electronic submission of data, collection of biometrics at U.S. consulates abroad, and development of an automated entry-exit system has created what has been referred to as a “virtual border” which

⁹² Federal statutes that mandating DHS create a biometric entry and exit system include: Section 2(a) of the Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA), Public Law 106-215, 114 Stat. 337 (2000); Section 205 of the Visa Waiver Permanent Program Act of 2000, Public Law 106-396, 114 Stat. 1637, 1641 (2000); Section 414 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107-56, 115 Stat. 272, 353 (2001); Section 302 of the Enhanced Border Security and Visa Entry Reform Act of 2002 (Border Security Act), Public Law 107-173, 116 Stat. 543, 552, (2002); Section 7208 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law 108-458, 118 Stat. 3638, 3817 (2004); Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Public Law 110-53, 121 Stat. 266 (2007), Consolidated Appropriations Act, 2016, Public Law 114-113, 129 Stat. 2242, 2493 (2016), Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104-208, 110 Stat. 3009-546 (1997), Section 802 of the Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114-125, 130 Stat. 122, 199 (2015), and Sections 214, 215(a), 235(a), 262(a), 263(a) and 264(c) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1184, 1185(a), 1225(a), 1302(a)(1303(a), 1304(c) and 1365b.

⁹³ Donald J. Trump, EXECUTIVE ORDER PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATES THE WHITE HOUSE (2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/> (last visited May 1, 2019).

⁹⁴ Biometric Exit Frequently Asked Questions (FAQs), BIOMETRIC EXIT FREQUENTLY ASKED QUESTIONS (FAQS) | U.S. CUSTOMS AND BORDER PROTECTION (2019), <https://www.cbp.gov/travel/biometrics/biometric-exit-faqs> (last visited May 1, 2019).

may be enhanced by upgraded digital cameras, lidar and other sensors can identify and track people and objects with considerable accuracy.⁹⁵

CBP conducted a “Southwest Border Pedestrian Exit Field Test” in 2015 to collect biometric information at the Otay Mesa POE, one of three in the San Diego–Tijuana metropolitan region. CBP continues to explore the best collection methods and modalities for a biometric entry-exit program. CBP found that the data collected in the field continues to have value because it provides CBP with a rich source of data for ongoing analysis in its efforts to implement an effective biometric entry-exit program. CBP and its vendors used this data for analysis prior to expending time and resources testing various systems in the field.⁹⁶

DHS developed its biometric-based entry and exit system to improve information resources available to immigration and border management decision-makers. According to a recent *Federal Register* notice regarding extension of existing collection of information, these biometrics may include: digital fingerprint scans, facial images, iris images, or other biometrics. Biometrics are from certain travelers entering or exiting the U.S. to verify identity, determine admissibility of those seeking entry into the U.S., confirm exit for tracking aliens who have overstayed their visa or are otherwise illegally present in the U.S., prevent visa fraud, and identify known or suspected criminals or terrorists.⁹⁷

⁹⁵ Cade Metz, PARTS OF A 'VIRTUAL' BORDER WALL, BUILT WITH THE TECH BEHIND DRIVERLESS CARS THE NEW YORK TIMES (2018), <https://www.nytimes.com/2018/09/18/technology/trump-border-wall-lidar.html> (last visited May 1, 2019).

⁹⁶ Notice of Availability of Updated Privacy Impact Assessment for the Southwest Border Pedestrian Exit Field Test, FEDERAL REGISTER (2018), <https://www.federalregister.gov/documents/2018/07/31/2018-16351/notice-of-availability-of-updated-privacy-impact-assessment-for-the-southwest-border-pedestrian-exit> (last visited May 1, 2019).

⁹⁷ Federal Register / Vol. 83, No. Agency Information Collection Activities: Biometric Identity, UNITED STATES GOVERNMENT PUBLISHING OFFICE (2018), <https://www.govinfo.gov/content/pkg/FR-2018-08-09/pdf/2018-17079.pdf> (last visited Apr 15, 2019).

VIII. WESTERN HEMISPHERE INITIATIVES

According to DHS, there are thousands of individuals on the terrorist watchlist who traversed the Western Hemisphere (WHEM) last year. DHS works with foreign partners to block and prevent many of these individuals from entering the U.S. through legitimate or illicit pathways, with border security as the last line of defense. On average, the U.S. keeps ten individuals on the terrorist watchlist per day from traveling to or entering the U.S., more than 3,700 in fiscal year 2017. Most of these individuals attempted to enter the U.S. by air, but some made land attempts. Additionally, last year DHS encountered more than 3,000 “special interest aliens” or SIAs, individuals with suspicious travel patterns who may pose a national security risk, in addition to many criminals, smugglers, traffickers, and other threat actors.⁹⁸

A. Western Hemisphere Travel Initiative

The Western Hemisphere Travel Initiative (WHTI) is the plan to implement a key 9/11 Commission recommendation and a requirement of the Intelligence Reform and Terrorism Prevention Act of 2004. WHTI establishes document requirements for travel by land or sea into the U.S. from Canada, Mexico, the Caribbean, and Bermuda. The goal of secure and standardized travel documents is to strengthen border security while facilitating entry for U.S. citizens and legitimate international travelers.⁹⁹

⁹⁸ Myth/Fact: Known and Suspected Terrorists/Special Interest Aliens, DEPARTMENT OF HOMELAND SECURITY (2019), <https://www.dhs.gov/news/2019/01/07/mythfact-known-and-suspected-terroristsspecial-interest-aliens> (last visited May 1, 2019).

⁹⁹ Western Hemisphere Travel Initiative (WHTI) Frequently Asked Questions, WESTERN HEMISPHERE TRAVEL INITIATIVE (WHTI) FREQUENTLY ASKED QUESTIONS | U.S. CUSTOMS AND BORDER PROTECTION (2019), <https://www.cbp.gov/travel/us-citizens/western-hemisphere-travel-initiative/faqs> (last visited May 1, 2019).

B. Biometric Identification Transnational Migration Alert Program

An example of a successful terrorist data sharing program operating in the WHEM is the Biometric Identification Transnational Migration Alert Program (BITMAP). This Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI) program facilitates partner-country law enforcement officer collection and sharing of biometric and biographic data on special interest individuals to identify potential threat actors in or transiting through participating countries.¹⁰⁰ HSI Assistant Director, Clark Settles, testified before the House Subcommittee on Border and Maritime Security that foreign partners are able to tactically collect biometric and biographic data on persons of interest they encounter in order to identify individuals who are threats to U.S. national security. HSI and U.S. Government (USG) partners work with host nations to take appropriate law enforcement action in such cases. BITMAP collections also bring individuals of interest to the attention of HSI to prevent them from acquiring visas and to stop admission to the U.S. upon future encounters.¹⁰¹

BITMAP was created in 2011 and involves trained and vetted law enforcement officers collecting biometric and biographic data on potentially dangerous individuals traveling through their country, which is then shared with U.S. law enforcement, DoD, and intelligence agencies. In the last few years, BITMAP has identified several hundred known or suspected terrorists (KST) in addition to drug smugglers, sex offenders, murderers, child predators, members of gangs like MS-13, and individuals with active warrants and other dangerous backgrounds.¹⁰²

¹⁰⁰ Science and Technology Operations Requirements Analysis, DEPARTMENT OF HOMELAND SECURITY OPERATIONS AND REQUIREMENTS ANALYSIS (2018), <https://www.dhs.gov/science-and-technology/ora> (last visited Apr 5, 2019).

¹⁰¹ The full transcript of Assistant Director Settles' testimony is available at <https://www.gpo.gov/fdsys/pkg/CHRG-115hhrg27610/pdf/CHRG-115hhrg27610.pdf>

¹⁰² Biometric Identification Transnational Migration Alert Program Authorization Act of 2018, UNITED STATES CONGRESS (2018), <https://www.congress.gov/crec/2018/09/04/CREC-2018-09-04-pt1-PgH7786.pdf> (last visited Mar 8, 2019).

BITMAP legislation introduced by Chairman Michael McCaul (R-TX) and co-sponsored by Rep. Bill Keating (D-MA) attempts to fully authorize BITMAP and help better identify national security threats.¹⁰³ The chairman noted in a 2018 floor speech that “many special interest aliens and other nefarious actors, including potential terrorists, are exploiting illicit pathways throughout Central and South America, racing towards the border.”¹⁰⁴

Central and South American states have been known to sanction and harbor terrorists, and it is not unreasonable to suspect that terrorists are attempting to enter the U.S. while hiding in plain view. Just last year CNN reported that 173 Venezuelan passports and IDs that were issued to individuals from the Middle East, including some connected to the terrorist group Hezbollah. Although a visa is required to enter the U.S. from Venezuela, the passport permits visa-free entry into more than 130 countries, including 26 countries in the European Union¹⁰⁵ which highlights the importance of BITMAP and other programs to screen travelers from governments that support terrorism.

C. Counterdrug and Counterterrorism Activities

The Government Accountability Office (GAO) concluded that WHEM nations such as Mexico and Colombia are major sources of illicit drugs such as cocaine, heroin, methamphetamine, and marijuana. Precursor chemicals used in the production of illicit fentanyl and other dangerous synthetic drugs often originate in China but typically enter the U.S. through

¹⁰³ Chairman McCaul's Bitmap Bill Advances Through Committee, COMMITTEE ON HOMELAND SECURITY (2018), <https://homeland.house.gov/press/chairman-mccauls-bitmap-bill-advances-through-committee/> (last visited Feb 3, 2019).

¹⁰⁴ Biometric Identification Transnational Migration Alert Program Authorization Act of 2018, UNITED STATES CONGRESS (2018), <https://www.congress.gov/crec/2018/09/04/CREC-2018-09-04-pt1-PgH7786.pdf> (last visited Apr 5, 2019).

¹⁰⁵ Scott Zamost, WHISTLEBLOWER REVEALS PASSPORT FRAUD CNN (2017), <https://www.cnn.com/2017/02/08/world/venezuela-passports-investigation/index.html> (last visited May 1, 2019).

Canada and Mexico. U.S. agencies implementing the National Drug Control Strategy¹⁰⁶ conduct several activities to disrupt the flow of illicit drugs and dismantle the organizations that control them.

DoD plays a key role in collecting, analyzing, and sharing intelligence on illegal drugs with U.S. law enforcement and international security counterparts. DoD supports other interdiction activities with the use of its assets and provides counternarcotics foreign assistance to train, equip, and improve the counternarcotics capabilities of relevant agencies of foreign governments. CBP, as the lead agency for border security, is responsible for keeping terrorists and their weapons, criminals and their contraband, and inadmissible aliens out of the country. The primary mission of ICE is to promote homeland security and public safety through the enforcement of federal laws governing border control, customs, trade, and immigration. ICE HSI investigates immigration crime, human rights violations, and human and narcotics smuggling.¹⁰⁷ In accordance with Section 202 of Title 6, U.S. Code, DHS (the parent of both CBP and ICE) is responsible for “[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the U.S.” and “[p]reventing the entry of terrorists and the instruments of terrorism into the U.S.” DoD's role in the execution of this responsibility, as noted earlier, is to provide support to DHS, when requested, appropriate, lawful, and approved by the President or the SecDef.¹⁰⁸

¹⁰⁶ In December 2016, Congress established the Western Hemisphere Drug Policy Commission to, among other things, evaluate the U.S.-funded counternarcotics programs in the Western Hemisphere.

¹⁰⁷ Counternarcotics: Overview of U.S. Efforts in the Western Hemisphere, GOVERNMENT ACCOUNTABILITY OFFICE (2017), <https://www.gao.gov/assets/690/687736.pdf> (last visited Mar 3, 2019).

¹⁰⁸ Frequently Asked Questions, UNDER SECRETARY OF DEFENSE FOR POLICY (2019), <https://policy.defense.gov/OUSDP-Offices/ASD-for-Homeland-Defense-Global-Security/Homeland-Defense-Integration-DSCA/faqs/> (last visited May 14, 2019).

IX. SHARING TERRORIST, CRIMINAL, AND DEROGATORY INFORMATION

What happens to all the information that is collected at the border and from international (specifically WHEM) partners? USG is mandated to share terrorist related data and has broad authorities to share KST information with the interagency and other partners. Authorities include E.O. 13388,¹⁰⁹ Homeland Security Presidential Directives (HSPD) 6¹¹⁰/11¹¹¹/24¹¹², National Security Presidential Memoranda 7¹¹³ and 9,¹¹⁴ the Intelligence Reform and Terrorism Prevention Act of 2004, etc.

Despite mandates, authorities, billions in funding, and a general consensus that terrorist-related information sharing is the right thing to do, agencies often still do not do it. But why? There are several reasons across the political spectrum to include public perception and unanticipated blowback, cowardice, perceived patriotism, privacy concerns, entrenched thinking,

¹⁰⁹ Executive Order 13388—Further Strengthening the Sharing of Terrorism Information to Protect Americans Notice of October 25, 2005—Continuation of National Emergency Regarding the Proliferation of Weapons of Mass Destruction. This E.O. directs, in accordance with applicable law, heads of agencies that possess or acquire terrorism information to promptly give access to the heads of other agencies that have counterterrorism functions. Full text is available at <https://www.govinfo.gov/content/pkg/WCPD-2005-10-31/pdf/WCPD-2005-10-31-Pg1592.pdf>

¹¹⁰ Directive on Integration and Use of Screening Information to Protect Against Terrorism, HSPD-6, 2 PUB. PAPERS 1174 (Sept. 16, 2003), <https://www.gpo.gov/fdsys/pkg/PPP-2003-book2/pdf/PPP-2003-book2-doc-pg1174.pdf>. The United States shall “develop, integrate, and maintain” terrorist information and use that information to “support Federal, State, local, territorial, tribal, foreign-government, and private-sector screening processes, and diplomatic, military intelligence, law enforcement, immigration, visa, and protective processes.”

¹¹¹ Comprehensive Terrorist-Related Screening Procedures, HSPD-11, 2 PUB. PAPERS 1763 (Aug. 27, 2004), <https://www.gpo.gov/fdsys/pkg/PPP-2004-book2/pdf/PPP-2004-book2-doc-pg1763.pdf>. This directive builds upon HSPD-6 to “enhance terrorist-related screening through comprehensive, coordinated procedures that detect, identify, track, and interdict people, cargo, conveyances, and other entities and objects that pose a threat to homeland security...”

¹¹² George W. Bush, DIRECTIVE ON BIOMETRICS FOR IDENTIFICATION AND SCREENING TO ENHANCE NATIONAL SECURITY GOVERNMENT PRINTING OFFICE (2008), <https://www.govinfo.gov/content/pkg/PPP-2008-book1/pdf/PPP-2008-book1-doc-pg757.pdf> (last visited Apr 17, 2019). This directive “establishes a framework to ensure that Federal executive departments and agencies (agencies) use mutually compatible methods and procedures in the collection, storage, use, analysis, and sharing of biometric and associated biographic and contextual information of individuals...”

¹¹³ Donald J. Trump, NATIONAL SECURITY PRESIDENTIAL MEMORANDUM - 7 THE WHITE HOUSE (2017), <https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-7/> (last visited May 1, 2019).

¹¹⁴ Donald J. Trump, PRESIDENTIAL MEMORANDUM ON OPTIMIZING THE USE OF FEDERAL GOVERNMENT INFORMATION IN SUPPORT OF THE NATIONAL VETTING ENTERPRISE THE WHITE HOUSE (2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-optimizing-use-federal-government-information-support-national-vetting-enterprise/> (last visited May 1, 2019).

inertia, and fear of personal liability. Agency and department heads are often reluctant to authorize anything new without a legal opinion, but there is often miscommunication with legal staff or the scope of the legal opinion is too narrow to proceed.¹¹⁵ This requires an agency head to continually seek legal opinions authorizing various narrow aspects of a program. Perhaps this is a good thing, although it certainly slows down the pace of implementation. No agency head wants to be called to testify as to why his or her program resulted in a death or civil liberty violation of an (often unwitting and unwilling) participant. So the pendulum swings back and forth with each agency head and cabinet appointment as the public and decision makers seek a happy middle ground where the country is safe but there is still freedom.

X. CONCLUSION

DoD, DHS, and other federal agencies, are funded and overseen by Congress but managed by the executive. Many have expressed alarm that immigrants coming through Mexico are turned away or detained and that the military is operating on the border. As noted, the military has operated on the southern border since Texas and New Mexico came into existence as states, and force is authorized in only limited cases. The military is authorized to assist DHS in certain circumstances, although the border is generally the domain of DHS. In order to determine what to do with those coming across—especially those without documents or with fraudulent documents—identity activities can allow the appropriate official to make informed decisions based upon several criteria such as: whether the person has been encountered before; whether the person has committed a crime in the U.S. or elsewhere; and whether the person is being sought by law enforcement officials in the U.S. or another country. Inherent authority in

¹¹⁵ Based upon personal experience.

combination with delegated authority—mainly indirectly delegated to the agencies but managed by the executive branch—is more than enough for the President to identify those attempting to enter the country under false pretenses or false identities and to secure the southern border as part of his national defense obligation.