

DEPARTMENT OF HOMELAND SECURITY

Office of Inspector General

Letter Report:

A Review of Border Patrol's Compliance
with Public Law 108-334 and the Use of
Checkpoints within the Tucson Sector



Office of Inspections and Special Reviews

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November 2005
(Revised)



Homeland
Security

November 9, 2005

MEMORANDUM FOR: Robert C. Bonner
Commissioner
Customs and Border Protection

David V. Aguilar
Chief
Office of Border Patrol

FROM: 
Richard L. Skinner
Inspector General

SUBJECT: A Review of Border Patrol's Compliance with
Public Law 108-334 and the Use of Checkpoints
within the Tucson Sector

In June 2005, the Homeland Security Appropriations Subcommittee for the House of Representatives (House Subcommittee) requested that we assess Border Patrol's compliance with Public Law (P.L.) 108-334. Specifically, the subcommittee had concerns that the Border Patrol was not meeting the following provisions:

- 1) That none of the funds appropriated in this Act may be obligated to construct permanent Border Patrol checkpoints in Customs and Border Protection's Tucson sector;
- 2) That the Commissioner of Customs and Border Protection is directed to submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for expenditure that includes the location, design, costs, and benefits of each proposed Tucson sector permanent checkpoint; and
- 3) That Customs and Border Protection shall relocate its tactical checkpoints in the Tucson sector at least an average of once every 14 days in a manner designed to prevent persons subject to inspection from predicting the location of any such checkpoint.

The following guidance was included in the House Subcommittee’s request letter to assist us in our assessment:

The intent of this language is to ensure that Border Patrol uses *tactical* checkpoints, which are moved to different locations at least an average of once every 2 weeks to prevent predictability. It is not simply to shut down the checkpoint for a few minutes or hours in the middle of the night, only to continue at the same location the next morning.

We conducted our review in two phases. First, we interviewed senior Border Patrol officials and program managers at headquarters. Before transferring to headquarters, several served in key management positions in the Tucson sector and provided important historical and operational insight regarding sector checkpoint operations. Second, we conducted fieldwork in the Tucson sector and interviewed both supervisory and line Border Patrol agents directly involved in checkpoint operations. We also inspected checkpoint log books, gathered source documentation to include copies of approved permits that allow Border Patrol to conduct checkpoint operations at designated locations within Arizona, physically inspected and observed day and night operations at the Interstate 19 (I-19) checkpoint in Santa Cruz county, and physically inspected the State Route 90 (SR-90) checkpoint in Cochise county.¹

We conclude that there is no evidence that funds were used to construct permanent checkpoints within the Tucson sector. Further, the Commissioner of Customs and Border Protection did submit a plan for expenditure that includes the location, design, costs, and benefits of each proposed Tucson sector permanent checkpoint. Finally, the Border Patrol’s current practice of moving or closing checkpoints an average of at least every 14 days complies with the statute. However, it does not comply with the interpretation stated in the House Subcommittee’s letter to us.²

Efforts to Balance Legislative Requirements with Tiered Enforcement Operations

Laws governing the use of checkpoints within the Tucson sector first appeared in Fiscal Year (FY) 1999 and sought to prohibit the Border Patrol from constructing permanent checkpoints. By FY 2003, in addition to prohibiting permanent checkpoint construction, the law required that any non-permanent (or tactical) checkpoints located within the sector be moved on a periodic basis, at least every seven days. These two provisions were carried forward into FY 2004 and FY 2005 legislation. In FY 2005, however, the requirement to move non-permanent checkpoints every 7 days was expanded to 14 days to provide the Border Patrol with greater flexibility. Tucson is the only Border Patrol sector that must comply with these requirements.

The Border Patrol attempts to balance legislative requirements with the need to maintain permanent checkpoints as part of its overall strategy to control the border through tiered (or layered) enforcement operations. The first tier is called “line watch operations.” Most of the enforcement assets in the Tucson sector are deployed directly along its 262-mile border with Mexico. Border

¹ Appendix A contains photographs of both the I-19 and SR-90 checkpoints. During our fieldwork, the SR-90 checkpoint was not operational due to inclement weather.

² The Border Patrol moves its active checkpoint operations from site to site intermittently. At some checkpoint sites, the Border Patrol will leave equipment off-road when not in operation. The fact that it does not physically relocate its equipment and that it continues to use that location seems to be what the letter seeks to preclude.

Patrol agents assigned to line watch operations maintain a high profile and are responsible for turning back, or arresting anyone they encounter attempting illegally to enter the United States. The second tier is called “patrol operations.” Patrol operations require a smaller contingent of agents and are deployed behind, e.g., further inland, those responsible for line watch operations. The primary responsibility of agents participating in patrol operations is to detect and arrest any illegal border crosser that makes it past agents conducting line watch operations. The third tier is known as “checkpoint operations.” Checkpoint operations are enforcement operations that occur at transportation hubs, such as train stations, bus stations, airports, as well as at certain locations along highways. Those that occur along highways are called traffic checkpoints. Traffic checkpoints are designed to deny illegal border crossers major routes of egress from the border to major cities within the United States. According to Border Patrol officials, each tier complements and strengthens the others.

Border Patrol officials said that the best approach to traffic checkpoint operations within the Tucson sector is to have a mixture of both permanent and non-permanent checkpoints. However, because P.L. 108-334 prohibits the construction of permanent checkpoints, the Border Patrol may operate non-permanent checkpoints at eight different pre-approved locations within the sector.³ The checkpoints generally consist of a small trailer, directional cones and signage, water and gas tanks, patrol vehicles, portable toilets, generators, canopies, and floodlights for night operations. They lack the infrastructure found at permanent checkpoints such as landlines for telephone and computer connectivity, climate controlled work areas and a kennel, and heavy equipment to assist with off-loading trucks that may be carrying illegal contraband. The Tucson checkpoints also lack special commuter and trucking lanes that improve checkpoint operations and the movement of traffic.

During our fieldwork in the Tucson sector, we observed several shortcomings of checkpoints that do not have permanent infrastructure. For example, agents at the I-19 checkpoint stopped a vehicle on the suspicion that a passenger was traveling with fraudulent documents. It took 20 minutes for the agents to call the nearest field office with their cell phones to verify the authenticity of the documents. At a permanent checkpoint, this kind of verification would take less than five minutes, as agents would have a direct connection to important automated law enforcement and immigration databases.⁴ Further, during this 20-minute period, the passenger sat in the hot weather under a canopy in a lawn chair immediately adjacent to the checkpoint trailer. Although there is an air-conditioned trailer on site, the passenger was not allowed in because it stored extra safety equipment, back-up radios, and a gun vault. The checkpoint trailer is not used to process or hold persons who present a risk of flight, or a risk to agent safety. Had this stop occurred at a permanent checkpoint, the passenger could have been detained in a secure, climate controlled area until the end of the shift and then transported to the nearest Border Patrol field office for processing. Instead, after it was verified that the passenger’s documents were fraudulent, an agent had to leave his checkpoint duties and drive the person to the nearest field office for processing, a 40 minute commute each way.

³ Appendix B contains a map of checkpoint locations in the Tucson sector.

⁴ At the I-19 checkpoint, the only direct connectivity to these important law enforcement and immigration databases is via a satellite link. However, agents prefer to call the nearest field office to run the records checks because it usually takes 15 to 20 minutes to log into the satellite system and establish connectivity. Once connectivity is established, the satellite link will automatically disconnect after 15 minutes of inactivity because of DHS’ security restrictions – making the agent start the logon process over again. Agents find the feature cumbersome.

Supreme Court Rulings and Other Factors Affect Checkpoint Operations

In addition to legislative requirements, Border Patrol attempts to comply with Supreme Court decisions on checkpoint operations, as well as with safety standards set by the Arizona Department of Transportation (ADOT). Border Patrol officials expressed concern that the requirement to move checkpoints on average of once every 14 days to prevent persons subject to inspection from predicting the locations of such checkpoints could turn non-permanent checkpoint operations into what could be construed as or resembling a roving patrol.

The Supreme Court held in *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976) that Border Patrol agents may constitutionally stop and question motorists at checkpoints without “individualized or reasonable suspicion.” In an effort to comply with this and other cases and to ensure that their non-permanent checkpoints are not construed as roving patrols, Border Patrol has conducted extensive legal analysis. The product of this analysis has been operations manuals that guide checkpoint operations, requiring that they be: 1) a reasonable distance from the border not to exceed 100 air miles; 2) planned in advance by a supervisor and not line Border Patrol agents; 3) well-advertised in advance by signs and cones; and, 4) lighted and marked so that motorists can see that other vehicles are being stopped and that Border Patrol agents are in charge.

By contrast, roving patrols are operated to maintain an element of surprise when stopping vehicles and are not designed to adhere to Supreme Court provisions for normal checkpoint operations. Because they operate in this manner, roving patrols forfeit the advantage of not having to conform to the reasonable suspicion standard before stopping and questioning motorists. The Supreme Court has held that Border Patrol agents on roving patrol may stop a vehicle only if they have reasonable suspicion, based on specific articulable facts that the vehicle contains aliens who may be illegally in the United States – a much higher threshold for stopping and questioning motorists than at routine checkpoints.⁵

When selecting sites to conduct checkpoint operations, Border Patrol first seeks approval from ADOT. As part of the approval process, supervisory Border Patrol agents and ADOT representatives work together to observe locations where possible checkpoints could operate. When a location meets ADOT safety standards, they assist Border Patrol in obtaining a permit to operate a checkpoint at the identified location. This includes drawing site plans that depict the proper placement of pre-warning signs, and pull-offs where secondary inspections can be conducted safely. Additionally, ADOT assists Border Patrol with drafting traffic control procedures that address how the checkpoint should be operated during traffic back-ups and inclement weather.

We verified at the I-19 and SR-90 checkpoints that each had a copy of the approved ADOT permit on the premises. Each permit was signed by an ADOT official, was valid for one year, and was for a checkpoint that, “...does not require placement of permanent features in, or excavation of the Right of Way.”

According to sector officials, ADOT representatives regularly inspect checkpoint operations. When ADOT finds a deficiency with checkpoint operations, it notifies the Border Patrol by telephone to

⁵ *U.S. v. Brignoni-Ponce*, 442 U.S. 873 (1975).

obtain corrective action. Border Patrol is quick to note that smugglers also know these approved locations, which makes it difficult to relocate checkpoints in a manner designed to prevent persons subject to inspection from predicting their next location.

Border Patrol's Use of Checkpoints

When we reviewed Border Patrol's interpretation of provisions contained in P.L. 108-334, the Tucson sector, not Border Patrol headquarters, played the lead role in developing internal policy to compel sector operations to comply with the law. Officials at headquarters told us that their guidance to the Tucson sector was to make every effort to comply with the appropriations law, while maintaining standards for checkpoint operations contained in the Border Patrol Traffic Checkpoint Policy operations manual.

When we asked headquarters officials whether they could provide official policy memoranda that outlined their guidance to the Tucson sector, they said that they could not because all guidance regarding the law was provided verbally by telephone. We then asked whether they received any policy memoranda from the Tucson sector, they responded that they had not and stressed that all discussions on the subject occurred verbally by telephone.

The headquarters officials we interviewed believe strongly that the Tucson sector was in compliance with all three provisions of the law. As evidence, they told us that they regularly corresponded with the House Subcommittee on how Border Patrol interpreted the provisions. They provided a chain of emails that demonstrated Border Patrol did indeed share with the House Subcommittee how it measured the 14-day average, as well as monthly calculations that showed compliance. We also noted that a House Subcommittee staff member countered the Border Patrol's method of measurement with an alternative method for measuring the 14-day average and provided monthly calculations that showed Border Patrol was not in compliance. Nowhere during the email exchange did we observe the full House Subcommittee staff advising Border Patrol that its method of measurement was wrong, and that Border Patrol should adopt the alternative method of measurement to be in compliance with the law.

Another factor headquarters officials considered in determining whether Border Patrol was in compliance is guidance the White House provided regarding its views on how the appropriations law should be interpreted. In a written statement on October 18, 2004, the White House wrote:

Under the heading 'Customs and Border Protection,' the Act purports to require the Bureau of Customs and Border Protection to relocate its tactical checkpoints in the Tucson, Arizona sector at least an average of once every 14 days. Decisions on deployment and redeployment of law enforcement officers in the execution of the laws are a part of the executive power vested in the President by Article II of the Constitution. Accordingly, the executive branch shall construe the relocation provision as advisory rather than mandatory.

The prevailing view of headquarters officials was that this guidance gave them wide discretion as to how to interpret the statutory language. However, they made it clear that they make "every effort to comply with their appropriators on Capitol Hill." Although program managers in the Tucson sector

mentioned the White House’s statement as a factor, they did not assign as much importance to it as headquarters officials. Rather, they tended to be more concerned with trying to balance the law with the overall tiered approach to border enforcement and to meeting the legal and safety requirements set by the Supreme Court and ADOT.

Tucson sector program managers were able to validate many of the statements made by Border Patrol headquarters officials. However, they disagreed with the assertion that they had not transmitted any policy memoranda to headquarters regarding their interpretation of the law. Sector managers produced copies of official policy memoranda that set forth how checkpoint operations are to be conducted within the Tucson sector and drew heavily from past Supreme Court decisions when outlining how checkpoint operations should be conducted. For example, a May 19, 2005, memorandum stated:

Checkpoints within Tucson sector will be closed for a period of eight hours, every 14 days. Closures will be random in nature. There will be increased, aggressive traffic observations made during the time of the temporary closures.

In formulating this guidance, Tucson sector program managers said that they made every effort to comply with the appropriations law, while balancing past Supreme Court decisions and ADOT safety standards. They also sought the opinion of Tucson sector legal counsel.

We analyzed logs that recorded the days and hours of checkpoint operations and were able to verify that the Tucson sector does conduct checkpoint operations in a manner that closely resembles the guidance set forth in the May 19, 2005, policy memorandum.⁶

Different Interpretations of Compliance

We met with staff from the House Subcommittee to obtain their interpretation of P.L. 108-334, especially of what constitutes a permanent checkpoint and how to measure movement of non-permanent checkpoints at least an average of once every 14 days.⁷ Although the discussion was wide-ranging, one view at the center of the discussion asserted that the intent of the law was to have Border Patrol “physically pick-up and move” checkpoints to other locations; *i.e.*, simply shutting down a checkpoint for eight hours and then bringing it back into operation at the same location does not constitute compliance. This view emphasized that the law uses the word “relocate,” and not “shutdown” to describe the manner in which checkpoints are to operate in the Tucson sector. By not relocating and opting simply to shutdown the checkpoints at least an average of once every 14 days, the checkpoints in the Tucson sector should be considered permanent. In support of this position, we

⁶ We also noted during our inspection of the I-19 and SR-90 checkpoints that each had all the mandatory equipment required by the Border Patrol Traffic Checkpoint Policy operations manual. Both also had all the equipment that was recommended in the manual, but not necessarily required – in essence, exceeding many of the operational standards. Lastly, during observation of both day and night operations of the I-19 checkpoint, line agents working the checkpoint were courteous to motorists passing through the checkpoint and conducted their work in a non-intrusive manner.

⁷ Our original report attributed some discussions of legislative interpretation to the “House Subcommittee staff.” We have revised the report at the request of the Subcommittee to make clear that the views we attributed to the Subcommittee staff were not the staff’s collective view or consensus. Indeed, the staff advised us that it had no formal view as a group. We have revised the report to describe the arguments that have contributed to the present controversy and generated the request for our review without further attribution.

were provided a legal opinion from the Congressional Research Service that tied the issue of permanency to the duration a checkpoint is open, rather than its location.

Under this same perspective, when measuring the movement of non-permanent checkpoints at least an average of once every 14 days, if a checkpoint was only open for part of a day (even for one hour), then it should be considered as being open for a full day. Further, under this formulation, daily increments were used to determine compliance on a monthly basis, taking the number of days a particular checkpoint was in operation during a month and dividing that figure by 30 days. As 14 days represents approximately 47 percent of a 30-day month, it was maintained that a violation occurred in those months in which checkpoints were open in excess of 47 percent.

The method of measurement espoused by this view is substantially different from the method used by Border Patrol. Border Patrol believes the law provides flexibility for using hourly increments when calculating the average and does not focus on being compliant with the 14-day average in any particular month. Rather, Border Patrol measures compliance over a period of months and contends non-compliance in a particular month is balanced with downed checkpoint operations to achieve an overall average that meets the 14-day requirement.

Sector officials said physically taking down a checkpoint, transporting it to another approved location, and setting it up takes an entire shift – approximately eight hours. Smugglers take advantage of the downtime to clear “stash houses” used to hide illegal aliens and contraband that have been staged near the checkpoint. As soon as Border Patrol is observed taking down a checkpoint, lookouts notify smugglers to load their trucks and buses with illegal aliens and contraband. As soon as the checkpoint is down, Border Patrol told us that the smugglers use the newly opened route to move their cargo north. Border Patrol agents from the Tucson sector said that they regularly observed increases in traffic volume as soon as a checkpoint is closed. We asked whether they had developed a measurement that documents the increase but none were aware of such a measurement.

The below table contains monthly operational statistics for the I-19 checkpoint from October 2004 to February 2005. Next, we directly compare the 14-day average figures used to determine compliance.⁸

I-19 Checkpoint Statistics from October 2004 to

Date of Month	October 2004 Hours Up	November 2004 Hours Up	December 2004 Hours Up	January 2005 Hours Up	February 2005 Hours Up
1	16	24	24	18	16
2	24	24	24	21	24
3	8	24	8	8	16
4	24	24	9	11	24
5	16	24	13	24	23
6	23 m	24	15	24	20
7	24	23	24	16	24
8	16	15	24	24	24
9	24	24	24	0	24
10	24	24	24	24	14
11	24	24	24	24	0
12	24	24	24	13	1
13	24 m	24	24	24	24
14	24	22	24	24	24
15	24	22	16	24	24
16	24	24 m	16	24	24
17	24	24	8	24	19
18	24 m	24	16	24	4
19	15	24	24	24	19
20	16	24	24	24	19
21	13	24	24	0	24
22	16	11	24	12	22
23	24	0 m	24	24	16
24	24	16	16	23	24
25	24	24	24	16	24
26	16 m	24	24	9	24
27	13	19	24	13	24
28	19	24	11	24	24
29	11	8	0	24	
30	22 m	24	13	22	
31	24		24	24	

* m indicates that the checkpoint moved to the other kilometer post location and continued operation.

14-Day Average as Calculated Under an Alternative View

Running Total of Days Open	26	54	84	113	140
Running Total of Days in Month	31	61	92	123	151
Running Average of Days Open *	84%	89%	91%	92%	93%

* Running Average of Days Open = Running Total of Days Open/Running Total of Days in Month

⁸ Email exchanges between the House Subcommittee and the Border Patrol were used to develop these tables.

14-Day Average as Calculated by Border Patrol

Total Days Over Five Month Period	151
Total Movements or Closures	11
Average Number of Days between Movements of Closures *	13.7

* Average Number of Days between Movements or Closures = Total Days Over Five Month Period/Total Movements or Closures

When determining compliance with the 14-day average provision, the use of different methods of measurement produces wide variations. Under the view we have been discussing, the Border Patrol would be in noncompliance for all five months represented. For Border Patrol to have been compliant during this period, the running average of days open for each month would have to equal 47 percent or less. By contrast, Border Patrol believes that it was compliant as their figures show over the five-month period the I-19 checkpoint was either moved or closed on average of every 13.7 days.

Missed Opportunities to Provide Definitive Guidance

Several opportunities to communicate to Border Patrol that its method of measuring the 14-day average was not in compliance with the law were missed. On March 15, 2005, the Commissioner of Customs and Border Protection testified on Tucson sector checkpoint operations at a budget hearing before the House Subcommittee.⁹ In email exchanges between staff and Border Patrol officials immediately before and after the hearing, none contained any communication that Border Patrol's method of measuring the 14-day average was wrong, and that it should adopt a different method of measurement to be in compliance. When discussing these observations with certain House Subcommittee staff members they recalled the email traffic but could not state whether the exchanges contained any definitive guidance. We were told this type of guidance was provided to Border Patrol officials verbally by telephone.

Headquarters and sector officials were asked whether they received any written or verbal guidance from the House Subcommittee subsequent to the budget hearing and they said no. We showed officials a copy of the letter from the House Subcommittee requesting that we assess Border Patrol's compliance with P.L. 108-334. No one said they previously had been told by House Subcommittee staff what the letter states: that "it [the intent of the appropriations law] is not simply to shut down the checkpoint for a few minutes or hours in the middle of the night, only to continue at the same location the next morning." Officials expressed concern that if this was indeed the intent, then checkpoint operations within the sector were not in compliance.

⁹ At this hearing, the Commissioner assured the House Subcommittee that he was committed to having the Tucson sector conduct checkpoint operations on "an average" that the legislation required. This was a missed opportunity to articulate to the Commissioner definitive guidance on how the average should be measured.

Border Patrol is Compliant with the Provision that No Permanent Checkpoints be Constructed

There are no permanent checkpoints in operation by Border Patrol in the Tucson sector. It is unique in this prohibition. Congress has appropriated funds to Border Patrol in the past for “planning, constructing, renovating, equipping and maintaining buildings and facilities necessary for the administration and enforcement of immigration laws.” With such funding, Border Patrol has built permanent checkpoints as the Fort Brown Station checkpoint located on Highway 4 near Brownsville, Texas in the Rio Grande Valley sector, and the El Cajon Station checkpoint located on State Route 94 in the San Diego sector. These permanent checkpoints were built on foundations that are constructed and anchored in the ground. They also contain infrastructure suitable for landlines for telephone and computer connectivity, climate controlled work areas and a kennel, heavy equipment to assist with off-loading trucks that may be carrying illegal contraband, and special commuter and trucking lanes that improve checkpoint operations and movement of traffic. None of the checkpoints that we inspected in the Tucson sector had any of these characteristics. Rather, they were temporary and non-permanent both in structure and form.¹⁰

Secondly, ADOT also classifies the Border Patrol checkpoints in the Tucson sector as being temporary immigration checkpoints that do not require placement of permanent features in, or excavation of the Right of Way. On an annual basis, Border Patrol must apply for permits from ADOT for all checkpoints that it operates within the Tucson sector. Border Patrol provided us with past and present approved permits for all locations where checkpoints are in operation. Under ADOT criteria, the checkpoints are not permanent.

Border Patrol is Compliant with the Provision that Directs the Submission of a Plan for Expenditure

A provision of the law directed Border Patrol to submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for expenditure that includes the locations, designs, costs and benefits of any proposed Tucson Sector permanent checkpoints. Earlier drafts of the law requested this report within 120 days of passage of the appropriations Act; however, no such time restriction was stated in P.L. 108-334. Border Patrol provided a copy of the plan for expenditure, as well as transmittal cover letters to the committees on appropriations for both the Senate and House of Representatives, dated May 27, 2005. During our meetings with House Subcommittee staff, they said they had not received the report, but after some searching, a copy of the report was discovered that had been received in early June 2005.

The plan proposed permanent checkpoints at three different locations. For each location, the plan specified why the particular site was selected, along with its anticipated design and compliance with ADOT’s 20-year traffic projections. The design included the number of inspection lanes, agents, electronic sensors, and remote video surveillance systems required at each site. Border Patrol also delineated any possible routes of circumvention that would be monitored by roving patrols or tactical checkpoints. The benefits of each checkpoint and Border Patrol’s planned community outreach efforts were also described. Appendices clearly outlined costs for each proposed permanent checkpoint.

¹⁰ The checkpoint south of San Clemente, California on Interstate 5 (I-5), is an example of what we interpret as being permanent, see Appendix C.

At Mile Post 17.8 on State Route 85 north of Ajo, Border Patrol would place the smallest of its requested permanent checkpoints to handle the large number of recreational vehicles that pass through the area to deter illegal border crossers from traveling in the extreme heat of the West Desert. Border Patrol would also place a permanent checkpoint on I-19, just south of Green Valley at Kilometer Post 53. This facility would be the largest in order to handle the heavy volume of passenger and commercial traffic flowing north from Nogales to Tucson. A third permanent checkpoint would be constructed on SR-90 at Mile Post 304 near Fort Huachuca. SR-90 has significant commercial traffic coming from Naco and a permanent checkpoint would be able to better monitor truck traffic.

The Border Patrol believes that the construction of permanent checkpoints at these three locations will fully institute the third tier of its overall strategy to control the border within the Tucson sector. Border Patrol said these permanent checkpoints would serve as an effective deterrent to illegal border crossers and smugglers attempting to enter the U.S. illegally. The deterrent effect of these checkpoints is achieved when they are combined with other enforcement efforts to increase the certainty of apprehension. Illegal border crossers and smugglers who know that they must pass through a checkpoint may attempt to bypass it on foot or by taking slower secondary routes, where they can be more easily detected and stopped by tactical checkpoints, roving patrols, ground sensors, cameras, and other technologies. Officials believe that as the risk of capture increases, smugglers will eventually change tactics or not cross the border at all. Whether or not Congress agrees with the proposals, the report submitted complies with its mandate as to its contents.

Border Patrol is Compliant with the Provision that Checkpoints Move at Least an Average of 14 days

Border Patrol’s compliance with the 14-day average provision is based on operational statistics we obtained for the I-19, SR-80, and SR-90 checkpoints from October 1, 2004 to August 16, 2005.¹¹ Using Border Patrol’s method for calculating the 14-day average, we developed the following table.

14-Day Averages Using Border Patrol’s Method of Calculation

	I-19	SR-80	SR-90
Total Days Over Five Month Period	319	319	319
Total Movements or Closures	27	30	28
Average Number of Days between Movements of Closures *	11.8	10.6	11.4

*Average Number of Days between Movements or Closures = Total Days Over 11 Month Period/Total Movements or Closures
 The data supports, that for the majority of FY 2005, Border Patrol had either moved or closed these checkpoints an average of once every 14-days. As the law does not specify a method for calculating

¹¹ Of the locations approved for checkpoint operations, these three locations are operated the most frequently. The other locations are used so infrequently that a simple visual inspection of the numbers shows that they are well within the 14-day average rule.

the average, we believe Border Patrol's method is reasonable in light of other considerations to balance legal and safety standards set by the Supreme Court and ADOT.

Concluding Observations

In our judgment, the debate over how to count the 14-day rule misses the point. Neither mathematical formula has any relevance to the underlying purpose of a checkpoint – whether apprehensions and seizures are enhanced.

The legislative determination that checkpoints in the Tucson sector must be mobile and cannot be permanent should be reconsidered in light of this report. First, Tucson is the only sector in the nation that cannot use permanent checkpoints. There are 33 permanent checkpoints in other sectors along the southwest border. No one has identified a reason that could explain why permanent checkpoints, which Congress has funded elsewhere, cannot operate effectively in the Tucson sector. Second, the Supreme Court language and ADOT impose requirements that largely immobilize checkpoints. They are not, and no longer hope to be, agile, swiftly sprung traps. Concerns for safety, avoidance of liability, and constitutional principles require the installation of an extended apparatus of signs, warning lights, traffic cones and barriers, illumination, and support structure before a checkpoint can begin operation. Third, a permanent checkpoint can be operated intermittently to respond to operational intelligence. In this mode, it would function similar to truck weigh stations that populate the nation's highways, sometimes open and sometimes closed – unpredictable.

Permanent checkpoints permit safer, more efficient law enforcement. Better signage and illumination enhances the driving public's safety and that of the Border Patrol agents who work the traffic lanes. Permanent facilities protect the health of agents, their dogs, and apprehended aliens. Importantly, they allow for permanent connectivity to law enforcement systems, such as: 1) Enforcement Case Tracking System; 2) Automated Biometric Identification System; and 3) Integrated Automated Fingerprint Identification System. Having this kind of connectivity at checkpoints could have a vital impact on the screening of potential smugglers or terrorists.

It is not necessary to prohibit permanent checkpoints in order to encourage the use of alternative tactics and mobile interior operations. We encountered many opinions about tactical choices during this review, but very little hard, routinely collected data that would measure which ones succeeded.

Recommendation

We recommend that the Chief, Office of Border Patrol develop performance measurements that could be used to determine the effectiveness of permanent checkpoints within the Tucson sector.

We extend our appreciation to the Border Patrol and the House Subcommittee staff for the cooperation and courtesies extended to our staff. Should you have any questions, please call me, or your staff may contact Robert L. Ashbaugh, Assistant Inspector General for Inspections and Special Reviews, at (202) 254-4100.

cc: Secretary
Deputy Secretary
General Counsel
Chief of Staff
Assistant Secretary for Public Affairs
Assistant Secretary, Policy
Executive Secretary
Assistant Secretary for Legislative Affairs
DHS Audit Liaison
CBP Audit Liaison

Appendix A

Picture 1. – The I-19 checkpoint in Santa Cruz county



Source: Office of Inspector General

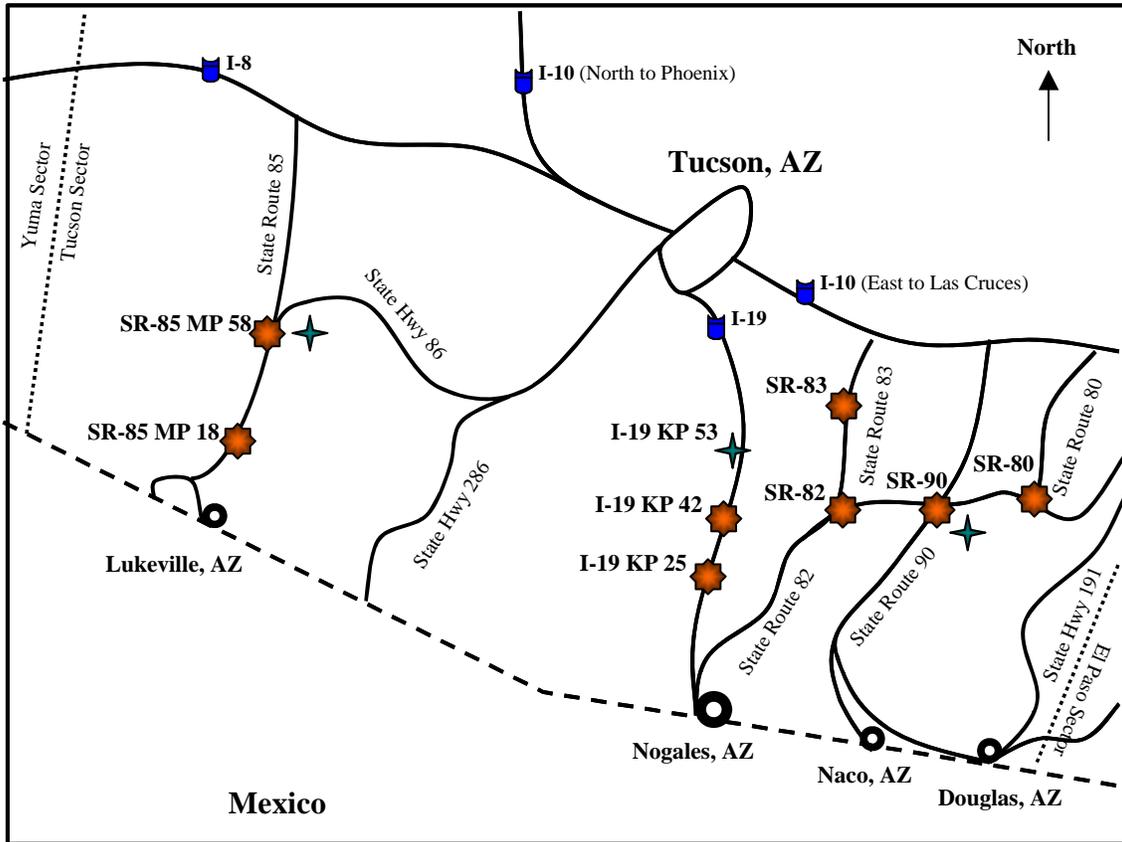
Picture 2. – The SR-90 checkpoint in Cochise county



Source: Office of Inspector General

Appendix B

Map 1. – Checkpoints in the Tucson Sector



-  Locations approved by ADOT to conduct checkpoint operations
-  Location of proposed permanent checkpoints per the plan for expenditure

Appendix C

Picture 3. – Permanent checkpoint south of San Clemente, California on I-5



Source: Border Patrol

Appendix D

U.S. Department of Homeland Security
Washington, D.C. 20229



U.S. Customs and
Border Protection

October 11, 2005

MEMORANDUM FOR RICHARD L. SKINNER
INSPECTOR GENERAL
DEPARTMENT OF HOMELAND SECURITY

FROM: Acting Director 
Office of Policy and Planning

SUBJECT: Response to the Office of Inspector General's Draft Letter Report
on Border Patrol's Compliance with Public Law 108-334 and the
Use of Checkpoints within the Tucson Sector

Thank you for providing us with a copy of your draft letter report entitled "A Review of Border Patrol's Compliance with Public Law 108-334 and the Use of Checkpoints within the Tucson Sector" and the opportunity to discuss the issues in this report. The U.S. Customs and Border Protection (CBP) appreciated the opportunity to work with the auditors in constructing a balanced and accurate document. CBP agrees with the overall substance and findings of the report. The importance of resolving the issues prompting this review and highlighted in the report reiterates the importance of establishing permanent checkpoint operations in the Tucson Sector. Permanent checkpoints permit safer, more efficient law enforcement.

As the auditors articulated, Border Patrol checkpoints deny the criminal element's access to routes of egress from the border to major cities within the United States. Both permanent and tactical Border Patrol checkpoints are a critical function in support of our national strategy of preventing terrorists and weapons of terror, as well as illegal aliens and illegal drugs, from entering the United States.

The Office of Inspector General (OIG) recommended that the Chief, Office of Border Patrol (OBP), develop performance measurements that could be used to determine the effectiveness of permanent checkpoints within the Tucson sector. CBP concurred with the recommendation and is taking action to address this issue. In the Government Accountability Office's (GAO) audit report, *BORDER PATROL: Available Data on Interior Checkpoints Suggest Differences in Sector Performance*, GAO-05-435, dated July 2005,

GAO recommended that OBP develop performance measures for checkpoints. In response, OBP developed and submitted for approval, a performance measure specifically addressing checkpoint operations. Complete implementation of that measure is scheduled for fiscal year (FY) 2006. During FY 2006, OBP and the Tucson Sector will develop performance measures specifically related to the effectiveness of checkpoints in Tucson.

With regard to the classification of the draft report, CBP has not identified information within the report requiring restricted public access based on a designation of "For Official Use Only."

Attached are technical comments that relate to statements that need to be clarified prior to the finalization of this report. If you have any questions regarding this response, please contact me or have a member of your staff contact Ms. Lynn Richardson at (202) 344-2953.

Attachment

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Appendix E

Congress of the United States
 House of Representatives
 Committee on Appropriations
 Washington, DC 20515-6015

June 8, 2005

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 TELEPHONE:
 (202) 225-2771

The Honorable Richard L. Skinner
 Acting Inspector General
 Department of Homeland Security
 Naval Security Station, Nebraska and Massachusetts Avenues, NW
 Washington, D.C. 20528

Dear Mr. Skinner,

Since fiscal year 2000, Congress has enacted appropriations law that prohibits the Border Patrol from using permanent checkpoints in the Tucson Sector, and directed them instead to employ tactical, mobile checkpoints in less predictable locations. The fiscal year 2005 Homeland Security Appropriations Act (PL 108-334) and accompanying report language state the following:

Homeland Security Department FY2005 Appropriations Act:

Provided further, That none of the funds appropriated in this Act may be obligated to construct permanent Border Patrol checkpoints in the Bureau of Customs and Border Protection's Tucson sector: Provided further, That the Commissioner, Bureau of Customs and Border Protection, is directed to submit to the Committees on Appropriations of the Senate and the House of Representatives a plan for expenditure that includes location, design, costs, and benefits of each proposed Tucson sector permanent checkpoint: Provided further, That the Bureau of Customs and Border Protection shall relocate its tactical checkpoints in the Tucson sector at least an average of once every 14 days in a manner designed to prevent persons subject to inspection from predicting the location of any such checkpoint.

Homeland Security Department FY2005 Appropriations Act House Report (108-541):

The Committee is concerned about the continued high level of illegal immigration within the Tucson Sector. While the Arizona Border Control initiative is devoting considerable resources to this problem, the Committee wants to enable CBP to conduct its border control operations with greater effectiveness. The Committee therefore directs CBP to conduct a study of locations for permanent checkpoints within the Tucson Sector and provide its

recommendations to the Committee no later than 120 days after enactment of this Act. This study should include detailed assessments of traffic congestion, environmental impact, and all associated costs. The Committee expects CBP to continue its rigorous border patrol operations to include roving patrols, nonpermanent checkpoints, aerial surveillance; deployment of sensor technology such as fixed lighting, motion and heat sensors, cameras, and signage systems that supplement established, tactical checkpoint locations, sensor technology and other means to discourage and stop illegal immigration through the sector. To facilitate such operations, the Committee has included restrictions that tactical checkpoints must be relocated at least an average of once every fourteen days. The Committee continues a restriction that funds may not be used for the construction of permanent checkpoints in the Tucson sector.

Homeland Security Department FY2005 Appropriations Conference Report Joint Explanatory Statement (108-774):

The language and allocations contained in House Report 108-541 and Senate Report 108-280 should be complied with unless specifically addressed to the contrary in the conference report and statement of managers. Both the Joint Explanatory Statement of Managers accompanying the conference report and the Senate report are silent on this matter so House report language should be complied with.

It has come to our attention that the Border Patrol may not be moving its checkpoints "at least an average of once every 14 days," especially the checkpoints in Santa Cruz and Cochise counties. The intent of this language is to ensure that the Border Patrol uses *tactical* checkpoints, which are moved to different locations at least an average of once every 2 weeks to prevent predictability. It is not simply to shut down the checkpoint for a few minutes or hours in the middle of the night, only to continue at the same location the next morning. We request that you assess Customs and Border Patrol's compliance with PL 108-334 and report your findings and actions to the Committee by September 1, 2005.

We appreciate your prompt completion of this investigation and look forward to hearing from you.

Sincerely,


Harold Rogers
Chairman,
Homeland Security Appropriations
Subcommittee


Jim Kolbe
Member,
Homeland Security Appropriations
Subcommittee

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