

THE NATIONAL SECURITY MISSION OF THE U.S. BORDER PATROL:
A QUESTION OF COLLECTIVE BARGAINING EXEMPTION

A thesis presented to the Faculty of the U.S. Army
Command and General Staff College in partial
fulfillment of the requirements for the
degree

MASTER OF MILITARY ART AND SCIENCE
Homeland Security Studies

by

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Fort Leavenworth, Kansas
2015

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REPORT DOCUMENTATION PAGE			<i>Form Approved</i> OMB No. 0704-0188		
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1. REPORT DATE (DD-MM-YYYY) 12-06-2015		2. REPORT TYPE Master's Thesis		3. DATES COVERED (From - To) AUG 2014 – JUN 2015	
4. TITLE AND SUBTITLE The National Security Mission of the U.S. Border Patrol: A Question of Collective Bargaining Exemption			5a. CONTRACT NUMBER		
			5b. GRANT NUMBER		
			5c. PROGRAM ELEMENT NUMBER		
6. AUTHOR(S) Jeff Southerland			5d. PROJECT NUMBER		
			5e. TASK NUMBER		
			5f. WORK UNIT NUMBER		
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) U.S. Army Command and General Staff College ATTN: ATZL-SWD-GD Fort Leavenworth, KS 66027-2301			8. PERFORMING ORG REPORT NUMBER		
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)			10. SPONSOR/MONITOR'S ACRONYM(S)		
			11. SPONSOR/MONITOR'S REPORT NUMBER(S)		
12. DISTRIBUTION / AVAILABILITY STATEMENT Approved for Public Release; Distribution is Unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT The post-September 11, 2001 mission, responsibilities, and duties of the U.S. Border Patrol are examined in order to determine the applicability of collective bargaining exemption. These factors are analyzed in the context of specific criteria identified in the legislation creating the Department of Homeland Security. The conclusions are then weighed with respect to other entities, including Department of Defense entities, that have been granted collective bargaining exemptions to determine the potential impacts.					
15. SUBJECT TERMS U.S. Border Patrol, mission, national security, collective bargaining, union, exemption					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT	b. ABSTRACT	c. THIS PAGE			19b. PHONE NUMBER (include area code)
(U)	(U)	(U)	(U)	60	

Standard Form 298 (Rev. 8-98)
Prescribed by ANSI Std. Z39.18

MASTER OF MILITARY ART AND SCIENCE

THESIS APPROVAL PAGE

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ABSTRACT

THE NATIONAL SECURITY MISSION OF THE U.S. BORDER PATROL: A QUESTION OF COLLECTIVE BARGAINING EXEMPTION, by Jeff Southerland, 60 pages.

This thesis examines the pre- and post-September 11, 2001 mission, responsibilities, and duties of the U.S. Border Patrol in order to determine the applicability of collective bargaining exemption. These factors are analyzed in the context of specific criteria identified in the legislation creating the Department of Homeland Security. The conclusions are then weighed with respect to other entities, including Department of Defense entities, that have been granted collective bargaining exemptions to determine the potential impacts.

ACKNOWLEDGMENTS

I extend my sincere gratitude to the U.S. Border Patrol for selecting me to attend a graduate level educational experience and allowing me the opportunity to complete this thesis. Specifically, I thank Chief Michael Fisher and Associate Chief John Morris for their part in recommending and approving my participation in this endeavor. I also wish to thank Dr. Orville S. Cupp for taking the time to chair my thesis committee while offering assistance throughout the process. I also extend great appreciation to my fellow students—both U.S. and international military officers—in U.S. Army Command and General Staff College Staff Group 20C, as well as my instructor cadre, all of whom welcomed my questions and explained all things military to an otherwise outsider. I also thank all those who took time to read the numerous iterations of this thesis as it progressed. Your insight and recommendations greatly contributed to the finished product.

I wish to especially thank my wife, Candace, and my little girls, Chloe and Sophia. Candace, you did a tremendous job raising the girls over the course of these several months so that I could devote time and attention to this effort. Your patience and love are amazing. Girls, you have been wonderful for your mother while your dad has been away. This endeavor would not have been possible without the help and sacrifice of you, my family.

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CHAPTER 1

INTRODUCTION

Labor disputes between employers and employees predate the founding of the United States. Disputes culminating in disruption of work were isolated and included strikes by fishermen in the late-17th century.¹ The 18th century witnessed an influx of arrivals from Europe and an increase in the numbers of skilled artisans in the colonies. The competition created by these numbers led to the formation of the first labor organizations in the mid-19th century. The ability of a workforce to negotiate with employers concerning working conditions was realized in 1842 as a result of the Massachusetts Supreme Judicial Court decision establishing the legality of unions.² The 1935 National Labor Relations Act declared it illegal for an employer to prevent an employee from participating in a union.³

The inclusion of the U.S. federal workforce into the realm of collective bargaining is a relatively recent occurrence. This happened during the 1960s when President John F. Kennedy issued Presidential Executive Order 10988 granting union rights to federal

¹ Richard Morris, "The Emergence of American Labor," U.S. Department of Labor, accessed September 2, 2014, <http://www.dol.gov/oasam/programs/history/chapter1.htm>.

² Encyclopaedia Britannica, "Commonwealth v. Hunt, (1842)," accessed September 6, 2014, <http://www.britannica.com/EBchecked/topic/128964/Commonwealth-v-Hunt>.

³ *National Labor Relations Act of 1935*, 29 U.S.C. § 151-169 (1935).

employees.⁴ Presidents Richard Nixon and Jimmy Carter expanded union rights for federal employees. These expansions led to the enactment of the Civil Services Reform Act of 1978. Soon after, however, President Carter issued Presidential Executive Order 12171 that provided exemptions to collective bargaining for specific departments, organizations and offices.⁵ The common characteristic of these entities and thus the reason for their exemption was their national security mission. President Carter's executive order reflected a view that the consequences of failing to accomplish the mission of national security were more important than any benefit attained through collective bargaining. Several future presidents shared this belief and made nine amendments to President Carter's original Executive Order, adding additional entities they deemed should also be exempt from collective bargaining.

The September 11, 2001 terrorist attacks resulted in the creation, via the Homeland Security Act of 2002, of the Department of Homeland Security (DHS)—a merger of several existing law enforcement, inspection, and intelligence organizations and the creation of some new entities—with a specific mission of safeguarding the United States from future attack.⁶ One new agency created within DHS was Customs and Border Protection (CBP). CBP consolidated several entities and changed their respective primary missions from enforcement and inspection to national security.

⁴ John Woolley and Gerhard Peters, "The American Presidency Project: Executive Order 10988," University of California Santa Barbara, accessed September 2, 2014, <http://www.presidency.ucsb.edu/ws/index.php?pid=58926>.

⁵ John Woolley and Gerhard Peters, "The American Presidency Project: Executive Order 12171," University of California Santa Barbara, accessed September 2, 2014, <http://www.presidency.ucsb.edu/ws/index.php?pid=58926>.

⁶ *Homeland Security Act of 2002*, Public Law 107-296 (2002).

The adoption of a national security mission for the entities within DHS should have been accompanied by a requisite collective bargaining exemption extended to others with a similar mission. This, however, did not occur. This inconsistency demands an answer to the following questions. Considering its current national security mission, should the U.S. Border Patrol, an office within DHS, be exempt from collective bargaining? What are the conditions that must be met in order to qualify for exemption? Have these criteria been met considering the pre- and post-September 11 mission and responsibilities of the U.S. Border Patrol?

The purpose of this research, therefore, is to examine the applicability of the post-September 11, 2001, U.S. Border Patrol mission for exemption from collective bargaining. An examination of U.S. Border Patrol duties and responsibilities prior to September 11, 2001 and since the inception of DHS will provide the necessary information to address the issue. This research will attempt to resolve the inconsistency concerning collective bargaining exemptions for those with a national security mission.

Certain assumptions will remain which, if absent, would impact the results of the research. For example, there is no indication that those who wish to harm the United States will cease in their attempts to do so. To the contrary, recent activity in the Middle East by the Islamic State in Iraq and Syria (ISIS), their stated goals of attacking the West, and their associated support by Westerners who possess the ability to lawfully enter the United States have all served to heighten the potential of a future attack. Also, the potential for collaboration between terrorist groups and transnational criminal organizations involved in drug and human trafficking is troubling. The presence and apprehension by U.S. Border Patrol of aliens from countries designated by the

Department of State as either State Sponsored Terrorist or Terrorist Safe Havens as discussed later in this thesis provides support for this convergence. Therefore, the current and future border security mission will certainly not diminish and may, in fact, increase in significance. Additionally, supporters of collective bargaining will continue to rationalize the benefits of union affiliation. The financial and political power of unions will also continue to influence the national discussion regarding collective bargaining rights.

Terms used in the research are commonly understood. Within the context of this thesis, there is no need to specifically define terms.

Debate on the legitimacy of unionization and collective bargaining could fill the pages of several additional theses. Therefore, this research will not examine the advantages and disadvantages of collective bargaining. Instead, the scope of this work will focus on the specific criteria that must exist for collective bargaining exemption as outlined in the Homeland Security Act of 2002. It will also examine the justifications for the original and subsequent national security mission exemptions to collective bargaining found in historical Presidential Executive Orders. The scope will be examined with respect to one office within DHS—the U.S. Border Patrol. Once rationale for the exemptions has been identified, the current mission of the U.S. Border Patrol will be examined through the lens of that rationale to determine applicability.

There are significant implications to the findings of this study due to the numerous components of DHS and CBP that could be impacted. Also significant is the possible expansion of exemptions for additional entities outside of DHS who have national security missions to whom the rationale discussed above would apply.

Conversely, if research determines that the U.S. Border Patrol post-September 11, 2001 mission qualifies for exemption but no exemption is granted, there exists the potential for entities with similar missions who are currently exempt from collective bargaining (e.g. Department of Defense) to have that exemption rescinded.

CHAPTER 2

LITERATURE REVIEW

In an attempt to resolve the inconsistency concerning collective bargaining exemptions for those with a national security mission, this chapter will examine historical data and documentation in the context of the U.S. Border Patrol mission and responsibilities. In order to understand whether the current U.S. Border Patrol mission and responsibilities qualify for collective bargaining exemption, the reader must understand several issues. First, an examination of the relationship between traditional law enforcement agencies and unionization will help the reader to better understand why the U.S. Border Patrol is unionized in the first place. Second, examination of various Presidential Executive Orders will provide insight into historical justifications for exemption from collective bargaining. Third, the Homeland Security Act of 2002 will be examined. This piece of legislation created DHS, identified its mission, and perhaps most significant to this discussion, identified the specific criteria for collective bargaining exemption for those entities that formed DHS. Fourth, the U.S. Border Patrol mission must be assessed—both prior to and after September 11, 2001. In assessing this factor, the reader will gain an understanding of whether changes, if any, to the U.S. Border Patrol mission fulfill the exemption criteria outlined in the Act. Finally, the U.S. Border Patrol duties and responsibilities must be fully understood. An examination of these criteria will lay the foundation for later analysis.

Before an examination of the relationship between unions and law enforcement can occur, a brief history of law enforcement in the United States is helpful. This short

history will provide context for the events that led to the creation of the U.S. Border Patrol.

The origins of law enforcement in the United States begin in 1635 in Boston with the establishment of a group of volunteer law enforcers called the “night watch”—the first of its kind among the original colonies.⁷ The early 1700s witnessed the first full-time paid law enforcement officers, also in Boston.⁸ Following the nation’s founding, the United States Congress created the first federal law enforcement officials, the U.S. Marshalls, in 1789.⁹ In 1835, Texas established the original statewide law enforcement agency, an entity that would later become the Texas Rangers.¹⁰ The southwest border of the United States in the late-1800s was witness to the Wild West and the rise of outlaws such as Billy the Kid, as well as infamous confrontations like that involving Wyatt Earp at the O.K. Corral.¹¹ Cross border illicit bandit activity and illegal immigrant entries from Mexico prompted the formation of the first mounted patrol of the southwest border in 1904 during the presidency of Theodore Roosevelt. This small group patrolled the U.S./Mexico border and the California coastline looking primarily for Chinese immigrants. It never grew larger than approximately 75 men, but was the precursor to

⁷ National Law Enforcement Officers Memorial Fund, “Important Dates in Law Enforcement History,” accessed September 3, 2014, <http://www.nleomf.org/facts/enforcement/impdates.html>.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

what would become the U.S. Border Patrol.¹² A more thorough examination of the U.S. Border Patrol mission and responsibilities will come later. For now, a brief history of unionization and its relationship to law enforcement is helpful.

Unionization within the United States predates the nation's founding. Depending on the perspective of the source, the significance of historical events and their relationship to union activity varies significantly. Under its Labor History Timeline, the website of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the largest federation of unions in the United States, interprets the Bacon Rebellion of 1676 as a pivotal labor milestone in the building of a new nation.¹³ In contrast, a George Mason University account of the Bacon Rebellion describes Bacon and his supporters as having "plundered the elite's estates and slaughtered nearby Indians."¹⁴ Another interesting interpretation by the AFL-CIO relates to the Boston Tea Party. This well-known event in 1773 immediately predated the first Continental Congress and the eventual founding of the United States. Numerous historical references to the Boston Tea Party make no mention of a specific labor connection to the event. The AFL-CIO website, however, identifies the Boston Tea Party as a labor protest.¹⁵ Supporters of organized labor and unionization seem able to establish connections and interpret historical events in a manner that associates notable events with the organized

¹² Texas State Historical Association, "United States Border Patrol," accessed August 21, 2014, <http://www.tshaonline.org/handbook/online/articles/ncujh>.

¹³ AFL-CIO, "AFL-CIO Labor History Timeline," accessed August 15, 2014, <http://www.aflcio.org/About/Our-History/Labor-History-Timeline>.

¹⁴ Nathaniel Bacon, "Bacon's Rebellion: The Declaration (1676)," George Mason University, accessed September 2, 2014, <http://historymatters.gmu.edu/d/5800>.

¹⁵ AFL-CIO, "AFL-CIO Labor History Timeline."

labor movement and foments support for the pro-collective bargaining perspective. The validity of these associations, however, can be a matter of dispute.

The historical context of some significant labor events remains undisputed. In 1842, the Massachusetts Supreme Court decision via the *Commonwealth v. Hunt* case established the legality of trade unions and held that unions had the right to take peaceful steps to raise wages and prevent the employment of nonunion workers.¹⁶ In 1866, the National Labor Union was founded.¹⁷ In 1886, the American Federation of Labor (AFL) was formed, and Samuel Gompers, a prominent labor leader, was named its president. One of Gompers' first acts as AFL president was a national strike that resulted in the 8-hour workday. Although he died in 1924, many of Gompers' initiatives set the stage for the labor rights endorsements President Franklin D. Roosevelt's New Deal during the 1930s.¹⁸

The relationship between unions and law enforcement has a lengthy history in the United States. Law enforcement unions have existed since the early 1900s.¹⁹ The traditional role of police unions was similar to non-law enforcement employee organizations—to provide a mechanism for employees to voice concerns over working

¹⁶ Encyclopedia Britannica, “*Commonwealth v. Hunt* (1842).”

¹⁷ AFL-CIO, “AFL-CIO Labor History Timeline.”

¹⁸ AFL-CIO, “Samuel Gompers (1850-1924),” accessed August 16, 2014, <http://www.aflcio.org/About/Our-History/Key-People-in-Labor-History/Samuel-Gompers-1850-1924>.

¹⁹ Richard Carpenter, “Unionism In Law Enforcement,” Florida Department of Law Enforcement, accessed October 3, 2014, <http://www.fdle.state.fl.us/Content/getdoc/8578c647-9be8-44cd-a88e-91ec7033084d/Carpenter-Richard-abstract-Unionism-in-Law-Enforce.aspx>.

conditions. Issues specific to law enforcement organizations included the inherent dangers of the profession, the relative social and economic status of police officers in society, and the successes of collective bargaining units witnessed outside of the law enforcement career.²⁰

Members of federal law enforcement agencies received collective bargaining rights in 1962 as the result of President John F. Kennedy's Presidential Executive Order that granted these rights to all federal employees.²¹

The U.S. Border Patrol's collective bargaining unit is the National Border Patrol Council. Comprised exclusively of non-management personnel, the National Border Patrol Council was established on November 1, 1965 and is affiliated with the American Federation of Labor and Congress of Industrial Organizations and the American Federation of Government Employees.²² The National Border Patrol Council website's Frequently Asked Question section describes the necessity for Border Patrol unionization due to management officials who "attempt to use agents and circumstances for their own political gain" by "throw(ing) an agent to the wolves" and "forfeit(ing) their personal integrity."²³ Allegations such as these give credence to assessments by observers who claim that, "In most cases, collective bargaining is viewed as an adversarial process

²⁰ Ibid.

²¹ John Woolley and Gerhard Peters, "The American Presidency Project: Executive Order 10988."

²² National Border Patrol Council, "About NBPC," accessed October 12, 2104, <http://bpunion.org/about-nbpc/overview>.

²³ Ibid.

characterized by conflict between the interests of management and organized employees. The term union normally has a bad connotation.”²⁴

The evolution of federal law enforcement and the inclusion of unions led to an examination by various U.S. presidents of the potential consequences of allowing entities with a national security mission to collectively bargain. As stated previously, the expansion of collective bargaining rights to the federal workforce was the result of President John F. Kennedy’s January 17, 1962 Presidential Executive Order 10988. This order inferred that effectiveness of public business could be maximized through the ability of federal employees to engage in organized employee-management relations.²⁵ Various U.S. presidents, including Richard Nixon and Gerald Ford, expanded these collective bargaining rights through presidential executive orders of their own. On October 29, 1969, President Nixon’s Presidential Executive Order 11491 created the Federal Labor Relations Council, a body charged with administering the order, deciding major policy issues, and making recommendations to the President on issues regarding labor-management relations.²⁶ In 1975, President Gerald Ford issued Presidential Executive Order 11838 further expanding collective bargaining rights and affecting union secret ballot elections.²⁷

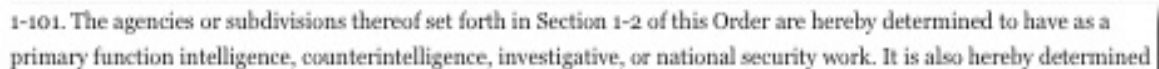
²⁴ Richard Carpenter, “Unionism In Law Enforcement.”

²⁵ John Woolley and Gerhard Peters, “The American Presidency Project: Executive Order 10988.”

²⁶ John Woolley and Gerhard Peters, “The American Presidency Project: Executive Order 11491,” University of California Santa Barbara, accessed December 8, 2014, <http://www.presidency.ucsb.edu/ws/index.php?pid=59075>.

²⁷ John Woolley and Gerhard Peters, “The American Presidency Project: Executive Order 10988.”

Two significant events in the evolution of collective bargaining occurred during the presidency of Jimmy Carter. The first was the passage of the Civil Service Reform Act of 1978. This legislation concluded that “labor organizations and collective bargaining in the civil service are in the public interest.”²⁸ The Civil Service Reform Act created the Office of Personnel Management, the Merit Systems Protection Board, and the Federal Labor Relations Authority, entities that continue to engage in labor-management relations to this day.²⁹ The second significant contribution to the collective bargaining discussion by the Carter administration occurred in 1979 with Presidential Executive Order 12171 (figure 1), which excluded various agencies from collective bargaining due to their primary roles of “intelligence, counterintelligence, investigative, or national security work.”³⁰ These factors contributing to collective bargaining exclusion in 1979 are similar to those found in the legislation that would create DHS 23 years later.



1-101. The agencies or subdivisions thereof set forth in Section 1-2 of this Order are hereby determined to have as a primary function intelligence, counterintelligence, investigative, or national security work. It is also hereby determined

Figure 1. Presidential Executive Order 12171

Source: John Woolley and Gerhard Peters, “The American Presidency Project: Executive Order 12171,” University of California Santa Barbara, accessed December 8, 2014, <http://www.presidency.ucsb.edu/ws/index.php?pid=58926>.

²⁸ Federal Labor Relations Authority, “50th Anniversary: Executive Order 10988,” accessed December 8, 2014, http://www.flra.gov/50th_Anniversary_EO10988.

²⁹ *Civil Service Reform Act of 1978*, Public Law 95-454 (1978).

³⁰ John Woolley and Gerhard Peters, “The American Presidency Project: Executive Order 12171.”

The Homeland Security Act of 2002 was the legislative response by the U.S. government to the terrorist attacks on September 11, 2001. This Act created a department-level organization, headed by a newly created cabinet-level secretary, by combining 22 federal agencies with more than 170,000 federal employees.³¹ In October, 2001, President George W. Bush appointed Pennsylvania Governor Tom Ridge as the first Director of the White House Office of Homeland Security.³² Over the course of the next year, various Congressional discussions would lead to passage of the Act in November of 2002. The record of these discussions provides insight into the complexities of the monumental effort to combine so many federal agencies. One of the main challenges involved collective bargaining.³³

The initial proposals regarding the creation of the new department included language that would allow for the institution of a new personnel management system that was not governed by existing personnel management law. This was fiercely opposed by organized labor. The historical relationship between labor unions and the Democratic party was the specific cause for delays within the Senate that lasted until the 2002 mid-term elections.³⁴

During the time leading up to the implementation of the Homeland Security Act, Republicans held a majority in the House of Representatives. The Senate, however, was

³¹ Douglas Brook et al., “Legislating Civil Service Reform: The Homeland Security Act of 2002” (Master’s thesis, Naval Postgraduate School, 2006), ix.

³² *Ibid.*, xi.

³³ *Ibid.*, 33.

³⁴ *Ibid.*, 38.

split evenly between Republicans and Democrats. The Act passed quickly through the House of Representatives. However, pressure by federal employee labor unions contributed to Senate delays.³⁵ The contention by the unions was that the proposed legislation would fail to honor collective bargaining agreements of the numerous agencies being joined within the department. They also claimed that the administration would attempt to indiscriminately remove the rights of workers.³⁶ Supporters of the bill asserted that exemption from collective bargaining was an executive authority exercised by numerous Presidents throughout history beginning with Jimmy Carter.³⁷ Not until the mid-term elections where the Republicans gained a majority in the Senate did the Act receive passage in both chambers. Interestingly, the Homeland Security Act was the specific topic that provided Republicans sufficient number of campaign victories to attain a majority in the Senate.³⁸ These victories provided sufficient numbers in both chambers of Congress for passage of the Act in November of 2002.

The Act (figure 2) as passed stated that no agency transferred to the new department would be excluded from collective bargaining as outlined in Title 5, United States Code, without first meeting two specific criteria. First, the mission and responsibilities of the agency would have had to materially change. Second, a majority of the employees within the agency would need their primary duties to include either intelligence, counterintelligence, or investigative work directly related to the

³⁵ Ibid., 35.

³⁶ Ibid., 42.

³⁷ Ibid., 41.

³⁸ Ibid., 42.

investigation of terrorism.³⁹ These two criteria are the basis to which the Border Patrol mission, responsibilities, and activities will be compared for determination of collective bargaining exemption during later analysis.

SEC. 842. LABOR-MANAGEMENT RELATIONS.

(a) LIMITATION ON EXCLUSIONARY AUTHORITY.—

(1) IN GENERAL.—No agency or subdivision of an agency which is transferred to the Department pursuant to this Act shall be excluded from the coverage of chapter 71 of title 5, United States Code, as a result of any order issued under section 7103(b)(1) of such title 5 after June 18, 2002, unless—

(A) the mission and responsibilities of the agency (or subdivision) materially change; and

(B) a majority of the employees within such agency (or subdivision) have as their primary duty intelligence, counterintelligence, or investigative work directly related to terrorism investigation.

Figure 2. Homeland Security Act of 2002

Source: Homeland Security Act of 2002, 6 U.S.C. § 111 (2002).

Having identified the specific criteria set forth in the Homeland Security Act of 2002 for collective bargaining exemption, an examination of the evolution of the U.S. Border Patrol mission and responsibilities is critical. The mission and responsibilities represent one of the two specific factors that must be present in order to allow collective bargaining exemption. An assessment of U.S. Border Patrol pre- and post-September 11 missions will determine whether these criteria have been met.

The 68th Congress of the United States unceremoniously formed the U.S. Border Patrol on May 28, 1924 as a line item in an appropriations bill for the Departments of

³⁹ *Homeland Security Act of 2002, 6 U.S.C. § 111, (2002).*

State, Justice, Commerce and Labor.⁴⁰ The Act (figure 3) provided funding to the Department of Labor for “additional land-border patrol” and “appointment of suitable officers” for the “enforcement of immigration and Chinese exclusion laws.”⁴¹ The continued flow of foreign immigrants into the United States in the early 1900s, primarily Chinese immigrants entering from Mexico and the California coast, prompted Congress to pass the legislation. The initial mission of the U.S. Border Patrol was clearly established in the 1924 Act as one of law enforcement. The initial establishment of a law enforcement mission for the U.S. Border Patrol is a critical piece of information that will be used in later analysis as comparison against any changes uncovered.

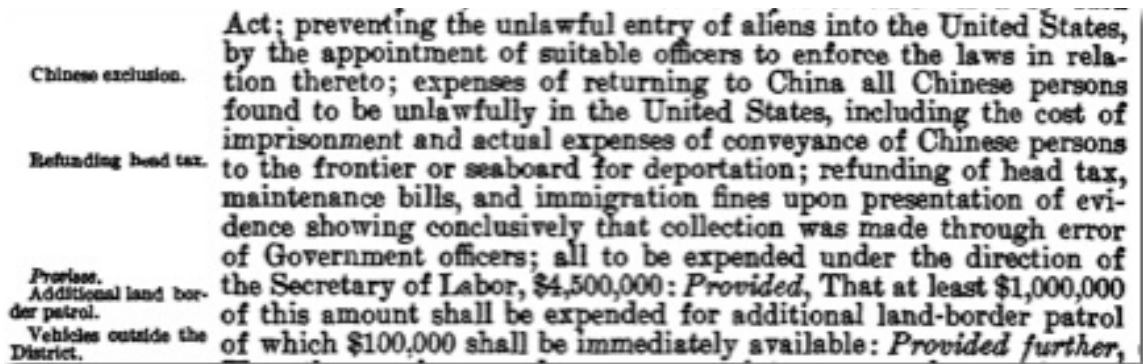


Figure 3. Appropriations Act of 1924

Source: *Appropriations Act of 1924*, H.R. 8350 (1924).

During the 1930s, the Border Patrol consisted of approximately 450 agents and operated on both the southern and northern borders. Northern border operations focused

⁴⁰ *Appropriations Act of 1924*, H.R. 8350 (1924).

⁴¹ *Ibid.*

on the apprehension of liquor smugglers from Canada and the enforcement of prohibition resulting from the enactment of the Eighteenth Amendment to the U.S. Constitution.⁴² Also in the 1930s, the Immigration and Naturalization Service was formed, and the U.S. Border Patrol operated under its purview. By the 1940s, the U.S. Border Patrol moved from the Department of Labor to the Department of Justice. By this time, total manpower had grown to approximately 1,500 personnel.⁴³ For the next sixty years, the primary U.S. Border Patrol mission remained the enforcement of U.S. immigration law. Manpower continued to grow and by 2000 had grown to approximately 10,000 agents nationwide. Following the terrorist attacks of September 11, 2001, the U.S. Border Patrol began a massive expansion of its manpower so that by 2014 there were more than 20,000 Border Patrol Agents across the United States.

The September 11, 2001 attacks resulted in the creation of DHS via the Homeland Security Act of 2002. The U.S. Border Patrol was absorbed into a newly formed agency called Customs and Border Protection. The Immigration and Naturalization Service was abolished, and its duties were absorbed by other DHS agencies. At the time of DHS' creation, the U.S. Border Patrol experienced a significant change to its traditional law enforcement mission. The mission of the U.S. Border Patrol took a specific and legislatively stated turn toward national security. According to Title 6, United States

⁴² U.S. Border Patrol, "Border Patrol History," accessed December 7, 2014, <http://www.cbp.gov/border-security/along-us-borders/history>.

⁴³ Ibid.

Code (figure 4), the entities within DHS had a shared mission of preventing terrorist attacks within the United States.⁴⁴

TITLE I—DEPARTMENT OF HOMELAND SECURITY

6 USC 111.

SEC. 101. EXECUTIVE DEPARTMENT; MISSION.

(a) **ESTABLISHMENT.**—There is established a Department of Homeland Security, as an executive department of the United States within the meaning of title 5, United States Code.

(b) **MISSION.**—

(1) **IN GENERAL.**—The primary mission of the Department is to—

- (A) prevent terrorist attacks within the United States;
- (B) reduce the vulnerability of the United States to terrorism;

Figure 4. Homeland Security Act of 2002

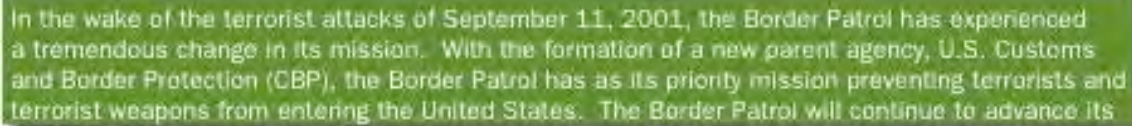
Source: Homeland Security Act of 2002, 6 U.S.C. § 111 (2002).

The U.S. Border Patrol’s 2004 National Border Patrol Strategy (figure 5) reflected this change, defining its priority mission as “preventing terrorists and terrorist weapons from entering the United States.”⁴⁵ This shift in mission priority would, at least in language, fulfill one of the two criteria for a collective bargaining exemption. An examination of U.S. Border Patrol duties and responsibilities will aid in determining whether this shift satisfies the fulfillment of the remaining criteria identified in the Act involving a material change to mission and responsibilities, as well as the majority of

⁴⁴ *Homeland Security Act of 2002, 6 U.S.C. § 111 (2002).*

⁴⁵ Office of Border Patrol, *2004 National Border Patrol Strategy* (Washington, DC: Office of Border Patrol, September 2004), 2.

personnel involved primarily in duties that include intelligence, counterintelligence, or investigative work related to terrorism.



In the wake of the terrorist attacks of September 11, 2001, the Border Patrol has experienced a tremendous change in its mission. With the formation of a new parent agency, U.S. Customs and Border Protection (CBP), the Border Patrol has as its priority mission preventing terrorists and terrorist weapons from entering the United States. The Border Patrol will continue to advance its

Figure 5. 2004 National Border Patrol Strategy

Source: U.S. Border Patrol, *2004 National Border Patrol Strategy* (Washington, DC: Customs and Border Protection, September 2004), 2.

Prior to analysis of the data uncovered thus far, one final factor must be considered—the duties and responsibilities of a Border Patrol Agent. A full understanding of these activities will provide the appropriate context for analysis in a subsequent chapter of the thesis.

A Border Patrol Agent’s career begins at the Border Patrol Academy. The Border Patrol Academy is one of many federal law enforcement basic training curricula offered at the Federal Law Enforcement Training Center (figure 6). Until recently, the Border Patrol Academy was located at one of several Federal Law Enforcement Training Center locations around the United States, including Glynco, Georgia; Charleston, South Carolina; and Artesia, New Mexico. In 2004, the Border Patrol consolidated all basic training to the Artesia, New Mexico location.⁴⁶

⁴⁶ Federal Law Enforcement Training Centers, “About the Artesia Center,” accessed February 12, 2015, <https://www.fletc.gov/about-artesia-center>.



Figure 6. FLETC

Source: Federal Law Enforcement Training Centers, “About the Artesia Center,” accessed February 12, 2015, <https://www.fletc.gov/about-artesia-center>.

The Border Patrol Academy is an intensive 19-week training environment that includes instruction in a variety of topics, including operations, physical training, firearms proficiency, driving, and Spanish language immersion. The Border Patrol Academy operations courses introduce trainees to the the legislative and regulatory parameters that govern Border Patrol operations. The operations courses consist of four main sections. These are Immigration Law, Nationality Law, Applied Authority, and Operations. Initial training in Immigration Law (Title 8, United States Code) provides trainees the ability to determine alien classifications, verify the legal status of individuals encountered, identify violations, and apply an appropriate consequence.

The courses in Nationality Law (U.S. Constitution; Immigration and Nationality Act of 1952) provide the basis by which an agent determines an encountered individual’s alienage, citizenship and nationality. The Applied Authority section examines a wide variety of laws appropriate to Border Patrol operations, including criminal statutes covered under Title 18, United States Code. The course teaches agents to identify violations of federal criminal law and how to recognize and articulate elements of a crime

in order to justify successful prosecution. It also identifies from what legislation, primarily the Immigration & Nationality Act, agents are granted the authority to perform their duties. The Operations section provides trainees with practical application through scenario-based instruction. This section also covers constitutional limitations and expectations for courtroom testimony.⁴⁷

In addition to the sections of law related specifically to a Border Patrol Agent's immigration duties, an agent receives cross-designation in other areas of law that provide authority for additional regularly encountered situations. These areas of law include Title 19, United States Code, which deals with customs-related provisions, as well as Title 21, United States Code, which allows Border Patrol Agents to enforce laws related to controlled substance violations.⁴⁸

The physical techniques taught at the Border Patrol Academy are designed to condition an applicant to be physically able to perform the everyday duties that a Border Patrol Agent executes while working in the field. The work of border security often takes place in some of the most isolated and remote areas of the country, and agents typically find themselves on foot many miles from the nearest source of food, water, or assistance. The physical techniques program prepares agents for the physical demands of operating in these conditions. The training received also enables agents to react to dangerous

⁴⁷ U.S. Customs and Border Protection, "CBP Border Patrol Academy," accessed February 14, 2015, https://help.cbp.gov/app/answers/detail/a_id/1017/~/cbp-border-patrol-academy.

⁴⁸ Ronald Vitiello, "Border Security and Enforcement—Department of Homeland Security's Cooperation with State and Local Law Enforcement Stakeholders," U.S. House of Representatives Committee on Homeland Security, accessed January 20, 2015, <http://homeland.house.gov/sites/homeland.house.gov/files/Testimony%20Vitiello.pdf>.

situations in such a way as to minimize the likelihood of injury—either to the agent or to others. Some of the techniques covered include defensive tactics, arrest methods for compliant and non-compliant encounters, and use of force (figure 7). In addition to classroom instruction noted above, there is also a rigorous fitness regimen that includes running, calisthenics, and strength training. All of these activities instill a sense of confidence when agents inevitably have to deal with a dangerous or strenuous situation.⁴⁹



Figure 7. Border Patrol Academy

Source: Associated Press, “Border Patrol Self-Defense,” accessed February 13, 2015, <http://tucsoncitizen.com/morgue/2007/04/23/49173-border-patrol-hiring-push-raises-concerns-of-lower-standards/>.

⁴⁹ U.S. Customs and Border Protection, “CBP Border Patrol Academy,” accessed February 14, 2015, https://help.cbp.gov/app/answers/detail/a_id/1017/~/-cbp-border-patrol-academy.

As uniformed federal law enforcement officers, Border Patrol Agents are required to carry a firearm while on duty. In order to develop proficiency with this tool, the Border Patrol Academy offers high-quality instruction through their firearms training program. The course includes basic weapon handling, firearm safety, survival shooting, reactive shooting, and judgment shooting (figure 8). The course also covers the various weapons employed by Border Patrol Agents in the field, including the Heckler & Koch P2000 pistol, the Colt M-4 Carbine rifle, and the Remington 870 shotgun.⁵⁰ Qualifications occur frequently throughout the Border Patrol Academy, as well as throughout an agent's career. Minimum firearms proficiency must be maintained in order to retain a position as a Border Patrol Agent.



Figure 8. Border Patrol Firearms Qualification

Source: Christopher Eger, “DHS Buying More Bullets,” *firearmstalk.com*, accessed February 15, 2015, <http://www.firearmstalk.com/DHS-Buying-More-Bullets.html>.

⁵⁰ *Ibid.*

Another element of training that occurs at the Border Patrol Academy is driver training. A Border Patrol Agent regularly operates motor vehicles in some of the most remote areas of the United States. Agents are also frequently involved in motor vehicle pursuits of individuals engaged in illicit activity who attempt to flee. To prepare trainees for these situations, the driver training course offers instruction in off-road driving, emergency response, skid control, pursuit, low- and high-risk vehicle stops, night driving, and offensive driving.⁵¹

A final and critical element of the Border Patrol Academy is Spanish language training. A Border Patrol Agent must be able to communicate effectively with individuals encountered in the course of their duties—the vast majority of whom are from Spanish-speaking countries.⁵² Agents must gain proficiency in the Spanish language in order to solicit information, collect information both verbally and in written form, perform interviews and interrogations, and for officer safety concerns—recognizing when seemingly compliant subjects are coordinating a possible attack.

Many of the topics covered during the course of instruction at the U.S. Border Patrol Academy reflect the organization’s traditional law enforcement mission. This should come as no surprise considering that the U.S. Border Patrol’s law enforcement mission was paramount for nearly eight decades since its inception in 1924 to its inclusion in the Department of Homeland Security in 2002. While the law enforcement activities of the U.S. Border Patrol certainly continue to some degree, chapter 4 will more

⁵¹ Ibid.

⁵² Ibid.

closely examine how the events of September 11, 2001 caused the mission, responsibilities, and duties of the U.S. Border Patrol to evolve.

Upon successful completion of the Border Patrol Academy, agents reports to their initial duty station which is typically on the land border between the United States and Mexico. An agent's education and training continues through involvement in a field training program. These programs are designed to provide agents area familiarization unique to that particular station's geographic area. They also make agents aware of individuals and organizations currently operating in the area, as well as the tactics employed by these elements. Agents are also expected to maintain currency on intelligence updates and any changes to case law that have the potential to affect border security operations.

The type of work performed by Border Patrol Agents is dependent on the area of the United States in which they work. However, the majority of agents across the country routinely perform a variety of similar duties. These include tracking (or signcutting), roving patrol, checkpoint operations, interviewing and interrogating, taking sworn statements, performing record checks through several national databases, documenting illegal activity for potential prosecution, collecting and sharing intelligence through the publication of intelligence products, and coordinating with federal, state, and local partners to accomplish shared goals.

In addition to these basic activities, several specialized certifications also exist. These include all-terrain vehicle operator, horse patrol, canine handler, emergency medical technician, personal watercraft operator, and snowmobile operator. The Border Patrol also employs a variety of technologies that assist with detection of illicit activity.

These technologies require additional training and certification in order to deploy, operate, and maintain. Finally, the Border Patrol has uniquely specialized personnel assigned to their Border Search Trauma and Rescue team and their Border Patrol Tactical unit. These teams provide the Border Patrol with an enhanced set of capabilities for specific incidents that require advanced medical and tactical expertise, respectively.

Border Patrol Agents receive national-level guidance from U.S. Border Patrol Headquarters, located in Washington, DC. The United States are split into four main geographic corridors, within which exist a total of 20 Border Patrol Sectors. These Sectors coordinate operations for a total of 136 stations located across the country. There are approximately 21,000 Border Patrol Agents currently conducting a variety of border security operations across the United States.

This chapter has introduced several concepts in order to develop a common understanding for later analysis. These concepts included the relationship between traditional law enforcement organizations and unions, an examination of Presidential Executive Orders that exempted organizations from collective bargaining, the reasoning behind these exemptions, an examination of the legislation that created DHS and the guidance it provided for collective bargaining exemption of involved entities, the U.S. Border Patrol mission prior to and following September 11, 2001, and U.S. Border Patrol duties and responsibilities. In the following chapters, this information will be analyzed to determine whether the criteria for exemption outlined in the Homeland Security Act of 2002 have been satisfied.

CHAPTER 3

RESEARCH METHODOLOGY

The research methodology to be employed in this endeavor will be a case study comparison through documentation review. According to Creswell, case study research involves “the study of an issue explored through one or more cases within a bounded system.”⁵³ The two cases to be examined are the pre- and post-September 11, 2001 U.S. Border Patrol mission, duties, and responsibilities. These cases will be examined in the context of the legislative wording agreed upon in the Homeland Security Act of 2002. This will allow the reader the opportunity to examine a thorough historical accounting of the topic of research. It is unnecessary to conduct new research on the subject matter, as all evidence to support the thesis topic already exists. A great deal of historical information exists pertaining to collective bargaining as it relates to both the private sector and law enforcement. There is substantial information on the U.S. Border Patrol’s history, mission, and responsibilities from its creation up to September 11, 2001. There is also sufficient documentation on the Border Patrol’s post-September 11 mission and responsibilities. Additionally, a great deal of information exists related to the justification for and discussions leading up to the creation of DHS.

There is an advantage to having access to these quantities of information, as the majority of them are open source documents. An advantage also exists in specifically targeting historical data for analysis versus introducing personal opinion into the methodology. Therefore, personal opinion regarding the advantages and disadvantages of

⁵³ John Creswell, *Qualitative Inquiry and Research Design* (California: Sage Publications, 2013), 73.

collective bargaining has intentionally been avoided. The inherent controversial nature of collective bargaining and unionization is reason enough to avoid injecting the opinions of supporters and/or opponents. A potential disadvantage to this approach is the challenge of sifting through the volume of related material that does not contribute specifically to the thesis.

Analysis in chapter 4 will focus on determining if the post-September 11, 2001 U.S. Border Patrol has evolved sufficiently in mission, responsibilities, and duties to be included in collective bargaining exemption. In order to make this determination, the mission and responsibilities will be analyzed more fully. Additionally, an in-depth examination of Border Patrol Agent duties will provide context into whether a preponderance of the workforce engages in activities consistent with those outlined in the Homeland Security Act of 2002.

This methodology will provide the reader with an examination of the research topic based on historic details. This approach will examine historic events in an unbiased manner and impartially determine the answers to the thesis questions. There are significant implications for the determinations revealed in this finding. The results of this evaluation will have the potential to impact numerous additional agencies—certainly within DHS, but possibly external to DHS as well. A matter of relevance for the Masters of Military Art and Science program and of particular importance to the U.S. military is their current collective bargaining exemption. If it is determined that the U.S. Border Patrol's mission, responsibilities, and duties have changed to the extent that a collective bargaining exemption is warranted but no such exemption is granted, there exists the

possibility that the military's current justification for collective bargaining exemption could be called into question.

CHAPTER 4

ANALYSIS

In chapter 2, several topics were examined in order to provide context for the examination of the applicability of the post-September 11, 2001, U.S. Border Patrol mission and responsibilities for exemption from collective bargaining. These topics included the U.S. Border Patrol's founding, its original mission, the duties of its personnel, and its affiliation with collective bargaining. Also examined were a variety of Presidential Executive Orders granting exemption to entities engaged in national security missions. Finally, the post-September 11, 2001 legislation creating DHS was reviewed in order to learn what criteria were established for possible collective bargaining exemption of DHS' participant entities. This review revealed two specific criteria for collective bargaining exemption. First, the mission and responsibilities of the agencies comprising DHS would have had to materially change. Second, a majority of the employees within the agency would need their primary duties to include either intelligence, counterintelligence, or investigative work directly related to the investigation of terrorism.⁵⁴ This chapter will analyze the literature reviewed in chapter 2 in order to determine whether these two criteria have been met.

Literature reviewed in chapter 2 revealed that the post-September 11, 2001 mission of the U.S. Border Patrol—stated legislatively within the Homeland Security Act of 2002 as well as in subsequent U.S. Border Patrol strategic guidance documents—evolved from a mission based primarily on immigration law enforcement to one based on

⁵⁴ *Homeland Security Act of 2002*, Public Law 107-296 (2002).

national security. While this change in mission seems clearly stated, an examination of U.S. Border Patrol responsibilities will determine if there are substantive changes relative to the new mission.

With regard to changes in responsibilities, there have been a number of recent policy and executive changes that provide evidence of a shift away from law enforcement. One recent policy change involves the selective enforcement, or prosecutorial discretion, of various immigration laws. In June of 2012 at the direction of the Obama Administration,⁵⁵ then-Secretary of Homeland Security Janet Napolitano issued guidance directing how DHS “should enforce the Nation’s immigration laws against certain young people who were brought to this country as children.”⁵⁶ This policy became referred to as Deferred Action for Childhood Arrivals, or DACA. This guidance, noted by President Obama in his June 15, 2012 remarks as a specific reference to “Dreamers”, was in direct contravention to Congress’ refusal to pass the Dream Act and its several iterations since 2001. The intent of the Dream Act has been to provide a path to legal status for children brought illegally to the United States by their parents. It also removes penalties for schools that provide in-state tuition to students despite their immigration status.⁵⁷

⁵⁵ Barack Obama, “Remarks by the President on Immigration,” The White House Office of the Press Secretary, accessed March 3, 2015, <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

⁵⁶ Janet Napolitano, “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” Department of Homeland Security, accessed March 3, 2015, <https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

⁵⁷ National Immigration Law Center, “DREAM Act: Summary,” accessed March 5, 2015, <http://www.nilc.org/dreamsummary.html>.

It has been argued that the implementation of DACA and the subsequent messaging, or lack thereof, in various U.S. and international media outlets led directly to the surge of approximately 50,000 Unaccompanied Alien Children that occurred in south Texas in 2014.⁵⁸ While this story was the focus of media attention for months due to the involvement of children, of potentially greater significance was the arrival of approximately 52,000 individuals comprising family units—an increase of more than 700% from 2013.⁵⁹ Opponents of prosecutorial discretion argue that DACA has encouraged illegal entries of children and family units by providing an incentive—whether real or imagined—for bringing children to the United States by any means. Regardless of the intent, prosecutorial discretion has resulted in the Border Patrol moving away from a comprehensive approach to the enforcement of all existing immigration laws. If the U.S. Border Patrol is a purely law enforcement entity, this reluctance to enforce current law is evidence to the contrary.

The policy of prosecutorial discretion was enhanced in November of 2014 with the issuance of a memorandum by DHS Secretary Jeh Johnson, which outlined how DHS resources would be prioritized. As further evidence to support the shift to national security, the highest priority individuals include aliens “engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security.”⁶⁰ Also

⁵⁸ Franco Ordonez, “U.S. Looks to Detain More Mother, Child Migrants, Sometimes for Months,” McClatchy Washington Bureau, accessed February 10, 2015, <http://www.mcclatchydc.com/2015/02/10/256181/us-looks-to-detain-more-mother.html>.

⁵⁹ *Ibid.*

⁶⁰ Jeh Johnson, “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” Department of Homeland Security, accessed February 13,

included within this priority of individuals are those aliens with felony convictions. Interestingly, however, aliens with felony convictions are provided a specific exception for offenses associated with immigration status. In other words, if an alien has received a felony conviction for only an immigration-related offense, that alien is not a priority for enforcement. This exemption enhances the significance of the national security mission while minimizing the significance of immigration offenses and provides further evidence of a DHS shift away from the enforcement of law and towards national security.

An April 2015 Texas federal court ruling has halted the Obama administration's deportation amnesty program. The presiding judge stated that the policy was "not merely ineffective enforcement. This is total non-enforcement."⁶¹ The judge wrote in his summary that the court's interpretation of the program was that current immigration laws that conflict with administration-led directives were not to be enforced.⁶² This finding confirmed 25 additional states' concerns that the administration had broken the law by bypassing Congress. This judgement is further evidence of the current shift away from enforcement responsibilities.

Another example of the change in Border Patrol responsibilities is the continued identification of western nations as targets for terrorism. The evolution of the global war on terror by the United States and its allies have created conditions where western nations

2015, http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

⁶¹ Stephen Dinan, "Judge Accuses Obama Lawyers of Misleading Him, Refuses to Restart Amnesty," *Washington Times*, accessed April 7, 2015, <http://www.washingtontimes.com/news/2015/apr/7/obama-motion-immediately-restart-amnesty-rejected-/>.

⁶² Ibid.

are prime targets for terrorist attacks. There are many examples of this targeting—not only following September 11, 2001, but previously as well. These include the bombing of the Marine Barracks in Lebanon in 1983; the PanAm Flight 103 bombing over Lockerbie, Scotland in 1988; the World Trade Center bombing in 1993; the Khobar Towers bombing in 1996; the U.S. Embassy bombing in Kenya and Tanzania in 1998; the attack on the USS Cole in 2000; the Fort Hood shootings in 2009; and the Boston Marathon bombing in 2013. The January 2015 Charlie Hebdo shooting in Paris, France is also evidence of this evolution. Additionally, with the rise of the Islamic State operating in Iraq and Syria, their stated goals of establishing an Islamic caliphate and demanding worldwide devotion from practicing Muslims, and their base of supporters that include individuals with lawful access to the United States and allied countries, the potential for future attempts at terrorism within the United States and allied countries are heightened. Congressional hearings in early 2015 reflect that one of the most pressing intelligence concerns involves the threat foreign fighters pose when they return to their home countries.⁶³

While the targeting of Western nations is not a new development, the ability to travel from distant places and attempt entry into the once geographically isolated United States has become increasingly simplified with the advent of global transportation. As the potential for these targeted attacks continues over time, the responsibilities of the U.S. Border Patrol have changed in order to focus on the interdiction of this class of individuals versus traditional unskilled migrant workers. The critical difference between

⁶³ Del Quentin Wilber and Terry Atlas, “Intelligence Chief Says Syria Drawing in More Foreign Fighters,” Bloomberg Business, accessed February 11, 2015, <http://www.bloomberg.com/news/articles/2015-02-11/intelligence-chief-says-syria-drawing-in-more-foreign-fighters>.

these two classes of individuals is the consequence of their successful illegal entry. Therefore, the change in responsibilities has become directly proportional to the possible consequences of failure to interdict illegal entrants. As the consequences have increased in significance, so, too, have the responsibilities of apprehending such individuals.

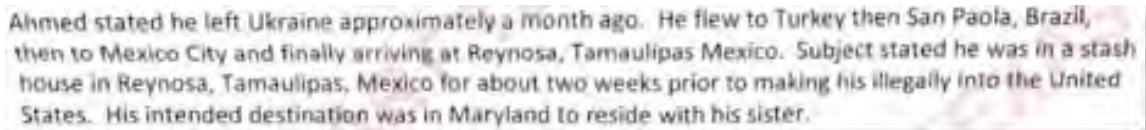
Supporting data for this change in responsibilities exists in an examination of recent U.S. Border Patrol apprehension data of aliens originating from countries designated by the Department of State as State Sponsors of Terrorism. In Fiscal Year 2014, the U.S. Border Patrol apprehended more than 1,000 individuals from these countries.⁶⁴ In addition to these subjects, there were approximately 400 individuals apprehended from countries identified by the Department of State as Terrorist Safe Havens.⁶⁵ Whether or not these individuals were confirmed to have ties to terrorist organizations is significant, but not relevant to this point. The relevant factor is that there exists current pathways from these countries to the United States. These pathways include geographic waypoints and specific travel data, but more significantly include a variety of contacts and information that resulted in an illegal entry into the United States. A specific example of the existence of these pathways is the February 2015 apprehension of an Iraqi citizen crossing illegally from Mexico into south Texas (Figure 9).⁶⁶ Iraq was identified by the Department of State's Annex of Statistical Information on Terrorism as

⁶⁴ U.S. Department of State, "State Sponsors of Terrorism," accessed February 25, 2015, <http://www.state.gov/j/ct/list/c14151.htm>.

⁶⁵ U.S. Department of State, "Terrorist Safe Havens," accessed February 25, 2015, <http://www.state.gov/j/ct/rls/crt/2013/224828.htm>.

⁶⁶ Brandon Darby, "Iraqi Caught Crossing US-Mexico Border Was Military Trainer and Spoke Fluent Russian," Breitbart Texas, accessed April 7, 2015, <http://www.breitbart.com/big-government/2015/04/07/exclusive-iraqi-caught-crossing-us-mexico-border-was-military-trainer-and-spoke-fluent-russian/>.

the country with the highest number of terrorist attacks, victims killed, victims wounded in 2013.⁶⁷ The pathway used by this individual could be utilized by anyone in the future.

A screenshot of a news article snippet. The text is white on a dark background. It reads: "Ahmed stated he left Ukraine approximately a month ago. He flew to Turkey then San Paolo, Brazil, then to Mexico City and finally arriving at Reynosa, Tamaulipas Mexico. Subject stated he was in a stash house in Reynosa, Tamaulipas, Mexico for about two weeks prior to making his illegally into the United States. His intended destination was in Maryland to reside with his sister."

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Figure 9. Iraqi Caught Crossing US-Mexico Border

Source: Brandon Darby, “Iraqi Caught Crossing US-Mexico Border,” Breitbart Texas, accessed April 7, 2015, <http://www.breitbart.com/big-government/2015/04/07/exclusive-iraqi-caught-crossing-us-mexico-border-was-military-trainer-and-spoke-fluent-russian/>.

Now that the first criteria within the Homeland Security Act of 2002 involving mission and responsibilities has been analyzed, an examination of the second criteria is necessary. This criteria involves the primary duties of Border Patrol Agents and whether these duties include intelligence, counterintelligence, or investigative work related to terrorism. While the second criteria is stipulated by the conjunction “or”, insinuating only one element need be met, this analysis will examine all elements with the intent of determining the applicability of all three.

To best understand if the activities of U.S. Border Patrol Agents fulfill these requirements, it is important to arrive at a commonly understood definition of these terms. Merriam-Webster defines intelligence as, “the ability to apply knowledge”, “the act of understanding or comprehending”, and as “information concerning an enemy or

⁶⁷ U.S. Department of State, “National Consortium for the Study of Terrorism and Responses to Terrorism: Annex of Statistical Information,” accessed March 3, 2015, <http://www.state.gov/j/ct/rls/crt/2013/224831.htm>.

possible enemy or an area.”⁶⁸ According to Mark Lowenthal, a career intelligence official and author, intelligence can be defined in three distinct ways: as “a process or means by which information is requested, collected, analyzed and disseminated; as a product of these various processes; and as the organizations that carry out these actions.”⁶⁹ U.S. Army Doctrine Publication 2-0 defines intelligence as a product, a process, and a function. As a product, it results “from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations.”⁷⁰ As a process, it “directly supports the operations process through understanding the commander’s information requirements, analyzing information from all sources, and conducting operations to develop the situation.”⁷¹ As a function, intelligence “facilitates situational understanding and supports decision-making.”⁷² The term applies to the activity that results in the products as well as the entities engaged in the activities that support it.⁷³ The U.S. Border Patrol defines intelligence as “the development and analysis

⁶⁸ Merriam-Webster, “Intelligence,” accessed March 25, 2015, <http://www.merriam-webster.com/dictionary/intelligence>.

⁶⁹ Mark Lowenthal, *Intelligence: From Secrets To Policy* (New York: CQ Press, 2006), 9.

⁷⁰ Department of the Army, Army Doctrine Publication 2-0, *Intelligence* (Washington, DC: Department of the Army, August 2012), 1.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

of raw information in order to determine what the information means and to identify the implications for decision making.⁷⁴

In addition to a common understanding of the definition of intelligence, it is important to understand the intelligence cycle or process (figure 10). As mentioned above, the intelligence cycle consists of a number of steps, including collection, analysis, production, and dissemination. The intelligence cycle begins with collection. Without a collection effort of some form, the cycle would cease to function. Each and every Border Patrol Agent functions as a collector of information that feeds this intelligence cycle. Border Patrol Agents routinely collect information regarding activity that is a threat to border security. Not only do they serve as collectors, they also apply experience and judgment in order to develop understanding, as well as analyze the information against related incidents in order to both identify trends and make apprehensions and disseminate this analysis to other agents. This sharing of intelligence can be informal through verbal interactions with fellow agents in the field or at shift change meetings. It can also be via the formal process of publishing documented intelligence products such as U.S. Border Patrol Field Intelligence Reports—a function accomplished by all Border Patrol Agents. These reports are shared by all agents across the country in a database called the Intelligence Reporting System. All Border Patrol Agents conduct these collection, analysis, and dissemination activities and have access to these systems.

⁷⁴ U.S. Border Patrol Intelligence Liaison Branch, “Intelligence Overview” (Washington DC: Office of Border Patrol, January 2014), 4.

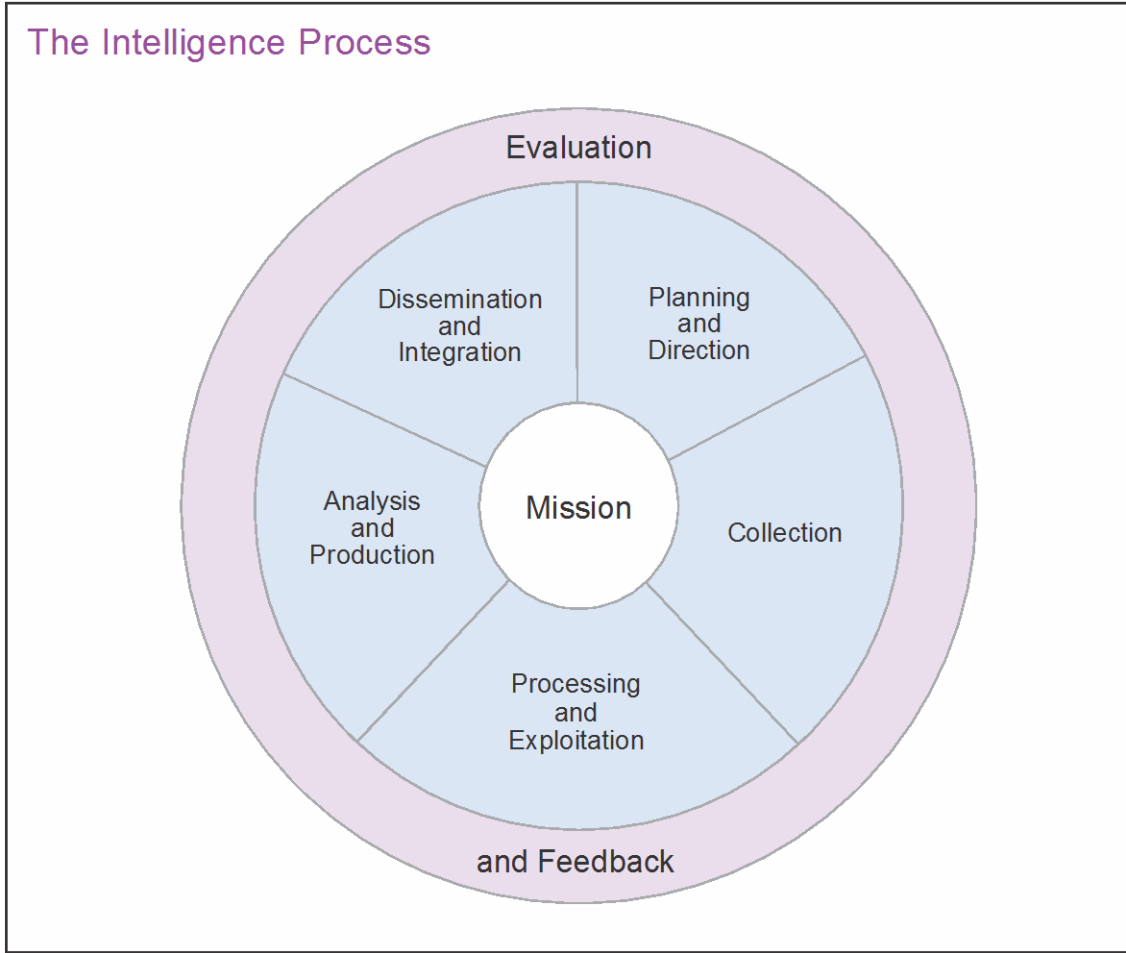


Figure 10. Intelligence Process

Source: Department of the Army, Joint Publication 2-0, *Joint Intelligence* (Washington, DC: Joint Chiefs of Staff, October 22, 2013), I-6.

The U.S. Border Patrol has dedicated intelligence units across the country comprised of personnel who have applied and been selected for specific Border Patrol Agent (Intelligence) positions. However, it is significant to note that the qualifications for these positions describe the duties performed by a majority of Border Patrol Agents. A typical vacancy announcement for a Border Patrol Agent (Intelligence) position describes qualifications that include experience reviewing, processing, and evaluating intelligence

information from a variety of sources; using creative methodologies to develop trends, patterns, profiles, estimates, studies, and tactical interdiction to solve unusual problems; collecting sensitive information regarding the criminal activities of aliens involved in alien smuggling, narcotics trafficking, and organized crime; and developing intelligence collection plans.⁷⁵ Also noteworthy is the fact that any Border Patrol Agent can serve in a collateral capacity as a Border Patrol Agent (Intelligence) without any additional training or qualifications.

An examination of Border Patrol Agent activities as they relate to the definition of intelligence and all elements of the intelligence cycle reveals that the second criteria set forth in the Homeland Security Act of 2002 for collective bargaining exemption has been satisfied. A majority of the personnel within the U.S. Border Patrol have as their primary duties an intelligence-related function.

In addition to routinely conducting intelligence-related activities, Border Patrol Agents also regularly engage in counterintelligence activities. As with intelligence, it is helpful to provide a definition of counterintelligence from a variety of sources in order to reach common understanding. Merriam-Webster defines counterintelligence as “activity meant to hide the truth from an enemy or to prevent the enemy from learning secret information.”⁷⁶ Lowenthal defines counterintelligence as efforts taken to protect one’s own operations from disruption by hostile forces.⁷⁷ U.S. Army Doctrine Reference

⁷⁵ USAJobs, “Border Patrol Agent (Intelligence),” accessed December 4, 2014, <https://www.usajobs.gov/GetJob/ViewDetails/>.

⁷⁶ Merriam-Webster, “Counterintelligence.”

⁷⁷ Mark Lowenthal, *Intelligence: From Secrets To Policy* (New York: CQ Press, 2006), 145.

Publication 2-0 defines counterintelligence as efforts that counter or neutralize intelligence collection efforts of adversaries.⁷⁸ The U.S. Border Patrol defines counterintelligence as “information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or hostile actions conducted by or on behalf of criminal groups or elements thereof, or international terrorist activities.”⁷⁹ Border Patrol Agents regularly engage in tactics that can be classified as counterintelligence.

At the most rudimentary level, Border Patrol Agents utilize a variety of techniques in an attempt to thwart the efforts of adversaries to detect their presence and collect information on their activities. One common technique is the use of light and sound discipline. This includes the use of earpieces that silence ambient radio traffic. It also includes the use of night vision and infrared technologies that allow agents to remain in total darkness and retain the element of surprise when operating in low light environments. Another technique is the use of encrypted radio systems in order to prevent friendly communications from being intercepted by individuals and organizations operating against them.

An additional example is the Border Patrol’s targeting of smuggling organizations’ forward observers. A tactic utilized by smuggling organizations operating along the southwest border is to conceal observers on rugged mountaintops in order to gather intelligence on agents’ location and movement. These observers report this

⁷⁸ Department of the Army, Army Doctrine Reference Publication 2-0, *Intelligence*.

⁷⁹ U.S. Border Patrol Intelligence Liaison Branch, “Intelligence Overview.”

information via radio or cellular communication to associates escorting smuggled contraband—whether humans or narcotics. Understanding these tactics, Border Patrol Agents intentionally target these observers during operations that specifically intend to remove smuggling organizations’ ability to collect and report on friendly movement. Agents also engage in feint movements, persistent and non-persistent presence, faux observation points, and overt vehicle maneuvers that mask covert pedestrian movement—all of which are intended to deny or disrupt an adversary’s ability to gather intelligence on Border Patrol activity.

Border Patrol Agents across the country, as part of their routine tactics and procedures, engage in activities that attempt to minimize or deny an adversary’s ability to have foreknowledge of border security operations. These actions are specific and intentional with a desired outcome of successful and uninterrupted Border Patrol operations. As with the intelligence requirement set forth in the Homeland Security Act of 2002, the criteria requiring a majority of employees to engage in counterintelligence activities has also been met.

The third activity identified in the Homeland Security Act for qualification of collective bargaining exemption is investigative work related to terrorism investigations. Again, it is helpful to define the term “investigate” in order to provide common understanding. Merriam-Webster defines investigation as the attempt to find out facts about something, such as a crime, or gather information about someone who may have done something illegal.⁸⁰ Merriam-Webster also identifies the Latin origin of the term,

⁸⁰ Merriam-Webster, “Investigate.”

investigate, as the past participle of *investigare*, which means “to track.”⁸¹ Border Patrol Agents regularly engage in investigative activities. Daily encounters with illegal entrants result in the necessity to gather additional information regarding the specific aspects of illicit activity. Thorough investigation reveals information critical to successful prosecution. Investigation also uncovers involvement of additional participants, including members of smuggling organizations at various echelons. Those involved in illegal activity are frequently uncooperative, attempting to conceal the truth and depth of their involvement in such activity. This is particularly the case when agents interact with individuals associated with smuggling organizations. Only as a result of effective investigative efforts can Border Patrol Agents overcome this deception and reveal information about illicit activity.

In order to establish the investigative connection to terrorism, it is important to examine the enhanced relationships and information sharing that resulted from the September 11, 2001 attacks. Following these attacks, there was a focus on improving communication and information sharing between organizations with a national security role. The U.S. Border Patrol was one of these organizations. Since that time, the U.S. Border Patrol has been involved in a robust interagency liaison program, sending agents for extended periods of time to a variety of government agencies including the Federal Bureau of Investigation, the Drug Enforcement Administration, the Joint Terrorism Task Force, and INTERPOL—all of whom play a part in the United States’ approach to combating terrorism. Accompanying these enhanced relationships was access to additional terrorism-related databases. A routine part of a Border Patrol Agent’s

⁸¹ Ibid.

investigation of any individual encountered illegally entering the United States is enrolling all subjects into these databases to check for potential affiliations with terrorism. These liaison efforts, enhanced collaboration, and persistent record checks for terrorism ties all provide evidence of the U.S. Border Patrol's role in investigating potential terrorism.

Additionally, as with the change in responsibilities noted above, the consequences of successful illegal entrance by those wishing to commit acts of terrorism within the United States is a factor that provides additional significance to comprehensive investigation regarding all entries. Identifying individuals with potential terrorism ties is critical, but equally critical is ruling out the majority of individuals who do not have these ties. Only through effective and thorough investigation conducted by each and every Border Patrol Agent can this determination be made.

Analysis of the U.S. Border Patrol's pre- and post-September 11, 2001 mission, responsibilities, and duties has provided valuable insight into whether these elements meet the criteria set forth in the Homeland Security Act of 2002 for collective bargaining exemption. Comparison of this data to the literature reviewed in chapter 2 provided for the arrival of a determination. This determination, as well as pertinent recommendations, will be discussed in the final chapter of this thesis.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

Conclusion

The purpose of this thesis was to examine whether changes, if any, to the U.S. Border Patrol's mission, responsibilities, and duties following the September 11, 2001 terror attacks and the subsequent creation of DHS were sufficient to warrant collective bargaining exemption. A review of historical documents provided a foundation for understanding these criteria. This review examined the historical roots of law enforcement in the United States and its ties to unionization. The review also included an assessment of previous presidential exemptions from collective bargaining and the justification for these exemptions. It also included a review of the legislation that formed DHS. This legislation contained fiercely contended and intentionally worded collective bargaining language that mirrored past presidential executive orders granting collective bargaining exemption. A thorough examination of these criteria has revealed that all three—mission, responsibilities, and duties—have evolved from what they had been prior to September 11, 2001.

The most obvious evolution to the three criteria was the change to the U.S. Border Patrol mission. Literature review and analysis in chapters 2 and 4, respectively, showed that the pre- and post-September 11, 2001 U.S. Border Patrol missions were starkly different. The former mission as outlined in the 1924 legislation creating the U.S. Border Patrol was clearly focused on the enforcement of immigration law. The current mission, reflected in both legislation and border security strategic guidance, reveals a concentration on preventing future acts of terrorism. Analysis revealed numerous

examples of this shift away from an enforcement mission and towards a national security mission.

The second criteria that was examined dealt with changes in the responsibilities of the U.S. Border Patrol. Again, literature review and analysis revealed that there were changes in responsibilities. The change to the U.S. Border Patrol mission from enforcement to national security directly impacted the responsibilities of the organization. Several examples were considered in order to provide evidence of this change. Also analyzed were the consequences resulting from failure to interdict illegal entries prior to and following September 11, 2001. While the U.S. Border Patrol certainly continues to enforce immigration law, albeit within a specified set of limitations, their primary mission and responsibilities have changed.

The final criteria that was examined involved changes to the duties of U.S. Border Patrol Agents. According to the collective bargaining language within the Homeland Security Act of 2002, these duties are required to include activities involving intelligence, counterintelligence or investigative work related to terrorism. With its use of the word “or”, the legislation required only one of these elements to exist in order to allow for collective bargaining exemption. Analysis, however, revealed that all three exist. A comprehensive approach to all three terms from a civilian, military, and law enforcement perspective provided a basis to which current U.S. Border Patrol duties were compared. This comparison revealed that U.S. Border Patrol duties satisfied the definitions and requirements of all three terms.

Recommendations

The determination of whether the post-September 11, 2001 U.S. Border Patrol mission, responsibilities, and duties comply with exemption criteria within the Homeland Security Act of 2002 has been made. A thorough examination of relevant data revealed that these criteria have indeed been met. Therefore, the U.S. Border Patrol should immediately be included in the list of organizations granted collective bargaining exemption by Presidential Executive Order.

This determination has significant second order effects. The U.S. Border Patrol is but one office within its parent agency, Customs and Border Protection. All offices within Customs and Border Protection share a similar mission, as do the 22 other agencies that formed the Department of Homeland Security. This mission is a national security mission. A comprehensive examination of the responsibilities and duties of each component of DHS would likely result in numerous collective bargaining exemptions. These exemptions would be substantiated when compared to the exemption criteria within the Homeland Security Act of 2002.

Not only are there significant implications for the numerous entities within DHS, but there are also significant impacts to organizations outside of the department—most notably for relevance to this military thesis, the Department of Defense. The Department of Defense and the military organizations contained therein have been granted collective bargaining exemption via multiple Presidential Executive Orders spanning five decades. As outlined during the literature review, these exemptions are due to the national security mission, responsibilities, and duties of the listed organizations, including the Department of Defense.

If after determining that the U.S. Border Patrol's mission, responsibilities, and duties meet the exemption requirements set forth in the applicable legislation, but the U.S. Border Patrol is permitted to continue to collectively bargain, a significant precedent will have been set. This precedent could allow for organizations that currently fulfill collective bargaining exemption criteria, such as the Department of Defense, to also be allowed to unionize despite having met the exemption criteria. It is not the intent of this thesis to weigh the advantages and disadvantages of a unionized U.S. Army, Navy, Air Force, and Marine Corps. Each of these potentials could fill the pages of future researchers' theses. The intent is, however, to illuminate the possibilities that could result from the findings of this thesis.

There are several potential topics for future research that were discovered as a result of completing this thesis. As mentioned previously, one topic that is worth investigating more fully is an examination of the advantages and disadvantages of unionization in general. This could deal specifically with the U.S. Border Patrol and could delve into the impacts to the U.S. military if collective bargaining were implemented. Another aspect of this approach could be the analysis of foreign militaries who are currently unionized to determine successes and failures. An additional topic for future research could be potential alternatives to collective bargaining for the U.S. Border Patrol and others. In other words, what is the Border Patrol's union providing the workforce that could be provided by some other means. A potential path for future researchers might be an investigation into the current development and education of U.S. Border Patrol leaders, as well as a recommended path forward depending on the findings.

Several questions were posed at the beginning of this thesis. Considering its current national security mission, should the U.S. Border Patrol, an office within DHS, be exempt from collective bargaining? What are the conditions that must be met in order to qualify for exemption? Have these criteria been met considering the pre- and post-September 11 mission and responsibilities of the U.S. Border Patrol? This thesis has answered these questions. The Homeland Security Act of 2002 clearly establishes the conditions that must be met in order for entities within the Department of Homeland Security to be exempt from collective bargaining. These conditions are consistent with historical Presidential Executive Orders granting similar exemption. In the case of the U.S. Border Patrol, analysis has shown that these conditions have been met. Should the U.S. Border Patrol be exempt from collective bargaining? Yes, it should.

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