

A Cosmic Legal Collision: The Engineer vs. The Border Patrol

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For a quarter of a century, Terry Bressi, staff member and chief engineer for the Spacewatch Project at the University of Arizona's Lunar & Planetary Lab, has had two constants in his life. The first is driving to and from the Kitt Peak National Observatory for work, a part of which involves trying to identify asteroids that might threaten Earth. The second is having the federal Customs and Border Protection (CBP) agents or their local law enforcement counterparts harass or even arrest him regularly during those drives on Arizona's Route 86, the only viable major road connecting Tucson and the observatory.

Bressi's battle against the harassment, arrests, and related tactics employed at the CBP internal checkpoint on SR 86 has entered its 16th year and a new phase. Recently, Bressi launched a multi-pronged legal attack against CBP and Arizona local government entities that represents the first head-on challenge to the 1976 Supreme Court decision, US v Martinez-Fuerte, that allowed CBP to operate internal checkpoints.

In that decision, the Court majority ruled that such internal checkpoints did not violate the Fourth Amendment or require probable cause for "brief questioning" (not further defined) of motorists to determine citizenship status, but that more prolonged stops would require probable cause that a crime had been committed. Since then, no case involving alleged abuses at the checkpoints has made it far enough in the federal courts to cause a reexamination of the fundamental assumptions underpinning the *Martinez-Fuerte* decision.

Bressi's latest lawsuits—one, a federal tort claim against CBP, the other targeting both Pima County and CBP officials, including a Bivens claim against CBP agents—may change that. As outlined below, Bressi believes that a DHS grant program known as Operation Stonegarden provides a financial incentive for state or local law enforcement agencies to violate the rights of American motorists. First, some background on Bressi's checkpoint-related battles, which he has chronicled online under the rubrics of Checkpoint USA (CPUSA) and, more recently, Roadblock Revelations.

The checkpoint stop that triggered his first, decade-plus confrontation with federal and local law enforcement agents occurred on Dec. 22, 2002 around 5:00pm. As Bressi approached the SR 86 checkpoint driving a University of Arizona vehicle, he noted tribal police from the local Tohono O'odham Reservation were present, along with Border Patrol and U.S. Customs personnel.

It was the tribal police who began the encounter, as Bressi noted in a contemporaneous account of the event:

I was stopped by the officer in charge who worked for the Tohono O'odham Police.

Upon request, the officer indicated the purpose of the checkpoint was sobriety & license checks which seemed inconsistent with the presence of U.S. Customs & INS law enforcement personnel.

Upon request, the officer provided his name but failed to provide photo identification. The officer then requested my license. I requested to know why he wanted it. The officer indicated everyone was being asked for their license for identification purposes and to check for compliance with traffic laws.

I requested to know if the stops being made were based upon individualized probable cause of wrongdoing. He indicated there was no probable cause & everyone was being treated the same.

After Bressi refused to present identification for the tribal police officer who could not provide probable cause to back-up his demand, Bressi was ordered to exit his vehicle. Instead, he turned the vehicle off, placed the keys on the dashboard in view of the officers, and put both hands on the steering wheel. At that point, tribal police opened the driver side door, unclipped Bressi's seatbelt, dragged him from the vehicle, and placed him face down on the highway and cuffed him. He was then lifted and taken to one of the police cars.

Bressi was detained for three hours before being presented with charges of failing to produce his license and failure to obey an officer directing traffic. "At no point was I informed whether or not I was under arrest, nor was I read my Miranda rights," Bressi wrote.

Bressi successfully fought the charges twice—winning the first time when the tribal police failed to produce documents requested by the court, and several months later after tribal police refilled identical charges against Bressi after he filed a civil rights action against the tribal police. The case was eventually settled shortly before it was due to go to trial in Tuscon.

During this same period, the local CBP union sent letters to the University of Arizona's leadership calling for Bressi to be fired. Then-Governor Janet Napolitano and Arizona State Representative Russell Pearce were copied on the letters, which alleged, among other things, that Bressi's videotaping of CBP agents and local police was a threat.

In a January 28, 2008 letter to university president Robert Shelton, local Border Patrol union president Ed Tuffly stated, "We will be aggressively pursuing action against Mr. Bressi and/or the University on behalf of our agents for the internet postings which Bressi has undertaken using video obtained while he was acting as a University employee. If it is determined that the [Arizona] law does not apply to Federal law enforcement officers, we will lobby for an amendment to the State law to ensure that we are protected."

This crude attempts to get Bressi fired also failed. But the episode only underscored Bressi's overall point: the Border Patrol believed it was a law unto itself.

Bressi's subsequent research on the links between CBP and local Arizona law enforcement have led him to believe that DHS's Operation Stonegarden program provides a financial incentive for those local police departments to violate the constitutional rights of motorists.

In describing an April 2017 CBP checkpoint encounter with Pima County Sheriff's Department Deputy Ryan Roher that led to his arrest, Bressi stated

In an attempt to justify the arrest, Deputy Roher (“Roher”) cited CPUSA for contempt of cop masquerading as a highway obstruction charge based on the ~144 seconds CPUSA was detained in the lane of traffic in front of two stop signs while exercising his right to remain silent...Roher, who had no lawful authority to actively participate in federal immigration checkpoint operations, was providing a general law enforcement presence at the roadblock under a federal grant program known as Operation Stonegarden. On the day in question, Roher was being paid \$75.07 per hour to be at the beck and call of his handlers in the U.S. Border Patrol. By the time his 8 hour shift was complete, Roher had made over \$600.00 in overtime from Stonegarden grant funds.

It was this 383rd checkpoint encounter that prompted Bressi to file his latest lawsuit. The lawsuit includes a Bivens claim against the federal agents involved in his April 2017 stop and arrest, as well as 42 U.S.C. 1983 claims against Arizona state and county entities who either authorized or participated in Operation Stonegarden activities with CBP. Bressi has also filed a federal tort claim against CBP for associated damages from his encounters with CBP agents. The agency has several months to respond before further legal action can be taken regarding the tort claims.

To the civil libertarian, Bressi’s view that the abuses and harassment he’s chronicled and lived through over the last 16 years represent clear violations of his Constitutional rights. And Bressi is not the only Arizona resident to take legal action against CBP over alleged checkpoint abuses.

Over the last several years, Arizona has been the site of multiple lawsuits against CBP over checkpoint confrontations, including an ongoing legal battle between the residents of the town of Arivaca and CBP over checkpoint operations in the community and the right of residents to monitor CBP agents in the performance of their duties. These confrontations demonstrate that the rationales offered by the Supreme Court majority in the *Martinez-Fuerte* decision permitting such checkpoint operations have not aged well.

Indeed, in the original *Martinez-Fuerte* decision, the court’s majority asserted that, “Motorists whom the officers recognize as local inhabitants, however, are waved through the checkpoint without inquiry.” Bressi’s experience, and those of the residents of Arivaca, demolish that notion, and the detailed record he’s kept of his encounters and legal battles should serve as the basis for a full judicial revisiting of the *Martinez-Fuerte* decision. It should also spur a long-overdue Congressional investigative deep-dive on the constitutionality and effectiveness of these checkpoints.

Regarding Operation Stonegarden, the DHS IG issued a report in late 2017 that was blunt in its assessment (pp. 2-3): “...FEMA and CBP have not collected reliable program data or developed measures to demonstrate program performance resulting from the use of more than \$531.5 million awarded under Stonegarden since FY 2008.”

Allegations of waste, fraud, and abuse in the Stonegarden program are what helped prompt the DHS IG inquiry, which also noted (p. 2), “One state allegedly received more than \$162,000 in overtime payments for duties unrelated to border security. In another instance, one state allegedly used nearly \$65,000 for overtime, training, and travel expenses — all without maintaining any supporting documentation.”

Bressi’s instincts about the abusive and ineffectual nature of the Stonegarden program have a clear factual basis.

In late 2017, the Government Accountability Office (GAO) issued a damning report on the relative ineffectiveness of the CBP checkpoints in accomplishing their stated mission: catching and deporting illegal aliens.

As GAO noted (p. 38), “CBP reported in the budget justification that apprehensions at checkpoints ranged from 1.34 to 2.52 percent of nationwide apprehensions across fiscal years 2013 through 2016.” A previous GAO study (2009) found that CBP was employing 4% of its personnel at the checkpoints while the arrests of illegals at the checkpoints only accounted for 2% of the total number of undocumented aliens.

This represents a shockingly low return on investment, as my Cato colleague Alex Nowrasteh remarked when the 2017 GAO report came out, “Border Patrol checkpoints would have to have apprehended about 100,000 to 120,000 more illegal immigrants from FY2013-2016 than they actually did to justify the man-hours spent occupying them by agents.”

The CBP checkpoints are good at one thing: catching American motorists with dime-bags of pot, as I wrote in a recent *Dallas Morning News* piece and the GAO noted in their 2017 report.

Nearly half of the arrests at the checkpoints involve U.S. citizens with an ounce or less of marijuana. So if CBP and its Operation Stonegarden local law enforcement partners aren't harassing or arresting people like Terry Bressi, they're arresting Americans for using a substance that more and more states are legalizing every year.

Bressi's lawsuits, along with the reports cited above, will, hopefully, provide the impetus for the eventual dismantling of these checkpoints. Until then, Americans living or passing through these veritable Constitution-free zones will remain at risk of being needlessly detained or even physically assaulted by federal or local law enforcement agents.

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