

REPORT
POGO



AN OVERSIGHT AGENDA FOR CUSTOMS
AND BORDER PROTECTION:

America's Largest, Least Accountable Law Enforcement Agency

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Acknowledgements

EDITOR

Sarah Turberville

CONTRIBUTING AUTHORS

Katherine Hawkins

Chris Rickerd

COPY-EDITING AND FACT-CHECKING

Julia Delacroix

Danni Downing

Jen Glifort

Amaya Phillips

Ryan Summers

DESIGN

Leslie Garvey

Renzo Velez



1100 13th Street NW, Suite 800
Washington, DC 20005
WWW.POGO.ORG

THE PROJECT ON GOVERNMENT OVERSIGHT (POGO)

is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing.

We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

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Introduction

The nation's largest law enforcement agency, U.S. Customs and Border Protection (CBP), is also its least transparent and accountable. The need for oversight and reform is pressing: Along the border, there have been numerous examples of CBP encounters leading to civilian deaths.

“When Border Patrol’s tactical unit deployed to Portland in 2020 and was infamously recorded spiriting a protester away in an unmarked van,” the country’s interior saw first-hand what border communities have experienced for decades: a stunning contempt for any constitutional protections that interfere with CBP’s security-first mission.¹

It’s clear there’s a need for reform. CBP’s own former deputy assistant commissioner for internal affairs described a culture in which agents “see themselves as members of a ‘paramilitary organization’ and soldiers ‘on the front line’ of a war against criminal organizations and terrorism. Many agents asserted that CBP’s mission was to protect the border at all costs, even at the expense of human life.”² He recalled, as a result, “many instances when agents used violence against undocumented individuals without fear of repercussion.”

Efforts to enact law enforcement best practices at CBP — be they external or internal, legislative or administrative — have run up against resistance based on an organizational ethos strongly resistant to scrutiny at all levels. In fact, one former senior FBI official said in 2015 that “if a small police department or a mid-sized or a large police department had as many questionable use of force cases as [CBP], DOJ would be all over that.”³ But the Department of Justice appears reluctant or unable to

¹ Chris Rickerd and Sarah Turberville, “Abusing migrants while on horseback? That fits with the Border Patrol’s long history of brutality,” *Los Angeles Times*, September 22, 2021, <https://www.latimes.com/opinion/story/2021-09-22/haitian-migrants-del-rio-border-patrol-horseback>.

² Affidavit from James Wong in Support of the Petitioners at 3, *Anastasio Hernández Rojas and Family v. United States*, Inter-American Commission on Human Rights (2020) (P-524-16), https://d3n8a8pro7vhmx.cloudfront.net/alliancesandiego/pages/204/attachments/original/1612397990/Additional_Observations_on_Merits_Case_14042_Exhibits_%281%29_compressed_%281%29.pdf?1612397990.

³ Andrew Becker, “This is how to stop Border Patrol killings with impunity, ex-officials say.” *Reveal*, December 9, 2016, <https://revealnews.org/blog/this-is-how-to-stop-border-patrol-killings-with-impunity-ex-officials-say/>. 34 U.S.C. § 12601 authorizes the Justice Department to investigate unconstitutional patterns and practices by state and local law enforcement agencies; it does not specify that the department has the authority to investigate such abuses by federal officials and agencies.

investigate egregious patterns of civil rights violations by the agency. That makes congressional oversight even more vital.

We propose a bottom-up, good governance approach to reforms, and have identified six discrete needs for oversight which have in common a focus on changing CBP culture:

- **Reforming recruitment and training**
- **Changing CBP's culture of stonewalling**
- **Improving management of complaints and discipline**
- **Conducting a review of efforts to improve CBP integrity**
- **Reevaluating CBP's jurisdiction**
- **Reinvestigating flawed agency responses to excessive uses of force and custodial deaths**

We steer clear of border-policy debates by focusing on increased professionalism and transparency, as well as on improved processes for addressing misconduct. These oversight topics address a culture of impunity that must be — or at least must become — unacceptable to every CBP leader, officer, and agent among the many who do serve honorably.

Recruitment and Training: Past Due for Reform

In the eight years following 9/11, the number of border patrol agents doubled to over 20,000.⁴ Reflecting on the enormous increase and lowered standards of hiring through that period, former CBP Internal Affairs head James Tomscheck called it “the greatest compromise of law enforcement integrity our country has ever seen.”⁵ Tomscheck was horrified by the resulting security breaches, including the hiring of

⁴ United States Border Patrol, *U.S. Border Patrol Fiscal Year Staffing Statistics (FY 1992-FY 2019)* last modified January 29, 2020, <https://www.cbp.gov/document/stats/us-border-patrol-fiscal-year-staffing-statistics-fy-1992-fy-2019>.

⁵ Ryan Devereaux, “An Unchecked Union,” *The Intercept*, December 27, 2020, <https://theintercept.com/2020/12/27/border-patrol-trump-biden-politics/>.

applicants who infiltrated the agency for cartels.⁶ Between 2005 and 2012, on average one CBP officer or agent was arrested for misconduct almost every day.⁷

Even today, CBP personnel are chosen, evaluated, and promoted for skill sets that have little applicability to the processing of asylum seekers, including the thousands of families and unaccompanied children coming to the southern border. Improving the quality and diversity of applicants, officers, and agents at CBP is imperative to addressing the agency's history of misconduct. It would also address the current mismatch between agents' prioritization of a border-security mission and the humanitarian responsibilities of contemporary migration.

All aspects of CBP hiring, vetting, and recruitment should be reviewed by Congress, including for basic efficacy after multiple wasteful initiatives.⁸

One example of the agency's recruiting problems is evident in CBP's standing as the federal law enforcement agency with the fewest women per capita. The agency struggles to maintain a workforce of women, who make up only 5% of agents, while women comprise an average of 15% of the workforce of every other federal law enforcement agency.⁹ Yet CBP does not seem to be doing much to address the

⁶ James Tomscheck, "Why Is Congress proposing to increase Customs and Border Protection corruption?" *The Hill*, May 16, 2017, <https://thehill.com/blogs/congress-blog/homeland-security/333698-why-is-congress-proposing-to-increase-customs-and>.

⁷ Garrett M. Graff, "The Green Monster: How the Border Patrol became America's most out-of-control law enforcement agency," *Politico Magazine*, November/December 2014, <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220/>.

⁸ Geneva Sands, "CBP terminates controversial \$297 million Accenture contract amid continued staffing struggles," *CNN*, April 5, 2019, <https://www.cnn.com/2019/04/05/politics/cbp-terminate-hiring-contract-accenture/index.html>; Josh Peter, "Professional Bull Riders get millions from Border Patrol for patriotism and plugs," *USA Today*, January 21, 2020, <https://www.usatoday.com/story/sports/2020/01/21/immigration-sports-league-has-unique-partnership-border-patrol/2798296001/>.

⁹ Cedar Attanasio and Elliot Spagat, "U.S. Border Patrol hires civilians to free up agents for field," *AP*, September 18, 2021, <https://apnews.com/article/business-health-texas-immigration-coronavirus-pandemic-b6915d675bf5adff78aae38d92c4c6ec>; Amanda Ripley, "Federal law enforcement has a woman problem: Police agencies are the most male-dominated part of the federal government — and that undermines their mission," *Politico*, November 14, 2017, <https://www.politico.com/story/2017/11/14/women-federal-law-enforcement-male-dominated-244649>. As a snapshot, in FY 2015 more than 1,300 women were considered qualified applicants, but just 54 were hired. The Deming, New Mexico, Border Patrol station was reported to have six women out of 300 agents (2%). Lauren Villagran, "Women break barriers as

problem. According to a story in *Politico*, in 2016, “CBP held 4,400 recruitment events. Of those events, 26 percent targeted veterans and 5 percent targeted women. Those ratios are almost exactly the same as the ratios of veterans and women in the Border Patrol overall.”¹⁰ This gender disparity matters. It affects how well CBP can achieve border management. Some female agents report being far more effective at processing family groups and female migrants.¹¹

But the CBP’s personnel problems aren’t limited to recruitment or even hiring. The agency’s training programs also need an overhaul. Existing training of Border Patrol agents does not meet the demands of modern-day migration. As an article from the *Washington Office on Latin America* explains, by 2019:

two out of three migrants were children or parents, most of them seeking to be apprehended and processed to seek asylum. Agents were dedicating much or most of their time to processing paperwork, caring for children and families in custody, and interacting with people who were victims of trauma. These are not tasks that the Border Patrol Academy prepared them for, nor are they tasks that require an armed, uniformed law enforcement officer’s time and skills.¹²

Border Patrol agents,” *Albuquerque Journal*, September 5, 2016, <https://www.abqjournal.com/839160/women-break-barriers-as-border-patrol-agents.html>.

¹⁰ Ripley, “Federal law enforcement has a woman problem” [see note 9]. During the Obama administration, plans to improve Border Patrol’s gender ratio failed badly: “After pledging in 2014 to more than double the number of women by hiring 1,600 through a female-only hiring drive, the agency hired only 50 by the official deadline at the end of the fiscal year, and it ultimately brought aboard about 175 by the end of 2015.” Alan Neuhauser, “Border Patrol Has a Problem With Women,” *U.S. News & World Report*, August 3, 2018, <https://www.usnews.com/news/the-report/articles/2018-08-03/for-women-border-patrol-is-a-hostile-place-to-work>.

¹¹ One female agent notes, “I see the difference it makes whenever we’re processing a family group or females. They’re more willing to open up to us as females, to tell us things they probably wouldn’t divulge to a male agent.” Ripley, “Federal law enforcement has a woman problem” [see note 9]. According to another female agent, “[a] lot of [migrant] females don’t want to talk to male agents, so they’ll keep their head down or just be super-quiet. It’s important to have a female who can relate to them, talk to them, get more information out of them if they’re willing,” adding that “[i]t really stinks that you don’t have a female agent down in Presidio [Texas, a station responsible for 114 miles of the border].” Sasha Von Oldershausen, “What It’s Like to Be a Female Border Patrol Agent.” *Marie Claire*, December 5, 2017, <https://www.marieclaire.com/career-advice/a14011798/female-border-patrol-agent/>.

¹² Adam Isacson, “Fixing a Culture that Protects and Rewards Abuse at U.S. Border Agencies.” *WOLA (Washington Office on Latin America)*, October 14, 2020, <https://www.wola.org/analysis/fixing-a-culture-protects-rewards-abuse-us-border-agencies/>.

On July 19, 2016, Gil Kerlikowske, then-commissioner of the CBP, spoke at a ceremony installing the new Chief of the Border Patrol Academy in Artesia, New Mexico. He highlighted major changes to the curriculum that were in progress:

CBP is currently enhancing our basic training programs and the USBP Academy. The entire Border Patrol Agent basic training curriculum is being re-designed to stay ahead of the curve when it comes to the most effective methods and tools. ...

Specifically, the new curriculum incorporates recommendations from several Use of Force Reviews; from the 21st Century Policing Report; and from the CBP Integrity Advisory Panel report. It also includes recommendations from field operations and suggestions from NGOs.

Significantly, the new curriculum represents a transition from traditional teaching methods to student-centric, performance-based training. To address these issues and accommodate the performance-based methodology, the program length is being increased by 88 hours bringing the total to 117 days of training.¹³

It is unclear, however, to what extent the curriculum innovation described was implemented and, crucially, whether it has also been adapted to the different challenges faced by border patrol agents given the humanitarian dimensions of current migration.

Implicit bias training is one example of how education and standard-setting beyond initial academy training could maintain and enforce a standard of impartiality and non-discrimination. In June 2016, the Department of Justice announced its plans to “train all of its law enforcement agents and prosecutors to recognize and address implicit bias as part of its regular training curricula. The new training [would be] based on the latest social science research and best practices in law enforcement.”¹⁴ Yet despite its millions of interactions with the public every year, the Department of Homeland Security (DHS) did not commit to following DOJ’s example in requiring such training.

¹³ “Commissioner Kerlikowske’s Remarks at the Change of Command Ceremony for U.S. Border Patrol Chief Dan Harris,” U.S. Customs and Border Protection, last modified February 3, 2021, <https://www.cbp.gov/newsroom/speeches-and-statements/commissioner-kerlikowske-s-remarks-change-command-ceremony-us>.

¹⁴ Department of Justice, “Department of Justice Announces New Department-Wide Implicit Bias Training for Personnel,” Press Release, June 27, 2016, <https://www.justice.gov/opa/pr/departement-justice-announces-new-department-wide-implicit-bias-training-personnel>.

Recommendations for Congressional Oversight

- Congress should evaluate whether CBP's qualification requirements for agents and officers match the skills needed to succeed in all aspects of current border management, including its primary function to process asylum-seeking families and children.
- Congress should investigate where and how CBP is failing in its hiring protocols and evaluate the agency's recruitment procedures and requirements, and its retention initiatives, based on best law-enforcement practices and employment equity.
- Congress should hold a hearing on CBP's struggles to increase its representation of women, and to encourage women currently and formerly employed by the agency to share their experiences and suggest changes to Congress.
- Congress should evaluate what CBP requires in the way of academy, refresher, and update trainings for its law enforcement workforce.
- Congress should investigate why DHS has not extended the Justice Department's 2016 commitment to train all officers and agents on how to recognize and minimize explicit and implicit biases.

Stonewalling: CBP's Cultural Resistance to Change

As one former CBP deputy explained, the agents who emerge from the agency's recruitment and training process tend to see themselves as members of a paramilitary organization.¹⁵ This is no mistake: CPB has defined itself as being in the space between police and the military. It chooses to align with one or the other on a case-by-case basis, as best suits its own internal objectives. For example, CBP operates an extensive K-9 program, as large police departments do, but it also secures military equipment under the 1033 Program.

Yet what sets CBP apart — despite its police posture and quasi-military stance — is a deep-seated sense of exceptionalism and a tradition of evading even the meager

¹⁵ Affidavit from James Wong in Support of the Petitioners at 3 [see note 2].

oversight and accountability mechanisms that other law enforcement agencies are subject to.

In August 2016, CBP leadership was first alerted to a Facebook group called “I’m 10-15.”¹⁶ Over three years later, in July 2019, *ProPublica* revealed some of that group’s racist and sexist content along with the astounding figure of almost 10,000 members, among them numerous current and former CBP personnel.¹⁷

Congressional investigation was stymied by CBP. House Committee on Oversight and Reform Chairwoman Carolyn Maloney denounced the agency in February 2020 for “obstructing the Committee’s investigation by making baseless and shifting legal claims in order to avoid producing critical documents and witnesses.” Aside from revealing that disciplinary actions fell far short of those recommended by an internal CBP review board, the chairwoman’s letter underscored that “[t]o date, CBP has not produced any information regarding a single employee who was involved in the secret Facebook groups and has not made a single witness available for a transcribed interview. This stonewalling is unacceptable.”¹⁸

In October 2020, Chairwoman Maloney raised the need to subpoena documents from a still-recalcitrant CBP. According to *ProPublica*, Chairwoman Maloney’s letter states that:

the documents CBP has already turned over show that the agency “reduced penalties for numerous employees” who engaged in misconduct; three agents who were slated to be fired had their punishments reduced to suspensions from work, while 19 others had the length of their suspensions cut down.¹⁹

¹⁶ DHS Office of Inspector General, *CBP Senior Leaders’ Handling of Social Media Misconduct*, OIG-21-34, (May 12, 2021), 12, <https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-34-May21.pdf>.

¹⁷ A.C. Thompson, “Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes,” *ProPublica*, July 1, 2019, <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes>.

¹⁸ House Committee on Oversight and Reform, “Committee Demands that CBP Comply with Investigation into Secret Facebook Groups,” Press Release, February 18, 2020, <https://oversight.house.gov/news/press-releases/committee-demands-that-cbp-comply-with-investigation-into-secret-facebook-groups>.

¹⁹ A.C. Thompson, “House Committee to Subpoena Records on Discipline Related to Secret Border Patrol Facebook Group,” *ProPublica*, October 30, 2020, <https://www.propublica.org/article/house-committee-to-subpoena-records-on-discipline-related-to-secret-border-patrol-facebook-group>.

The racial profiling exception created for border enforcement must also be examined. DOJ's 2014 *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity* should be strengthened to close a glaring loophole that exempts law enforcement activity at the nation's borders from this guidance.²⁰ Incidents during the last administration, such as a border patrol agent detaining two Montana women for speaking Spanish, were unfortunately not new or isolated and reflect an imperative to address training and guidance in this area.²¹

Recommendations for Congressional Oversight

- The public deserves a full accounting of “I’m 10-15,” particularly in light of the DHS inspector general’s conclusion that “although OFO [CBP’s Office of Field Operations] officials took action in response to social media misconduct during that period, CBP and Border Patrol headquarters officials did not, except when required to do so.”²² Congress should review why the racist and sexist memes and “jokes” of “I’m 10-15” appealed to a significant number of CBP personnel, whether similar groups exist on other social media platforms, and how DHS’s internal review “to address the threat of domestic violent extremism” within the department addresses CBP.²³
- Congress should examine CBP’s professionalism standards and investigate why racial profiling guidance has not been issued.

²⁰ Department of Justice, *Guidance For Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity*, December 2014, <https://www.justice.gov/crt/case-document/file/1388381/download>.

²¹ Allyson Waller, “U.S. Border Agency Settles With 2 Americans Detained for Speaking Spanish,” *New York Times*, November 26, 2020, <https://www.nytimes.com/2020/11/26/us/montana-spanish-border-patrol.html>.

²² *CBP Senior Leaders’ Handling of Social Media Misconduct*, 12 [see note 16].

²³ Department of Homeland Security, “Secretary Mayorkas Announces Domestic Violent Extremism Review at DHS,” Press Release, April 26, 2021, <https://www.dhs.gov/news/2021/04/26/secretary-mayorkas-announces-domestic-violent-extremism-review-dhs>.

Complaints and Discipline: A Lack of Accountability

It's not just accountability to Congress that CBP struggles to provide. The entire life cycle of complaints at the agency — from filing through acknowledgment, investigation, and outcome — fails to meet basic standards of responsiveness and redress. Congress should investigate and oversee these structural problems with CBP complaint processing.

Without transparent, prompt, and effective complaints investigation and redress, broad public confidence and trust in CBP will never be possible. Congress can shine light on CBP's murky processes, and vindicate those who courageously come forward to protest rights violations. Ultimately, bringing best practices to bear on reforming CBP's complaints process requires understanding it and the people and policies involved. Only congressional oversight has the ability to uncover hidden obstacles to truth and accountability.

Multiple NGOs have written to current DHS leadership about the history of CBP non-responsiveness when provided with complaints. The Kino Border Initiative in Nogales, Arizona, reported 63 complaints about CBP during the Trump administration that DHS acknowledged receiving. Yet it found that “definitive results have been provided in only 14 cases.”²⁴ The ACLU and ACLU of Texas described 13 unresolved administrative complaints about CBP filed with the Office of Inspector General between 2019 and 2020.²⁵ And the National Immigration Project of the National Lawyers Guild compiled dozens of complaints, including many directed at CBP, that DHS has failed to redress or, in dozens of cases, even respond to.²⁶

²⁴ Letter from Kino Border Initiative Director of Education and Advocacy Joanna Williams to Department of Homeland Security Secretary Alejandro Mayorkas about unresolved complaints of CBP misconduct, February 11, 2021, 3, <https://www.kinoborderinitiative.org/wp-content/uploads/2021/02/KBI-Complaint-Summary-Cover-Letter-2-11-21.pdf>.

²⁵ Letter from ALCU and ACLU Texas to Department of Homeland Security Secretary Alejandro Mayorkas about unresolved complaints of CPB misconduct, March 3, 2021, 17, <https://www.aclu.org/letter/letter-biden-administration-must-address-cbp-abuses-border>.

²⁶ Chris Rickerd and Cristina Velez, National Immigration Project of the National Lawyers Guild, *Complaints Ignored, Abuses Excused*, (April 27, 2021), https://nipnlg.org/PDFs/2021_27Apr_ice-report.pdf.

The agency certainly understands that this is a longstanding problem. In 2014, several NGOs compiled and submitted recommendations for improving DHS’s complaints process, including that DHS should “[p]rovide all complainants with a written confirmation of receipt of their complaint within 90 days and a summary regarding the outcome of their complaint within one year, including findings of fact, findings of law, action taken, and available redress.”²⁷

In 2016, CBP received an outside consultant’s report on its complaints system. It committed to “actively implementing and addressing the recommendations through improved policies, procedures, training, processes and reporting requirements.”²⁸ And in 2019, DHS committed to “developing a case tracking system that will track disciplinary and adverse actions across all components and will develop a reporting process to capture, manage, and monitor component’s management of discipline and adverse action [by] March 31, 2022,”²⁹ a project ripe for congressional oversight. Yet complainants’ reports of abuse by CBP have consistently been left unresolved.

As the House Committee on Oversight and Reform’s investigation into the “I’m 10-15” Facebook group shows, there are core deficiencies in the agency’s process of discipline — even when it determines that policy has been violated. For disciplinary decisions, CBP’s Office of Professional Responsibility cedes authority over investigations to the human resources component.

According to a report from the DHS inspector general, “[w]hen an investigation substantiates allegations of misconduct, managers work with CBP [Labor and Employee Relations] staff to *propose* appropriate discipline.”³⁰ (Emphasis added) Unless the proposed penalty is severe, field office directors or sector chiefs have the ultimate say on punishment of their own officers or agents — and these are the very individuals who would have been supervising the offending agents in the first place. This system leads to localized discrepancies in discipline and an incentive to protect colleagues in the field. Indeed, many complaints are not even elevated to

²⁷ACLU et al., “Recommendations to DHS to Improve Complaint Processing” (May 5, 2014), https://www.aclu.org/sites/default/files/assets/14_5_5_recommendations_to_dhs_to_improve_complaint_processing_final.pdf.

²⁸ U.S. Customs and Border Protection, “CBP Statement on Complaints and Discipline Systems Review,” Press Release, March 18, 2016, <https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-complaints-and-discipline-systems-review>.

²⁹ Department of Homeland Security Office of Inspector General, *DHS Needs to Improve Its Oversight of Misconduct and Discipline*, OIG-19-48 (June 17, 2019), 16, <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-48-Jun19.pdf>.

³⁰ *CBP Senior Leaders’ Handling of Social Media Misconduct*, 10 [see note 16].

headquarters, but rather retained locally through an opaque determination that the alleged misconduct is not serious enough to be reported to CBP's central complaint processing entity, the Joint Intake Center.

As a result, discipline is rare. In 2015, the ACLU of Arizona reported that records produced from the Tucson and Yuma Border Patrol sectors showed “numerous reports of abuse and corruption, but only one example of disciplinary action: one agent, suspended for one day, for an unlawful vehicle stop. (In that case the complainant was alleged to be a government employee and the son of a Border Patrol agent.)”³¹

These findings mirror those of the American Immigration Council, which studied allegations of misconduct filed between January 2012 and October 2015 and found that “95.9 percent of the 1,255 cases in which an outcome was reported resulted in ‘no action’ against the officer or agent accused of misconduct.”³²

No wonder the inspector general has reported that of 16,003 CBP employees surveyed, 47% “did not agree that employees at all levels are held accountable for conduct at their component.”³³

Recommendations for Congressional Oversight

- Congress should investigate the role of Human Resources at CBP in imposing discipline, both for consistency across cases and to compare outcomes with benchmarks from leading law enforcement agencies. The investigation should include examining the qualifications, skills, and training associated with Human Resources personnel who impose discipline.

³¹ ACLU of Arizona, *Record of Abuse: Lawlessness and Impunity in Border Patrol's Interior Enforcement Operations* (October, 2015), 3, https://www.acluaz.org/sites/default/files/documents/Record_of_Abuse_101515_0.pdf.

³² Guillermo Cantor and Walter Ewing, American Immigration Council, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* (August 2, 2017), 1, <https://www.americanimmigrationcouncil.org/research/still-no-action-taken-complaints-against-border-patrol-agents-continue-go-unanswered>.

³³ *DHS Needs to Improve Its Oversight of Misconduct and Discipline*, 10 [see note 29].

- Congress should audit the backgrounds of investigators at CBP, who are often former officers or agents, and examine whether the proportion of such investigators aligns with law enforcement best practices.
- Congress should investigate claims by former Senior Border Patrol agent Jenn Budd that “the U.S. Border Patrol illegally operates and uses a secret investigation team to protect agents and the agency from allegations of criminal conduct.”³⁴
- Congress should assist NGOs in getting adequate responses to past-filed complaints and require oversight components to explain their lack of communication.
- Congress should examine the level of transparency provided by DHS Office of the Inspector General, the CBP Office of Professional Responsibility, and the DHS Office of Civil Rights and Civil Liberties in their complaint investigations, including whether these components should be proactive in releasing materials, like investigation reports, that could be requested in redacted form under the Freedom of Information Act.

Efforts to Improve CBP Integrity: A Necessary Review

There have been several efforts aimed at addressing the numerous concerns relating to the professionalism of CBP officers. Given the agency’s lack of internal accountability, Congress should evaluate CBP’s response to and progress toward meeting the recommendations set forth by these independent evaluations.

For example, in March 2016 the CBP Integrity Advisory Panel (IAP), composed of law enforcement experts and headed by former DEA Administrator Karen Tandy and then-New York Police Department Commissioner William Bratton, presented a report with 39 recommendations for “assuring integrity” at the agency.³⁵ Along with interim

³⁴ Jenn Budd, “How Border Patrol Agents Get Away With Murder – Part 2.” *DemCastUSA*, July 30, 2021, <https://demcastusa.com/2021/07/29/budd-border-patrol-part-2/>.

³⁵ Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel* (March 15, 2016), 3, [https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20\(accessible\)_0.pdf](https://www.dhs.gov/sites/default/files/publications/HSAC%20CBP%20IAP_Final%20Report_FINAL%20(accessible)_0.pdf); Homeland Security Advisory Council, *Interim Report of the CBP Integrity Advisory Panel* (June 29, 2015), <https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf>.

recommendations from 2015, it was adopted unanimously. In these detailed reports, the IAP identified that the rapid growth of CBP without a focus on accountability and discipline mechanisms has led to serious criminal and integrity problems within the agency. The panel stressed that CBP is “vulnerable to a corruption scandal that could potentially threaten the security of our nation” and that “[t]he CBP discipline system is broken.”

To our knowledge, however, key components of these reports have not been implemented.

In fact, CBP’s Office of Professional Responsibility rejected the IAP’s assessment that it is “woefully understaffed” and failed to meet its recommendation for “a substantial increase in the number of [internal affairs] investigators.” The IAP wrote that the office would need around 550 full-time investigators to be fully staffed.³⁶ CBP is still far short of this number. As the Cato Institute noted recently, between 2015 and 2019 the agency increased the number of internal affairs officers from 174 to 252. This represents “one [IA officer] per every 193 CBP [law enforcement officers]. The New York Police Department (NYPD) has one internal affairs officer for every 66 sworn LEOs.”³⁷

That’s just one of the recommendations CBP hasn’t met. According to *ProPublica*, the IAP also “encouraged CBP to create a discipline czar, a high-level official who could track all the misconduct and corruption cases and keep the agency’s commissioner informed about them. In a statement to *ProPublica*, CBP said the agency, more than three years later, was still ‘working on the best options to meet this recommendation.’”³⁸

CBP has also declined to adopt the Police Executive Research Forum (PERF) and Integrity Advisory Panel recommendations to bar shooting at vehicles “unless vehicle occupants are attempting to use deadly force—other than the vehicle—against the

³⁶ Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel*, 11 [see note 35].

³⁷ Alex Nowrasteh, “Corruption, Criminality, Discipline, and Performance Problems at Border Patrol,” Cato Institute, May 20, 2021, <https://www.cato.org/blog/corruption-criminality-discipline-performance-problems-border-patrol>.

³⁸ A.C. Thompson, “Years Ago, the Border Patrol’s Discipline System Was Denounced as ‘Broken.’ It’s Still Not Fixed,” *ProPublica*, June 20, 2019, <https://www.propublica.org/article/border-patrol-discipline-system-was-denounced-as-broken-still-not-fixed>.

agent.”³⁹ This is despite the fact that CBP agents have repeatedly ignored this guideline, with deadly results.⁴⁰

Relatedly, CBP has failed to adopt best practices around its use of body cameras, a primary means of providing accountability for a large agency operating in remote locations such as Del Rio, Texas. Best practices are reflected in H.R. 531, the ICE and CBP Body Camera Accountability Act of 2021, and the George Floyd Justice in Policing Act, which contains a provision that would require use of body-worn cameras by all federal law enforcement officers. But despite announcing on August 4, 2021 the deployment of 6,000 body-worn cameras for agents and officers, CBP has made no details available.⁴¹

Body cameras can work to increase accountability or to thwart it. Consulting with stakeholders about policy choices — like those recommended by groups ranging from The Constitution Project Committee on Policing Reforms to The Leadership Conference on Civil and Human Rights — can make all the difference.⁴²

Recommendations for Congressional Oversight

- Congress must oversee CBP’s crucial body-worn camera program to ensure that the cameras are not used to provide a veneer of accountability without mechanisms to provide actual transparency and accountability.

³⁹ The Police Executive Research Forum, *U.S. Customs and Border Protection Use of Force Review: Cases and Policies*, February 2013, <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

⁴⁰ Dana Liebelson, “A CBP Officer Shot A 21-Year-Old American In The Head. 6 Months Later, CBP Won’t Say Why.” *HuffPost*, August 19, 2019, https://www.huffpost.com/entry/cbp-shooting-unarmed-vehicles_n_5d24cd0ae4b0583e4828365f.

⁴¹ U.S. Customs and Border Protection, “CBP Agents and Officers Begin Use of Body-Worn Cameras,” Press Release, August 4, 2021, <https://www.cbp.gov/newsroom/national-media-release/cbp-agents-and-officers-begin-use-body-worn-cameras>.

⁴² The Constitution Project Committee on Policing Reforms, *Guidelines for the Use of Body-Worn Cameras by Law Enforcement: A Guide to Protecting Communities and Preserving Civil Liberties*, December 2016, <https://www.pogo.org/report/2020/06/guidelines-for-the-use-of-body-worn-cameras-by-law-enforcement/>; The Leadership Conference on Civil and Human Rights, “Civil Rights Principles on Body-Worn Cameras,” May 2015, <https://civilrights.org/2015/05/15/civil-rights-privacy-and-media-rights-groups-release-principles-for-law-enforcement-body-worn-cameras/>.

■ Congress should require CBP to provide detailed explanations of how and whether it has implemented the recommendations from the Integrity Advisory Panel's two reports.

CBP's Expansive Jurisdiction: Time for a Reevaluation

Presently, CBP claims jurisdiction 100 miles into the interior of the U.S. from any land or sea border; this means that two-thirds of the U.S. population lives in the border enforcement zone.⁴³ Such expansive jurisdiction is not only unnecessary and resource-depriving, it also creates ample opportunities for abuses of power. In some cases, the agency does not recognize even the 100-mile limit for operations other than interior checkpoints, and roving-patrol stops are commonly made outside the zone.⁴⁴

The inclusion of CBP Border Patrol Tactical Unit (BORTAC) personnel in law enforcement activities at protests in Portland, Oregon, last year accentuated civil liberties concerns about what operations are properly considered related to border management.⁴⁵ Oregon senators Ron Wyden and Jeff Merkley have effectively pursued information from DHS about how the Trump administration misused CBP and other federal law enforcement against protesters in Portland, but the entire episode illustrates how CBP's expansive jurisdiction can be extended well into the interior of

⁴³ "100-Mile Border Enforcement Zone," Southern Borders Communities Coalition, last modified October 4, 2021, <https://www.southernborder.org/100-mile-border-zone>.

⁴⁴ For reference, 8 C.F.R §1.2 currently defines "immigration officer" in expansive terms: "the following employees of the Department of Homeland Security, including senior or supervisory officers of such employees, designated as immigration officers *authorized to exercise the powers and duties of such officer as specified by the Act and this chapter I*: aircraft pilot, airplane pilot, asylum officer, refugee corps officer, *Border Patrol agent*, contact representative, deportation officer, detention enforcement officer, detention officer, fingerprint specialist, forensic document analyst, general attorney (except with respect to CBP, only to the extent that the attorney is performing any immigration function), helicopter pilot, immigration agent (investigations), immigration enforcement agent, immigration information officer, *immigration inspector*, immigration officer, immigration services officer, investigator, intelligence agent, intelligence officer, investigative assistant, special agent, other officer or employee of the Department of Homeland Security or of the United States as designated by the Secretary of Homeland Security as provided in 8 CFR 2.1." (Emphasis added)

⁴⁵ John Burnett, "Border Patrol Response To Portland Unrest: Straying From Mission Or Continuing One?" *NPR*, July 23, 2020, <https://www.npr.org/2020/07/23/894712004/border-patrol-response-to-portland-unrest-straying-from-mission-or-continuing-on>.

the United States, beyond any reasonable distance for immigration control.

A recent ACLU of Michigan report underscored how cavalierly the agency treats even loose limits on its authority.⁴⁶ It noted, for example, that CBP wrongly considers Lake Michigan within its enforcement zone, “even though this lake does not share a shoreline with Canada.”⁴⁷ It also notes that, “[a]lthough Border Patrol’s mandated mission is to police the border ... [o]nly 1.3% of cases in the Border Patrol’s records involved people attempting to enter the United States without authorization from Canada.”⁴⁸ Outside of defined emergencies, CBP personnel (and surveillance) should be strictly limited to the border regions.

The agency’s elastic missions and claimed jurisdiction should also be confined, as in the words of former House Appropriations Chairman Hal Rogers, “a sort of a mini industrial complex syndrome ... has set in there and we’re going to have to guard against it every step of the way.”⁴⁹

Recommendations for Congressional Oversight

- Congress should review whether CBP has undertaken its obligation to determine what constitutes a “reasonable distance” as required by 8 CFR §287.1(b).⁵⁰ A determination of “reasonableness” would at least affect where CBP can set up immigration checkpoints. This regulation clearly contemplates that the distance will be less than 100 air miles in certain places.
- Congress should review how to limit CBP’s authority outside the 100-mile zone. This would involve cabining CBP officers’ and agents’ broad geographic authority as “immigration officers.” Congress should examine

⁴⁶ Monica Andrade-Fannon and Geoff Boyce, ACLU Michigan, *The Border’s Long Shadow: How Border Patrol Uses Racial Profiling and Local and State Police to Target and Instill Fear in Michigan’s Immigrant Communities* (March 25, 2021), <https://www.aclumich.org/en/publications/borders-long-shadow>.

⁴⁷ Andrade-Fannon and Boyce, *The Border’s Long Shadow*, 27 [see note 46].

⁴⁸ Andrade-Fannon and Boyce, *The Border’s Long Shadow*, 5 [see note 46].

⁴⁹ Ted Robbins, “U.S. Border Industry Grows As Immigration Slows.” *NPR*, September 22, 2012, <https://www.npr.org/2012/09/22/161604484/u-s-border-industry-grows-as-immigration-slows>.

⁵⁰ 8 CFR §287.1(b) states: “Reasonable distance; fixing by chief patrol agents and special agents in charge. In fixing distances not exceeding 100 air miles ... chief patrol agents and special agents in charge shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States.”

the relationship between the number, location, and footprint of CBP interior checkpoints and migrant deaths.⁵¹

Refusing to Turn the Page: Areas Needing Reinvestigation

Uses of Force

Border communities will not trust CBP without an independent accounting of notorious and improperly investigated cases of brutality and cruel treatment. In May 2012, 16 members of Congress wrote then-DHS Secretary Janet Napolitano, then-Attorney General Eric Holder, and then-acting DHS Inspector General Charles K. Edwards after viewing the PBS documentary *Crossing the Line at the Border*. The film included eyewitness video of a brutal beating of Anastasio Hernandez-Rojas, who at one point was prone and handcuffed on the ground.⁵² The letter “called for justice in the tragic case of Anastasio Hernandez-Rojas and reiterated the need for tougher oversight of Border Patrol personnel to end the abuse of people in the agency’s custody.”⁵³

The letter was written two years after Hernandez-Rojas was killed, and the Department of Justice took another three and a half years to absolve DHS personnel of criminal responsibility.⁵⁴ It remains unclear whether any administrative sanctions were imposed, but three former senior DHS officials involved in the departmental investigation have submitted 45 pages of testimony to the Inter-American Commission on Human Rights for its pending hearing on Hernandez-Rojas’s death.

⁵¹ Jasmine Aguilera, “More Migrants Die Crossing the Border in South Texas Than Anywhere Else in the U.S. This Documentary Depicts the Human Toll,” *Time*, August 20, 2021, <https://time.com/6091742/migrant-deaths-texas-documentary/>.

⁵² PBS, “Crossing the Line and the Border,” *Need to Know*, July 19, 2012, 1:33, https://www.youtube.com/watch?v=iUyy85t8E_U.

⁵³ Representative Lucille Roybal-Allard, “16 Members of Congress Call for Justice in Hernandez-Rojas Case,” Press Release, May 10, 2012, <https://roybal-allard.house.gov/news/documentsingle.aspx?DocumentID=294987>.

⁵⁴ Department of Justice, “Federal Officials Close the Investigation into the Death of Anastasio Hernandez-Rojas,” Press Release, November 6, 2015, <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas>.

Alliance San Diego offers an overview of the testimony, in which the officials allege that investigators:

conducted a shadow investigation that interfered with the official police investigation; manipulated facts to justify excessive use of force; tampered with and destroyed evidence and dispersed witnesses; failed to investigate why border agents repeatedly Tased the victim — an unarmed, handcuffed civilian in federal custody — in actions constituting torture; illegally issued an administrative subpoena to obtain the victims' health records; and refused to reopen the investigation when eyewitness video emerged.⁵⁵

These allegations, from those who were in positions of authority both at CBP Internal Affairs and DHS Office of the Inspector General at the time, must be revisited. Confidence in investigators' motivation and ability to hold CBP personnel accountable cannot be maintained in the face of such serious claimed misconduct.

In 2017, Congress again responded with outrage to news of misconduct that had been hidden for years. An *ABC News* investigation revealed a video of the 2013 death of Cruz Velazquez.⁵⁶ Velazquez, who was only 16, was crossing at the San Ysidro port when, the recording shows, two CBP officers suspicious of a liquid he was carrying defied policy by having him drink it to disprove contraband. The substance was highly potent methamphetamine, and Velazquez died in agony after the officers did not call for medical attention, despite observing his discomfort.

A *Type Investigations* report with *ABC News* revealed that no administrative sanctions were levied for clear violations of policy: "Neither [of the officers involved] were subject to discipline as a result of their involvement in Velazquez's death, and both officers remain on duty." When then-CBP commissioner Gil Kerlikowske was asked about the lack of accountability, he "struggled to explain why. 'I don't have the knowledge and the specifics about the case itself,' Kerlikowske said. He told *ABC News* he had never seen the video and declined an offer to watch it."⁵⁷

⁵⁵ Alliance San Diego, "Former DHS Officials Reveal Details about Border Agency Cover-Up in New Filing with International Tribunal," February 4, 2021, https://www.alliancesd.org/former_dhs_officials_reveal_details_about_border_agency_cover_up_in_new_filing_with_international_tribunal.

⁵⁶ *ABC News*, "Video shows border officers' actions and inactions resulted in tragic 2013 incident," July 29, 2017, 6:36, <https://www.youtube.com/watch?v=DkVm76c880U>.

⁵⁷ Brian Ross, Brian Epstein, John Carlos Frey, and Peter Madden, "Life and Death at the Border," *Type Investigations*, July 29, 2017, <https://www.typeinvestigations.org/investigation/2017/07/29/life-death-border/>.

Children's Deaths in Custody

In March 2020, Homeland Security Committee Chair Bennie Thompson wrote a scathing, 11-page letter to the DHS Inspector General, decrying the office's investigations into the deaths of two children, ages 7 and 8, in Border Patrol custody. The letter highlights the clear need for oversight:

The Committee's examination of these two deaths — which has been greatly impeded by the refusal of the Department to provide all of the documents subpoenaed by the Committee — is still ongoing, but the many critical shortcomings in the work of the OIG raise significant concerns about the thoroughness of the office's reviews as well as the willingness of the office to conduct in-depth examinations of sensitive topics.⁵⁸

Informed by the committee's work looking into these tragic deaths, the public and the children's families deserve a proper accounting of agency failures and recommendations for reform, particularly as the number of children in CBP custody continues to be significant.

Recommendations for Congressional Oversight

- Congress should request detailed information on the number of children held in CBP custody, particularly those held for more than 72 hours. Congress should examine policy changes that might reduce the number of unaccompanied minors in CBP custody, including ending expulsions of families (which may lead parents to send their children across the border alone) and employing sufficient numbers of medical practitioners and licensed child welfare professionals.
- Congress should investigate CBP's treatment of pregnant women and newborns in custody, including recent cases where CBP expelled women and their newborns under Title 42 shortly after they gave birth (in one case, while a woman was in active labor) without providing their U.S. citizen children's birth certificates, and where a mother was forced to give

⁵⁸ Letter from House Homeland Security Committee to Secretary Joseph V. Cuffari about deaths of young children in CBP custody, March 26, 2020, <https://homeland.house.gov/imo/media/doc/2020-03-26%20DHS%20OIG.pdf>.

birth in a Border Patrol station and returned there with her newborn after discharge from the hospital.⁵⁹

- Congress should inspect conditions in CBP facilities and ensure that court-appointed monitors have adequate access to children in CBP custody. Congress should press the agency to issue policy changes to allow legal and humanitarian access by NGOs.

Conclusion

CBP suffers from long-standing and serious transparency, oversight, and accountability deficits. The “publics” the agency serves are diffuse, frequently vulnerable in manifold ways, and often lacking effective avenues for redress of abuses. Patterns of racial profiling, excessive force, and dehumanizing conduct have implicated significant numbers of CBP personnel. A recent comparative study of federal law enforcement agency termination rates concluded that there is “a stunning degree of misconduct in CBP.”⁶⁰

These oversight recommendations represent a clear opportunity for Congress to bring accountability to the largest law enforcement agency in the United States. They should not be understood as an endorsement of any particular administration’s policy on immigration. Nor should it be read as an approval of CBP’s understanding of its mission. Indeed, mission and misconduct are inextricably linked at CBP. Long-term change relies on the understanding that fundamental professional reforms may struggle to take root until CBP’s outdated model of border enforcement — one that depends on deterrence through militarization — is revised, and CBP’s footprint in border communities is reduced.

⁵⁹ Complaint, National Immigration Litigation Alliance, et al. v. U.S. Customs and Border Protection, 1:21-cv-11094, 1-2 (U.S. Dist Ct, MA, July 1, 2021), <https://immigrationlitigation.org/wp-content/uploads/2021/07/1-COMPLAINT-July-1-2021.pdf>; Michelle Mark, “Photos show a newborn baby had to sleep on a bench in a Border Patrol station after detained mother gave birth into her pants,” *Yahoo News*, July 23, 2021, <https://news.yahoo.com/photos-show-newborn-baby-had-220334728.html>.

⁶⁰ Nowrasteh, “Corruption, Criminality, Discipline, and Performance Problems at Border Patrol,” [see note 37].



POGO

PROJECT ON GOVERNMENT OVERSIGHT

1100 G Street NW, Suite 500
Washington, DC 20005

WWW.POGO.ORG

