

REPORT

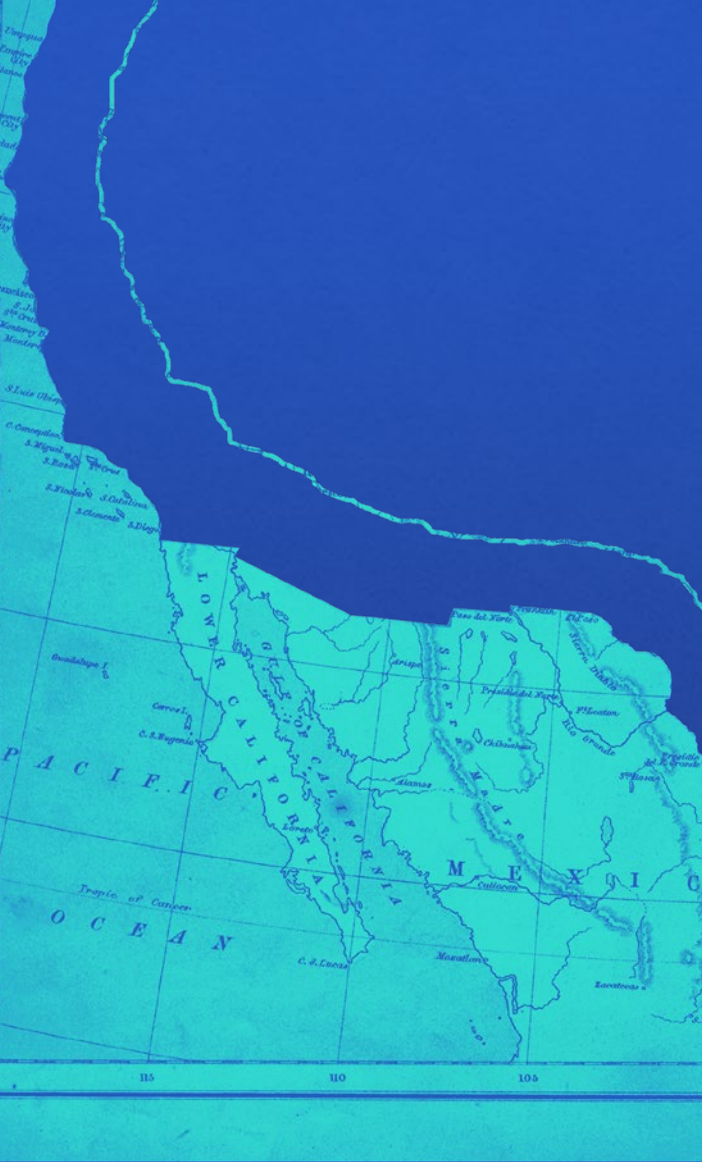


# The Border Zone Next Door, and its Out-of-Control Police Force

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# Acknowledgements

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## **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.

# Introduction

There is a police force in the United States that has the explicit power to engage in racial profiling, and is allowed to stop and question Americans without any evidence they have broken the law. This police force is heavily militarized, with a history of brutality and impunity for unlawful behavior. It has access to cutting-edge surveillance technology and huge databases of biometric data, and cannot be directly sued for violating Americans' constitutional rights.

That police force is U.S. Customs and Border Protection (CBP) — the agency the Project On Government Oversight (POGO) described in a report last year as “America’s largest, least accountable law enforcement agency.”<sup>1</sup> That report focused on steps congressional overseers could take to help improve accountability at CBP. This follow-up report emphasizes the dangers CBP’s overbroad authority poses to citizens and non-citizens alike, and shares steps the executive branch can take to limit the risk of abuse. CBP currently operates in a shockingly broad area and has even broader authority, with capabilities that could be dangerous in the hands of someone looking to control the public.

When politicians and the media discuss “the border,” they are usually referring to the boundary between the United States and Mexico, as well as the land immediately around it. But the U.S. government defines the “border enforcement zone” where CBP can operate very differently, and much more broadly. If you’re in the United States, chances are you’re located in that zone right now.

Even if you’re not within the enforcement zone, CBP probably maintains that it has the authority to conduct searches and make arrests in your neighborhood. The agency sent snipers to George Floyd’s funeral in suburban Texas, forced people protesting against police brutality into unmarked vans in Portland, Oregon, and surveilled racial justice protests all over the United States in 2020. These actions are just a small preview of what CBP could do under a future authoritarian president, underscoring why it’s so critical for the current administration and Congress to rein in this agency’s authority before it’s too late.

## Dangers of the Vast “Border Enforcement Zone”

Federal law provides that the U.S. Border Patrol can conduct stops and searches without a warrant “within a reasonable distance from any external boundary” of the United States.<sup>2</sup> Decades-old federal regulations, issued without public comment or debate, define that reasonable distance as “100 air miles” from any external boundary, including the Atlantic and Pacific Oceans and the Gulf of Mexico, in addition to the land borders with Mexico and Canada.<sup>3</sup> CBP even claims the enforcement zone extends

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<sup>1</sup> Sarah Turberville and Chris Rickerd, Project On Government Oversight, *An Oversight Agenda for Customs and Border Protection: America’s Largest, Least Accountable Law Enforcement Agency* (October 21, 2021), <https://www.pogo.org/report/2021/10/an-oversight-agenda-for-customs-and-border-protection-americas-largest-least-accountable-law-enforcement-agency>.

<sup>2</sup> 8 U.S.C. § 1357(a)(3) (2022), <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title8-section1357&num=0&edition=prelim>.

<sup>3</sup> 8 C.F.R. § 287.1 (2022), <https://www.ecfr.gov/current/title-8/chapter-I/subchapter-B/part-287/section-287.1>.

100 miles from the southern tip of Lake Michigan, although the lake is entirely within the United States.<sup>4</sup> Almost two thirds of the U.S. population lives in this border enforcement zone, which includes virtually the entire states of Connecticut, Delaware, Florida, Hawaii, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Rhode Island, and Vermont, as well as most of the largest cities in the country.<sup>5</sup>

Within this vast enforcement zone, Border Patrol can set up checkpoints to stop and question every driver based on no suspicion whatsoever. CBP agents can board buses and trains and check the immigration status of the people on board (if the bus or train operator consents). Agents can also set up roving patrols to stop cars if they have a “reasonable suspicion” of anyone committing an immigration violation on board.<sup>6</sup> A “reasonable suspicion” in theory should be based on specific facts about a person or their actions, but in practice it can be almost anything, including either speeding up or slowing down when seeing a Border Patrol vehicle, staring at or looking away from an agent, living in a city where agents believe there is a large undocumented population, or speaking Spanish.<sup>7</sup>

The practical effect of living within the 100-mile enforcement zone depends on where exactly you’re located. In many areas, you can live your entire life in the border enforcement zone without getting pulled over by Border Patrol or driving through one of their checkpoints. For now, there are no checkpoints along the coasts. There are a few intermittently along the northern border, concentrated in New York and New England,<sup>8</sup> although roving patrols occur along the entire U.S.-Canada border. However, for many residents of southern border communities spanning from southern California to the Rio Grande Valley, permanent checkpoints and other encounters with Border Patrol are a daily fact of life.<sup>9</sup>

For U.S. citizens, Border Patrol checkpoints and roving patrols are most often an inconvenience, but they can be far more serious. Marijuana seizures and arrests are common, as Willie Nelson and Snoop Dogg can attest.<sup>10</sup> These arrests continue without regard to whether a state has legalized recreational or medical marijuana.<sup>11</sup>

Border Patrol maintains that its checkpoints are necessary to catch migrant and drug smugglers. Sometimes agents do make fentanyl and heroin busts, or find scores of people being smuggled in

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<sup>4</sup> ACLU of Michigan, *The Border’s Long Shadow*, (March 25, 2021), 4, [https://www.aclumich.org/sites/default/files/field\\_documents/100\\_mile\\_zone\\_report-updated.pdf](https://www.aclumich.org/sites/default/files/field_documents/100_mile_zone_report-updated.pdf).

<sup>5</sup> Tanvi Misra, “Inside the Massive U.S. ‘Border Zone,’” *Bloomberg CityLab*, May 14, 2018, <https://www.bloomberg.com/news/articles/2018-05-14/mapping-who-lives-in-border-patrol-s-100-mile-zone>.

<sup>6</sup> Hillel R. Smith and Kelsey Y. Santamaria, Congressional Research Service, *Searches and Seizures at the Border and the Fourth Amendment*, R46601 (March 30, 2021),

<sup>7</sup> ACLU of Michigan, *The Border’s Long Shadow*, 32-33 [see note 4].

<sup>8</sup> Government Accountability Office, *Border Patrol: Actions Needed to Improve Checkpoint Oversight and Data*, GAP 22-10458 (2022), 10, <https://www.gao.gov/assets/730/720899.pdf#page=16>.

<sup>9</sup> Government Accountability Office, *Border Patrol: Actions Needed to Improve Checkpoint Oversight and Data*, 10 [see note 8].

<sup>10</sup> “Celebrities Arrested at Sierra Blanca checkpoint and El Paso,” *El Paso Times*, February 19, 2020, <https://www.elpasotimes.com/picture-gallery/news/crime/2020/02/19/celebrities-arrested-sierra-blanca-border-patrol-checkpoint-el-paso/4809909002/>.

<sup>11</sup> Josh Lee, “Checkpoint Woes for N.M. Producers,” *The Paper*, April 5, 2022, <https://abq.news/2022/04/checkpoint-woes-for-n-m-producers/>.

dangerous conditions.<sup>12</sup> But far more drugs are seized by the Office of Field Operations at ports of entry or in the mail than in Border Patrol operations, particularly when the statistics exclude marijuana.<sup>13</sup> In any case, with nearly over 17,000 state and local law enforcement agencies operating in the country,<sup>14</sup> interior enforcement of drug possession laws is largely outside of CBP's authority, and with good reason. In New Hampshire, state police attempted to use Border Patrol's search authority in the border zone to evade constitutional restrictions on searches and seizures, until a state court judge found their conduct unconstitutional.<sup>15</sup> The Vermont Supreme Court similarly excluded evidence of drug possession gathered by a "roving patrol" that searched a car under circumstances where state police would need a warrant.<sup>16</sup>

Checkpoints accounted for only 2% of Border Patrol arrests between fiscal years 2016 and 2020.<sup>17</sup> Occasionally, Border Patrol agents unknowingly wave smugglers through checkpoints, as reportedly occurred with the overheated tractor-trailer where 53 migrants were found dead on June 27, 2022.<sup>18</sup> The existence of checkpoints can also lead to migrants dying in the countryside in attempts to avoid them. This is the case in Brooks County, Texas, a rural county around 70 miles from the U.S.-Mexico border, but which is one of the deadliest places in the United States for migrants.<sup>19</sup> The remains of 119 migrants were discovered there in 2021.<sup>20</sup>

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<sup>12</sup> U.S. Customs and Border Protection, "Close to \$190K in Fentanyl and Heroin Seized at Checkpoint," Press Release, June 22, 2022, <https://www.cbp.gov/newsroom/local-media-release/close-190k-fentanyl-and-heroin-seized-checkpoint>; U.S. Customs and Border Protection, "Laredo Sector Border Patrol Agents Apprehend Over 100 in Two Separate Human Smuggling Attempts," Press Release, July 14, 2021, <https://www.cbp.gov/newsroom/local-media-release/laredo-sector-border-patrol-agents-apprehend-over-100-two-separate>.

<sup>13</sup> Government Accountability Office, *Border Security: CBP Could Improve How It Categorizes Drug Seizure Data and Evaluates Training*, GAO-22-104725 (2022), 30, <https://www.gao.gov/assets/730/720456.pdf#page=36>; Kristin Finklea, Congressional Research Service, *Illicit Drug Flows and Seizures in the United States: What Do We [Not] Know?*, R45182 (July 3, 2019), 7, <https://sgp.fas.org/crs/misc/R45812.pdf#page=10>.

<sup>14</sup> Andrea M. Gardner and Kevin M. Scott, U.S. Department of Justice, Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies, 2018—Statistical Tables*, 1 (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/csllea18st.pdf>.

<sup>15</sup> Ron Nixon, "Drug Arrests at Immigration Checkpoint Violated Constitution, New Hampshire Court Finds," *New York Times*, May 4, 2018, <https://www.nytimes.com/2018/05/04/us/new-hampshire-border-patrol-illegal-checkpoints-aclu.html>.

<sup>16</sup> Derek Brouwer, "Vermont Supreme Court Deals Blow to Border Agents' Roving Patrols," *Seven Days*, September 24, 2021, <https://www.sevendaysvt.com/OffMessage/archives/2021/09/24/vermont-supreme-court-deals-blow-to-border-agents-roving-patrols>.

<sup>17</sup> Government Accountability Office, *Border Patrol: Actions Needed to Improve Checkpoint Oversight and Data*, 16-17 [see note 8].

<sup>18</sup> Juan Lozano and Elliot Spagat, "U.S. official: Migrants who died cleared inland checkpoint," Associated Press, June 30, 2022, <https://apnews.com/article/texas- united-states-san-antonio-laredo-f80721c90620e40124adad62e684519b>.

<sup>19</sup> Ivonne Spinoza, "'Death Valley for Migrants': The Invisible Cost of Border Crossing," Independent Lens, PBS, February 3, 2022, <https://www.pbs.org/independentlens/blog/death-valley-for-migrants-the-invisible-cost-of-border-crossing/>.

<sup>20</sup> Melissa del Bosque, "It's Not Aiding and Abetting, It's Humanitarian Aid: A Q&A With Eddie Canales, Founder of the South Texas Human Rights Center," *The Border Chronicle*, April 5, 2022, <https://www.theborderchronicle.com/p/its-not-aiding-and-abetting-its-humanitarian>.

Interior Border Patrol checkpoints threaten long-term U.S. residents as well as people who have recently crossed a border. Undocumented people who have lived in the United States for years or decades cannot travel to visit family members or go to weddings, graduations, and funerals, or seek medical care for themselves or their children without risking deportation.<sup>21</sup> Some of them call the limited region where they live “la jaula de oro” — the golden cage.<sup>22</sup>

In one notorious case from 2017, Border Patrol agents at an interior checkpoint arrested 10-year-old Rosa Maria Hernandez in an ambulance, en route to a hospital for emergency gallbladder surgery.<sup>23</sup> Hernandez, who was brought to the United States when she was three months old to receive medical treatment for cerebral palsy, was allowed to undergo the surgery under guard, but agents arrested her and sent her to a shelter for unaccompanied children afterwards.<sup>24</sup> She had never before been apart from her parents and was only reunited with her family after an ACLU lawsuit.<sup>25</sup>

U.S. citizens are also not safe from abuse by CBP. Francisco Erwin Galicia, an 18-year-old born in Dallas, was arrested at a checkpoint in 2019. He presented state identification, but Border Patrol agents did not believe he was a citizen and detained him incommunicado for 23 days in a holding cell without a bed before he was transferred to ICE custody and then released. He lost 26 pounds.<sup>26</sup> Other citizens have been wrongfully deported before agents acknowledged their mistake, including Julio Cesar Ovalle, whom the Border Patrol arrested on the way to the grocery store, and a four-year-old girl who was mistakenly sent to Guatemala from Dulles Airport.<sup>27</sup> CBP agents tased pastor Steven Anderson

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<sup>21</sup> John Burnett, “Fearing Checkpoints, Undocumented Immigrants Cut Off From Medical Care,” NPR, November 3, 2017, <https://www.npr.org/2017/11/03/561883665/fearing-checkpoints-undocumented-immigrants-cut-off-from-medical-care>; Elena Mejía Lutz, “At Border Patrol Checkpoints, an Impossible Choice Between Health Care and Deportation,” *Texas Observer*, February 13, 2018, <https://www.texasobserver.org/border-patrol-checkpoints-impossible-choice-health-care-deportation/>.

<sup>22</sup> Manny Fernandez, “Checkpoints Isolate Many Immigrants in Texas’ Rio Grande Valley,” *New York Times*, November 22, 2015, <https://www.nytimes.com/2015/11/23/us/checkpoints-isolate-many-immigrants-in-texas-rio-grande-valley.html>.

<sup>23</sup> Marwa Eltagouri, “A 10-year-old immigrant was rushed to the hospital in an ambulance. She was detained on the way,” *Washington Post*, October 27, 2017, <https://www.washingtonpost.com/news/post-nation/wp/2017/10/26/a-10-year-old-immigrant-was-rushed-to-the-hospital-in-an-ambulance-she-was-detained-on-the-way/>.

<sup>24</sup> Vivian Yee, “10-Year-Old Immigrant Who Was Detained After Surgery is Released,” *New York Times*, November 3, 2017, <https://www.nytimes.com/2017/11/03/us/girl-cerebral-palsy-released.html>.

<sup>25</sup> Maria Sacchetti, “A girl with cerebral palsy is being held in immigration detention. The ACLU just sued for her release,” *Washington Post*, October 31, 2017, [https://www.washingtonpost.com/local/immigration/a-girl-with-cerebral-palsy-is-being-held-in-immigration-detention-the-aclu-just-sued-for-her-release/2017/10/31/8453eb50-be53-11e7-959c-fe2b598d8c00\\_story.html](https://www.washingtonpost.com/local/immigration/a-girl-with-cerebral-palsy-is-being-held-in-immigration-detention-the-aclu-just-sued-for-her-release/2017/10/31/8453eb50-be53-11e7-959c-fe2b598d8c00_story.html).

<sup>26</sup> Dennis Romero, “U.S. citizen says he lost 26 pounds while wrongfully held in ‘inhumane’ conditions,” NBC News, July 27, 2019, <https://www.nbcnews.com/storyline/immigration-border-crisis/u-s-citizen-says-he-lost-26-pounds-while-wrongfully-n1035321>; Meagan Flynn, “U.S. citizen freed after nearly a month in immigration custody, family says,” *Washington Post*, July 24, 2019, <https://www.washingtonpost.com/nation/2019/07/23/francisco-erwin-galicia-ice-cpb-us-citizen-detained-texas/>.

<sup>27</sup> Guillermo Contreras, “San Diego Latino, a U.S. citizen, alleges Border Patrol wrongly deported him,” Associated Press, November 2, 2018, <https://apnews.com/article/5ab6f1c76e674fd7823891e29ccc7e46>; American Immigration Council, “United States Agrees to Settle Lawsuit Alleging Wrongful Deportation,” Press Release, July 2, 2015, <https://www.americanimmigrationcouncil.org/news/united-states-agrees-settle-lawsuit-alleging-wrongful-deportation-0>.



without justification in Arizona in 2009.<sup>28</sup> In 2015, agents did the same to college student Jess Cooke in upstate New York.<sup>29</sup>

In 2012, another U.S. citizen, who wished to be identified by a pseudonym, was forced to undergo a strip search at a border crossing after a dog “alerted” for the presence of drugs.<sup>30</sup> (False alerts by drug-sniffing dogs are very common, a fact that has been known for years.<sup>31</sup>) When agents found no drugs, they handcuffed her and drove her to a hospital, where she was shackled to a bed and forced to take a laxative so agents could observe her defecation. She was also forced to undergo X-rays, a CT scan, and an invasive cavity search by doctors.<sup>32</sup>

Less brutal but far more pervasive is CBP’s use of surveillance technology to collect vast amounts of data from both citizens and non-citizens. Forty-three Border Patrol checkpoints are equipped with license plate readers, and CBP retains the data they collect for 15 years.<sup>33</sup> Fifty-two checkpoints have fingerprint readers and four have iris scanners.<sup>34</sup> CBP uses facial recognition technology on U.S. citizens and non-citizens alike at many airports, seaports, and land ports of entry, despite a lack of clear congressional authorization to collect such data from U.S. citizens.<sup>35</sup>

CBP collects data from thousands of travelers’ cell phones every year and stores it in a database that about 2,700 personnel from the Department of Homeland Security can search without a warrant.<sup>36</sup> CBP also buys a vast amount of cell phone location data from data brokers, and collects DNA from asylum seekers to be stored in an FBI database.<sup>37</sup> The agency has used its surveillance powers and access to

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<sup>28</sup> Wes Kimbell, “America’s Internal Checkpoints,” *Reason*, January 2014, <https://reason.com/2013/12/28/americas-internal-checkpoints/>.

<sup>29</sup> David Sommerstein, “St. Lawrence County woman tased at border patrol checkpoint,” North Country Public Radio, May 8, 2015, <https://www.northcountrypublicradio.org/news/story/28314/20150508/st-lawrence-county-woman-tased-at-border-patrol-checkpoint>.

<sup>30</sup> Melissa del Bosque, “Checkpoint Nation,” *Texas Observer*, October 8, 2018, <https://www.texasobserver.org/checkpoint-nation/>.

<sup>31</sup> Daryl James, “The Police Dog Who Cries Drugs at Every Traffic Stop,” *Reason*, May 13, 2021, <https://reason.com/2021/05/13/the-police-dog-who-cried-drugs-at-every-traffic-stop/>; Eyder Peralta, “Report: Drug-Sniffing Dogs Are Wrong More Often Than Right,” NPR, January 7, 2011, <https://www.npr.org/sections/thetwo-way/2011/01/07/132738250/report-drug-sniffing-dogs-are-wrong-more-often-than-right>.

<sup>32</sup> Third Amended Complaint, *Doe v. Customs and Border Protection*, No. 13-cv-406 (Western District of Texas, El Paso Division, July 17, 2015), <https://cbpabusestest2.files.wordpress.com/2016/06/doe-v-cbp-2015-07-17-tac.pdf>.

<sup>33</sup> Government Accountability Office, *Border Patrol*, 13 [see note 8].

<sup>34</sup> Government Accountability Office, *Border Patrol*, 13 [see note 8].

<sup>35</sup> *Assessing CBP’s Use of Facial Recognition Technology: Hearing before the House Committee on Homeland Security, Subcommittee on Border Security, Facility, and Operations*, 117th Cong. (July 27, 2022) (Statement of Jeramie D. Scott, Senior Counsel, Electronic Privacy Information Center), [https://homeland.house.gov/imo/media/doc/scott\\_testimony\\_bsfo\\_072722.pdf](https://homeland.house.gov/imo/media/doc/scott_testimony_bsfo_072722.pdf).

<sup>36</sup> Ron Wyden, senator, to Chris Magnus, CBP commissioner, on CBP border searches of electronic devices, September 15, 2022, <https://www.wyden.senate.gov/imo/media/doc/Wyden%20letter%20to%20CBP%20on%20border%20searches%20of%20devices.pdf>.

<sup>37</sup> Alfred Ng, “Homeland Security records show ‘shocking’ use of phone data, ACLU says,” *Politico*, July 18, 2022, <https://www.politico.com/news/2022/07/18/dhs-location-data-aclu-00046208>; Adolfo Flores, “US Border Officers Are Collecting DNA From Asylum-Seekers Even Though They Don’t Have Criminal Records,” *BuzzFeed News*, June 4, 2021, <https://www.buzzfeednews.com/article/adolfoflores/asylum-seekers-dna-us-border>.

classified databases to target activists, humanitarian workers, immigration lawyers, congressional staff, and journalists.<sup>38</sup>

## Racial Profiling

Racial profiling by CBP is rampant, due in part to a series of Supreme Court precedents from the 1970s. In the 1975 case *United States v. Brignoni-Ponce*, the Supreme Court held that Border Patrol needed “reasonable suspicion” of an immigration violation to pull over a vehicle, and that the occupants’ race was not enough by itself to justify a stop. However, the court said that agents could rely on a long list of vague justifications, including “the characteristic appearance of persons who live in Mexico” and “previous experience with alien traffic.”<sup>39</sup> In the words of professor Reece Jones, the full list of justifications creates “a broad range of possible reasons to stop someone, so broad that virtually any stop can be justified.”<sup>40</sup>

In 1976, the Supreme Court held in *United States v. Martinez-Fuerte* that Border Patrol could stop drivers at interior checkpoints without any basis for suspecting them of illegal conduct, then refer drivers to a further secondary inspection “largely on the basis of apparent Mexican ancestry.”<sup>41</sup>

Twenty-four years later, in *Indianapolis v. Edmond*, the Supreme Court recognized that a “search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”<sup>42</sup> The court ruled that it was unconstitutional for the Indianapolis Police Department to set up checkpoints for the purpose of having dogs sniff passenger vehicles for drugs. It maintained, though, that the stops in the *Martinez-Fuerte* case were different. To this day, thousands of Americans have their vehicles sniffed for drugs by Border Patrol with no more individualized suspicion than the drivers in *Indianapolis v. Edmond*.<sup>43</sup>

Normally, subjecting people to search or seizure because of their race is considered a clear violation of the Constitution. And of course, race is a poor proxy for immigration status. Many counties along the U.S.-Mexico border have a population that is majority Latino, and the rest have 25-50% Latino

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<sup>38</sup> Ryan Deveraux, “A Pastor’s Legal Fight Against CBP Exposes a Reckless Surveillance Operation,” *The Intercept*, March 6, 2022, <https://theintercept.com/2022/03/06/cbp-border-surveillance-migrant-caravan/>; Julia Ainsley, “U.S. officials made list of reporters, lawyers, activists to question at border,” NBC News, March 6, 2019, <https://www.nbcnews.com/politics/immigration/u-s-officials-made-list-reporters-lawyers-activists-question-border-n980301>; Jana Winter, “Operation Whistle Pig: Inside the secret CBP unit with no rules that investigates Americans,” Yahoo! News, December 11, 2021, <https://news.yahoo.com/operation-whistle-pig-inside-the-secret-cbp-unit-with-no-rules-that-investigates-americans-100000147.html>.

<sup>39</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).

<sup>40</sup> Reece Jones, *Nobody is Protected: How the Border Patrol Became the Most Dangerous Police Force in the United States* (Berkeley, California: Counterpoint Press, 2022), 138.

<sup>41</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976).

<sup>42</sup> *Indianapolis v. Edmond*, 531 U.S. 32, 36 (2000).

<sup>43</sup> Border patrol recordkeeping on “canine assists” at checkpoints is limited to instances that lead to arrest, and unreliable even then, so it is difficult to establish the total numbers. Fernanda Santos, “Border Patrol Accused of Profiling and Abuse,” *New York Times*, October 14, 2015. <https://www.nytimes.com/2015/10/15/us/aclu-accuses-border-patrol-of-underreporting-civil-rights-complaints.html>; Government Accountability Office, *Border Security*, 33-35 [see note 13].



residents.<sup>44</sup> Nevertheless, when the Justice Department banned racial profiling by federal law enforcement officials in 2014, CBP and other agencies within the Department of Homeland Security successfully lobbied for an exemption. A Homeland Security official said this was necessary because “We tend to have a very specific clientele that we look for.”<sup>45</sup> One study of an Arizona checkpoint found that agents were 26 times more likely to ask Latino drivers for identification and 20 times more likely to pull them over for secondary inspection.<sup>46</sup> (It is difficult to obtain nationwide data about checkpoints, as Border Patrol’s recordkeeping is both limited and inconsistent.)<sup>47</sup>

Profiling also occurs along the northern U.S. border. Black CBP agents stationed in Michigan have sued the agency for allegedly engaging in and ordering them to participate in racial profiling.<sup>48</sup> CBP documents obtained by the ACLU of Michigan support their allegations. The documents show that 96.2% of non-citizens arrested by agents in the Detroit sector had a “Black,” “Dark Brown,” “Dark,” “Light Brown,” “Medium,” or “Yellow” complexion, while only 3.7% had a “Fair” or “Light” complexion. In 19.2% of Border Patrol arrests in roving patrols or on transit, agents cited the fact that the person they arrested spoke Spanish or another foreign language as part of the basis for the stop.<sup>49</sup>

## An Unaccountable, Politicized Agency

CBP’s expansive authority is particularly dangerous given the agency’s chronic problems with accountability, excessive force, and corruption.

In a 2015 report, an expert panel headed by former New York City Police Commissioner William Bratton and former Drug Enforcement Administrator Karen Tandy warned that “arrests for corruption of CBP personnel far exceed, on a per capita basis, such arrests at other federal law enforcement agencies” and the agency was “vulnerable to corruption that threatens its effectiveness and national security.”<sup>50</sup> The same panel reported one year later that the “CBP discipline system is broken” and made 39

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<sup>44</sup> Jeffrey S. Passel, Mark Hugo Lopez, and D’Vera Cohn, Pew Research Center, *U.S. Hispanic population continued its geographic spread in the 2010s* (February 3, 2022), [https://www.pewresearch.org/fact-tank/2022/02/03/u-s-hispanic-population-continued-its-geographic-spread-in-the-2010s/ft\\_2022-01-31\\_hispanicpopulation\\_05/](https://www.pewresearch.org/fact-tank/2022/02/03/u-s-hispanic-population-continued-its-geographic-spread-in-the-2010s/ft_2022-01-31_hispanicpopulation_05/). In 2000, the Ninth Circuit Court of Appeals held in *United States v. Montero-Camargo* that in light of these changing demographics, as well as case law disfavoring racial profiling, agents could no longer rely on Hispanic appearance to justify a stop. 208 F.3d 1122 (9th Cir. 2000). However, this decision has not dramatically changed Border Patrol enforcement in practice.

<sup>45</sup> Sari Horwitz and Jerry Markon, “Racial profiling will still be allowed at airports, along border despite new policy,” *Washington Post*, December 5, 2014, [https://www.washingtonpost.com/politics/racial-profiling-will-still-be-allowed-at-airports-along-border-despite-new-policy/2014/12/05/a4cda2f2-7ccc-11e4-84d4-7c896b90abdc\\_story.html](https://www.washingtonpost.com/politics/racial-profiling-will-still-be-allowed-at-airports-along-border-despite-new-policy/2014/12/05/a4cda2f2-7ccc-11e4-84d4-7c896b90abdc_story.html).

<sup>46</sup> Paul Ingram, “Residents claim racial profiling at Border Patrol checkpoint,” *Tucson Sentinel*, October 19, 2014, [https://www.tucsonsentinel.com/local/report/101914\\_arivaca\\_observers/residents-claim-racial-profiling-border-patrol-checkpoint/](https://www.tucsonsentinel.com/local/report/101914_arivaca_observers/residents-claim-racial-profiling-border-patrol-checkpoint/).

<sup>47</sup> Government Accountability Office, *Border Patrol*, 31-55 [see note 8].

<sup>48</sup> Tresa Baldas, “Officer says racism at Port Huron-Canada border happens daily: ‘It needs to be exposed’,” *Detroit Free Press*, April 2, 2021, <https://www.freep.com/story/news/local/michigan/detroit/2021/04/02/cbp-officers-blow-whistle-racial-profiling-daily-thing-border/4645648001/>.

<sup>49</sup> ACLU of Michigan, *The Border’s Long Shadow*, 5, 22, 32 [see note 4].

<sup>50</sup> Homeland Security Advisory Council, *Interim Report of the CBP Integrity Advisory Panel* (June 29, 2015), 6, <https://www.dhs.gov/sites/default/files/publications/DHS-HSAC-CBP-IAP-Interim-Report.pdf>.

recommendations for reforming the agency. Recommended reforms included greatly expanding the agency's internal affairs office and designating its sworn law enforcement officers as national security employees ineligible to be represented by a union.<sup>51</sup> The panel explained that this step would "greatly enhance CBP's ability to take appropriate disciplinary action of the type that is essential to assure integrity as is the case in the other agencies responsible for national security, both inside and outside of DHS," replacing a system of appeals that dragged out and watered down discipline for serious misconduct.<sup>52</sup>

As POGO discussed in our report last year, the advisory panel's recommendations were nowhere near fully implemented. Corruption arrests by CBP have continued and the agency has failed to address domestic violence and sexual misconduct in the ranks.<sup>53</sup> One former supervisory Border Patrol agent, Juan David Ortiz, is currently facing trial for allegedly murdering four women.<sup>54</sup>

Ortiz's case is an extreme outlier, but the agency's chronic impunity and corruption problems have not been addressed. Instead, in the words of former CBP Commissioner Gil Kerlikowske, "DHS has been completely politicized," particularly CBP.<sup>55</sup>

In March of 2016, while a campaign advisor to then-presidential candidate Donald Trump, Stephen Miller promised to give the Border Patrol Union an unprecedented role in policymaking. "I am here today to say that we are going to work closely, directly, and intimately with the National Border Patrol Council to develop a border policy for this nation," he said.<sup>56</sup> The National Border Patrol Council, which had never endorsed a presidential candidate before in its history, endorsed Trump later that month.<sup>57</sup>

Miller kept his promise. The head of the union, Brandon Judd, was appointed to Trump's transition team.<sup>58</sup> Judd attended meetings in the White House, where his views sometimes prevailed over cabinet secretaries', and appeared with Trump in the White House briefing room during a 2019 government

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<sup>51</sup> Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel* (March 15, 2016), 3-8, 11-17, 21, [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).

<sup>52</sup> Homeland Security Advisory Council, *Final Report of the CBP Integrity Advisory Panel*, 18 [see note 51].

<sup>53</sup> Mia Steinle, "13 CBP Employees Arrested for Corruption this Administration," Project On Government Oversight, April 23, 2018, <https://www.pogo.org/investigation/2018/04/13-cbp-employees-arrested-for-corruption-this-administration>; Adam Zagorin and Nick Schwellenbach, "Protecting the Predators at DHS," Project On Government Oversight, April 7, 2022, <https://www.pogo.org/investigation/2022/04/protecting-the-predators-at-dhs>.

<sup>54</sup> Rick Jervis, "Border Patrol agent's murder trial the latest in string of incidents stirring distrust," *USA Today*, November 27, 2022, <https://www.usatoday.com/story/news/nation/2022/11/27/murder-trial-laredo-border-patrol-agent-juan-david-ortiz/10762769002/>.

<sup>55</sup> Ryan Devereaux, "An Unchecked Union," *The Intercept*, December 27, 2020, <https://theintercept.com/2020/12/27/border-patrol-trump-biden-politics/>.

<sup>56</sup> Devereaux, "An Unchecked Union," [see note 55].

<sup>57</sup> Julián Aguilar, "Border Patrol Union Endorses Trump for President," *Texas Tribune*, March 30, 2016, <https://www.texastribune.org/2016/03/30/border-patrol-union-endorses-trump-president/>.

<sup>58</sup> Katie Rogers and Ron Nixon, "A Border Patrol Agent (and Frequent Fox News Guest) Has Trump's Ear on Immigration," *New York Times*, April 2, 2018, <https://www.nytimes.com/2018/04/02/us/politics/border-patrol-trump-brandon-judd-fox.html>.

shutdown over a dispute about border wall funding.<sup>59</sup> (Most federal unions strongly opposed the shutdown, which forced members into furloughs or to work with their paychecks frozen.)<sup>60</sup>

Later in 2019, Trump met with Judd at the White House while the union was engaged in contract negotiations. While in the room with Judd, Trump called acting CBP Commissioner Mark Morgan to encourage him to reach a deal with the union. Morgan complied, and the National Border Patrol Council was rewarded with a contract until 2025 that greatly increased the amount of “official time,” in which government agencies pay the salaries of employees who work for the union on labor relations matters rather than their agency’s normal duties.<sup>61</sup> “Official time” is a normal feature of federal union contracts, authorized by the Federal Labor Relations Act, but the amount Border Patrol received was not normal, nor was the direct interference of the president in contract negotiations. The union received the equivalent of 74 full-time paid positions in “official time”— three times as much as Border Patrol had used under its contract, and eight times as much as the union would have received under standards the White House imposed on other federal employee unions a few weeks later.<sup>62</sup>

In January of 2020, the government officially designated CBP as a “security agency,” protecting employees’ names from being released in response to Freedom of Information Act requests.<sup>63</sup> This designation, while previously reserved for agencies like the FBI and the Secret Service, was consistent with CBP leadership’s repeated statements that “border security is national security.”<sup>64</sup> But it is not consistent with the continued recognition of the National Border Patrol Council under federal labor law, which states that employees engaged in work “which directly affects national security” should not be recognized as part of a collective bargaining unit, like a union.<sup>65</sup>

Adding to the increased politicization of CBP, the Border Patrol Union is openly hostile to Democratic politicians. In 2019, *ProPublica* reported on a secret Facebook group known as “I’m 10-15,” which had

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<sup>59</sup> Eliana Johnson, “Fiery West Wing meeting led to more power for military at U.S.-Mexico border,” *Politico*, November 22, 2018, <https://www.politico.com/story/2018/11/22/kelly-nielsen-debate-border-troops-1012547>; Dara Lind, “How the Border Patrol union became Trump’s closest shutdown allies,” *Vox*, January 3, 2019, <https://www.vox.com/2019/1/3/18167401/shutdown-border-wall-trump-patrol-agents>.

<sup>60</sup> Caitlin Emma, “Federal employee union sues Trump over government shutdown,” *Politico*, December 31, 2018, <https://www.politico.com/story/2018/12/31/union-sues-trump-government-shutdown-afge-1077360>.

<sup>61</sup> Collective Bargaining Agreement Between the National Border Patrol Council and U.S. Customs and Border Protection (November 1, 2019), <https://cdn.website-editor.net/5c378a023be14294962fa8a8b0a4c761/files/uploaded/NBPC-CBP-CBA-signed%252009-17-19%2520%2528NEW%2529.pdf>.

<sup>62</sup> Nick Miroff, Josh Dawsey, and Arelis Hernández, “With Trump backing, Border Patrol contract significantly increases union staffing,” *Washington Post*, December 10, 2019, [https://www.washingtonpost.com/national/with-trump-backing-border-patrol-contract-significantly-increases-union-staffing/2019/12/10/77025414-16da-11ea-a659-7d69641c6ff7\\_story.html](https://www.washingtonpost.com/national/with-trump-backing-border-patrol-contract-significantly-increases-union-staffing/2019/12/10/77025414-16da-11ea-a659-7d69641c6ff7_story.html).

<sup>63</sup> Ken Klippenstein, “Exclusive: Customs and Border Protection Gains an Additional Layer of Secrecy,” *The Nation*, February 4, 2020, <https://www.thenation.com/article/politics/cbp-security-agency/>.

<sup>64</sup> *Examining the Department of Defense’s Deployment to the U.S.-Mexico Border: Hearing Before the House Committee on Homeland Security, Subcommittee on Border Security, Facilitation, and Operations*, 116th Congress (June 20, 2019) (Testimony of Carla L. Provost, Chief, U.S. Border Patrol), <https://homeland.house.gov/imo/media/doc/Testimony-Provost.pdf>; U.S. Customs and Border Protection, 2022-2026 U.S. Border Patrol Strategy (2022) <https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/USBPStrategy%20-%20FINAL.pdf#page=7>.

<sup>65</sup> 5 U.S.C. § 7112(b)(6) (2022), <https://www.law.cornell.edu/uscode/text/5/7112>.



9,500 members around the country, including the chief of Border Patrol at the time, Carla Provost. Agents not only posted dehumanizing remarks and photographs of asylum seekers and other migrants, but posted sexually explicit, digitally altered images of Democratic representatives and referred to them as “bitches” and “hoes.”<sup>66</sup> (Provost said she logged on only rarely to the group, and “I am as outraged as everyone else when it comes to the statements that were made on that page.”)<sup>67</sup> CBP began a disciplinary investigation, but very little changed. According to a report by the House Oversight and Reform Committee, investigators found that 60 agents had engaged in misconduct and recommended that 24 of them be fired, but in the end only two agents lost their jobs.<sup>68</sup>

The agency’s politicization and insubordination continued after President Joe Biden took office. When Department of Homeland Security Secretary Alejandro Mayorkas toured the border in January 2022, at least one agent turned his back on him. Another secretly recorded the meeting and leaked the audio to a conservative website.<sup>69</sup>

In September 2022, CBP West Texas’s official Twitter account retweeted several tweets by former Trump advisor Stephen Miller, including one that claimed, “Biden’s eradication of our border means we are no longer a Republic—he’s ended nearly 250 years of constitutional government.”<sup>70</sup> The National Border Patrol Council’s Twitter feed is full of similar false accusations that Biden is a friend of drug cartels and has opened the border.<sup>71</sup> Nonetheless, the union retains both its favorable contract and its “security agency” designation.

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<sup>66</sup> 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>; Ryan Deveraux, “Border Patrol Chief Carla Provost Was a Member of Secret Facebook Group,” *The Intercept*, July 12, 2019, <https://theintercept.com/2019/07/12/border-patrol-chief-carla-provost-was-a-member-of-secret-facebook-group/>.

<sup>67</sup> Alex Horton, “A Border Patrol chief in a racist Facebook group says she didn’t realize it was racist,” *Washington Post*, July 25, 2019, <https://www.washingtonpost.com/nation/2019/07/25/border-patrol-chief-was-member-racist-facebook-group-says-she-didnt-notice/>.

<sup>68</sup> Staff of House Committee on Oversight and Reform, 117th Cong., *Border Patrol Agents in Secret Facebook Group Faced Few Consequences for Misconduct*, 2, 8 (Committee Print 2021), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/COR%20CBP%20Facebook%20Group%20Report%20-%20October%202021.pdf>.

<sup>69</sup> Geneva Sands, “Leaked audio and video show Border Patrol agents confronting Homeland Security secretary at meetings,” *CNN*, February 1, 2022, <https://www.cnn.com/2022/02/01/politics/border-patrol-agents-mayorkas/index.html#:~:text=At%20one%20point%20during%20the,the%20day%20he%20was%20appointed>.

<sup>70</sup> Zachary Petrizzo, “U.S. Customs and Border Protection Twitter Account Shares Stephen Miller Posts,” *The Daily Beast*, September 10, 2022, <https://www.thedailybeast.com/customs-and-border-protection-twitter-account-shares-stephen-miller-posts>.

<sup>71</sup> National Border Patrol Council (@BPUnion), “Joe Biden doesn’t care one bit about the mess he’s made, the deaths and human misery he’s caused, his enrichment of cartels or the costs to the American people. He’s singularly focused on an open border,” Twitter, November 28, 2022, <https://twitter.com/BPUnion/status/1597262323814567936>; National Border Patrol Council (@BPUnion), “Joe Biden and his policies have made more money for murderous cartel thugs than anything else in the history of cartels,” Twitter, November 25, 2022, <https://twitter.com/BPUnion/status/1596156034816638977>; National Border Patrol Council (@BPUnion), “When Biden wins the criminal cartels win. He feeds them billions of dollars with his horrendous...Biden & the politicians who vote with him are the best friends cartels ever had.” Twitter, October 12, 2022, <https://twitter.com/BPUnion/status/1580350965492088833>.

## CBP Cracks Down on Civilian Dissent

During Trump's last year in office, his administration repeatedly deployed CBP personnel into the interior of the country. In February of 2020, the administration announced that it would send CBP officers to assist Immigration and Customs Enforcement in making arrests in cities, including New York City, Chicago, Los Angeles, Atlanta, Houston, New Orleans, Detroit, Newark, and Boston. The officers dispatched included members of a militarized tactical Border Patrol unit known as BORTAC.<sup>72</sup>

CBP airplanes, helicopters, and drones conducted hundreds of hours of surveillance of racial justice protests after George Floyd's murder.<sup>73</sup> CBP deployed 66 BORTAC agents, including members of sniper teams, to Floyd's funeral in suburban Houston.<sup>74</sup> The agency also sent 400 officers to the Washington, DC, area in early June 2020, and 443 more to Portland, Oregon, from June to December of 2020.<sup>75</sup> (The legal justification for these deployments was not the border enforcement zone statute, but rather 40 U.S.C. § 1315, which allows the Secretary of Homeland Security to designate DHS employees to assist the Federal Protective Service in protecting federal property.)<sup>76</sup>

BORTAC agents and other federal officials arrested protesters and took them into unmarked vans with tinted windows, and used excessive force against Portland protesters.<sup>77</sup> Federal forces deployed to Portland did not display individual names, identification numbers, or their agency names on their uniforms, so it was often difficult or impossible for protesters and journalists to know exactly which agency was responsible for each abuse. According to an internal DHS report, the acting Secretary of Homeland Security and his deputy originally asked the agency's Office of Intelligence and Analysis Operations to create dossiers on everyone participating in the protests.<sup>78</sup> This was later restricted to

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<sup>72</sup> Caitlin Dickerson and Zolan Kanno-Youngs, "Border Patrol Will Deploy Elite Tactical Units to Sanctuary Cities," *New York Times*, February 14, 2020, <https://www.nytimes.com/2020/02/14/us/Border-Patrol-ICE-Sanctuary-Cities.html>.

<sup>73</sup> Zolan Kanno-Youngs, "U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance," *New York Times*, June 19, 2020, <https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html>.

<sup>74</sup> Julián Aguilar, "Texas ACLU criticizes the extensive law enforcement presence at George Floyd's funeral," October 1, 2020, <https://www.texastribune.org/2020/10/01/george-floyd-burial-police-texas/>.

<sup>75</sup> Jana Winter, "Exclusive: Leaked document reveals details of federal law enforcement patrolling Washington amid protests," Yahoo! News, June 5, 2020, [https://news.yahoo.com/exclusive-leaked-document-reveals-details-of-federal-law-enforcement-patrolling-washington-amid-protests-154138680.html?soc\\_src=hl-viewer&soc\\_trk=tw](https://news.yahoo.com/exclusive-leaked-document-reveals-details-of-federal-law-enforcement-patrolling-washington-amid-protests-154138680.html?soc_src=hl-viewer&soc_trk=tw); Department of Homeland Security to Ron Wyden, senator, regarding information requested in Wyden's June 19, 2021 letter to DHS, [https://www.wyden.senate.gov/imo/media/doc/Enclosure%20Response%20to%2006.09.21%20RFI%20v16%20\(unrestricted\)%20Revised%20Redacted.pdf](https://www.wyden.senate.gov/imo/media/doc/Enclosure%20Response%20to%2006.09.21%20RFI%20v16%20(unrestricted)%20Revised%20Redacted.pdf).

<sup>76</sup> Melissa Quinn, "White House defends legality of use of federal agents in Portland," CBS News, July 21, 2020, <https://www.cbsnews.com/news/portland-protests-federal-agents-white-house-dhs-legality/>.

<sup>77</sup> Shawn Boburg, Meg Kelly, and Joyce Sohyun Lee, "Swept up in the federal response to Portland protests: 'I didn't know if I was going to be seen again,'" *Washington Post*, September 10, 2020 (video and text), <https://www.washingtonpost.com/graphics/2020/investigations/portland-protesters-federal-response-trump/>; Kathryn Hampton, Michele Heisler, and Donna McKay, Physicians for Human Rights, "Now they just seem to want to hurt us": *Dangerous Use of Crowd-control Weapons against Protestors and Medics in Portland, Oregon* (October 8, 2020), <https://phr.org/our-work/resources/now-they-just-seem-to-want-to-hurt-us-portland-oregon/>.

<sup>78</sup> Office of Intelligence and Analysis, Department of Homeland Security, *Office of Intelligence and Analysis Operations in Portland* (April 20, 2021) 54, n.400, <https://s3.documentcloud.org/documents/23257042/ia-and-ogc-portland-reports.pdf>.

people arrested at the protests, but the department did create dossiers on individuals “arrested for trivial criminal infractions having little to no connection to domestic terrorism,” such as trespassing or failing to comply with an order.<sup>79</sup>

Local and state officials denounced the federal deployment. So did Tom Ridge, the former governor of Pennsylvania and the first head of the Department of Homeland Security at its inception in 2003. “It would be a cold day in hell before I would consent or agree to the unsolicited, uninvited intervention in any of my cities,” Ridge said. “I certainly don’t favor that kind of action, and certainly don’t think DHS was designed for that purpose to start with...it wasn’t designed to be the President’s personal militia.”<sup>80</sup> The Oregon attorney general sued CBP, DHS, and other agencies for violating protestors’ rights.<sup>81</sup>

The Biden administration withdrew BORTAC and other DHS personnel from Portland, but the agency has not disciplined agents for excessive force against racial justice protesters. According to the Government Accountability Office, CBP agents in Portland reported on 229 uses of “chemical munitions” (such as tear gas and pepper spray), 106 uses of “kinetic impact munitions” (such as rubber bullets and beanbag rounds), and 107 uses of “mixed munitions” (combinations of the previous categories).<sup>82</sup> Internal agency review boards found that “nearly all” of these complied with the agency’s use-of-force policy. In the only five incidents found not to be consistent with the policy, reviewers nevertheless concluded that “the actual use of force was reasonable and justified.”<sup>83</sup> DHS’s inspector general also found that the deployment was legally justified under 40 U.S.C. § 1315, disregarding evidence that federal forces escalated violence.<sup>84</sup>

## Inadequate Attempts at Reform

The Biden administration has not implemented major policy changes to prevent CBP from being used against dissenters, or to protect non-citizens and residents of border communities from abuse. The

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<sup>79</sup> Office of Intelligence and Analysis, Department of Homeland Security, *Office of Intelligence and Analysis Operations in Portland*, 55, 58-59 [see note 78].

<sup>80</sup> “Tom Ridge, The First Homeland Security Secretary, Says He’d Likely Resign Before Letting Federal Agents Into American Cities,” CBS Pittsburgh, July 23, 2020, <https://www.cbsnews.com/pittsburgh/news/tom-ridge-says-he-would-likely-resign-before-letting-federal-agents-into-cities/>.

<sup>81</sup> Emily Gillespie and Rachel Siegel, “Oregon attorney general sues federal agencies for allegedly violating protestors’ civil rights,” *Washington Post*, July 19, 2020, <https://www.washingtonpost.com/nation/2020/07/18/portland-oreland-ag-lawsuit/>.

<sup>82</sup> Government Accountability Office, *Law Enforcement: Federal Agencies Should Improve Reporting and Review of Less-Lethal Force*, GAO 22-104470 (December 2021) 38, <https://www.gao.gov/assets/720/718230.pdf#page=45>.

<sup>83</sup> Government Accountability Office, *Law Enforcement: Federal Agencies Should Improve Reporting and Review of Less-Lethal Force*, 56 [see note 82].

<sup>84</sup> Department of Homeland Security Inspector General, *DHS Had Authority to Deploy Federal Law Enforcement Officers to Protect Federal Facilities in Portland, Oregon, but Should Ensure Better Planning and Execution in Future Cross-Component Activities*, OIG 21-31 (April 16, 2021) 8-15, <https://www.oig.dhs.gov/sites/default/files/assets/2021-04/OIG-21-31-Mar21.pdf>; Ainara Tiefenthäler, Evan Hill, Drew Jordan, Malachy Browne, and David Botti, “Videos Show How Federal Officers Escalated Violence in Portland,” *New York Times*, July 24, 2020, <https://www.nytimes.com/video/us/100000007243995/portland-protests-federal-government.html>.



administration has taken some limited positive steps, but none have been commensurate with the threat presented by CBP's impunity.

In September 2021, Secretary of Homeland Security Mayorkas announced the formation of an internal committee called the Law Enforcement Coordination Council. The council's purpose is "to comprehensively assess a broad range of law enforcement matters...that ensure more fair, equitable, and impartial policing."<sup>85</sup> But the council includes no participants outside of government, and its work has occurred entirely behind closed doors.<sup>86</sup>

This announcement was made shortly after a September 2021 incident when mounted Border Patrol agents charged at Haitian migrants on the banks of the Rio Grande near Del Rio, Texas.<sup>87</sup> Photographs and video of the incident went viral, and Mayorkas promised Congress an investigation that would conclude in "days, not weeks."<sup>88</sup> In fact, the investigation took months — and investigators did not interview a single Haitian migrant about the incident before drawing their conclusions.<sup>89</sup>

Additionally, an increasing number of Border Patrol car chases are ending in fatalities — 21 deaths as of August 15, 2022, which is on pace to break last year's annual record.<sup>90</sup> Until recently, those incidents were investigated by Border Patrol "Critical Incident Teams," despite a growing body of evidence that these teams were "cover-up units" that tampered with investigation results with the explicit objective of shielding agents from liability.<sup>91</sup> Former CBP Commissioner Chris Magnus directed the Critical Incident Teams to disband and fully transfer investigative authority to the agency's Office of

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<sup>85</sup> Department of Homeland Security, "DHS Announces Continued Efforts, Outlines Steps Taken to Address Best Practices in Law Enforcement Efforts," press release, September 29, 2021, <https://www.dhs.gov/news/2021/09/29/dhs-announces-continued-efforts-outlines-steps-taken-address-best-practices-law>.

<sup>86</sup> Civil society groups to Alejandro Mayorkas, Secretary of Homeland Security, about Law Enforcement Coordination Council, October 19, 2021, [https://www.hrw.org/sites/default/files/media\\_2021/10/NGO%20Letter%20to%20Sec.%20Mayorkas%20re%20LECC%2010-19-21.pdf](https://www.hrw.org/sites/default/files/media_2021/10/NGO%20Letter%20to%20Sec.%20Mayorkas%20re%20LECC%2010-19-21.pdf).

<sup>87</sup> Sarah Turberville and Chris Rickerd, "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>.

<sup>88</sup> Kevin Johnson, "DHS vows to have findings within 'days' in investigation of Border Patrol's treatment of Haitian migrants," *USA Today*, September 22, 2021, <https://www.usatoday.com/story/news/politics/2021/09/22/photos-border-patrol-using-horse-reins-whips-prompts-dhs-probe/5812845001/>.

<sup>89</sup> Office of Professional Responsibility, U.S. Customs and Border Protection, *Report of Investigation: Allegations of Misconduct by Del Rio Sector Horse Patrol Unit Members*, No. 202112280 (2022), <https://www.cbp.gov/sites/default/files/assets/documents/2022-Jul/202112280-cbp-closing-report-public-redacted-final.pdf>; Rebecca Deitsch, "Democrats want answers after CBP failed to interview corralled Haitian migrants," *The Hill*, November 10, 2022, <https://thehill.com/policy/national-security/3730108-democrats-want-answers-after-cbp-failed-to-interview-corralled-haitian-migrants/>.

<sup>90</sup> Veronica Escobar et al., U.S. Representatives, to Chris Magnus, commissioner of Customs and Border Protection, about fatal vehicle crashes after CBP vehicle pursuits, September 13, 2022, [https://escobar.house.gov/uploadedfiles/8.15.22\\_letter\\_to\\_cbp\\_on\\_high\\_speed\\_pursuits.pdf](https://escobar.house.gov/uploadedfiles/8.15.22_letter_to_cbp_on_high_speed_pursuits.pdf).

<sup>91</sup> Southern Border Communities Coalition and Alliance San Diego, letter to congressional leadership, about request for congressional investigations and oversight hearings on the unlawful operation of the U.S. Border Patrol's Critical Incident Teams, October 27, 2021, [https://d3n8a8pro7vhmx.cloudfront.net/alliancesandiego/pages/3292/attachments/original/1635367319/SBCC\\_Letter\\_to\\_Congress\\_Final\\_10.27.21.pdf?1635367319](https://d3n8a8pro7vhmx.cloudfront.net/alliancesandiego/pages/3292/attachments/original/1635367319/SBCC_Letter_to_Congress_Final_10.27.21.pdf?1635367319).

Professional Responsibility.<sup>92</sup> But that office may be hiring some of the same Border Patrol agents who tampered with investigations, and there has been no indication that past “investigations” by CITs are being reopened.<sup>93</sup>

Like many law enforcement agencies, CBP has begun using body-worn cameras, but its body camera policy is flawed.<sup>94</sup> There is no mechanism for public, timely release of the footage, even to individuals whose encounters with agents are recorded. Nor is there assurance that officers involved in excessive use of force will not be able to view the footage of the incident in question before drafting a detailed explanation of their conduct.<sup>95</sup>

Typically, investigations into corruption, waste, and abuse of power within a federal agency fall to that agency’s office of the inspector general. CBP falls under the Department of Homeland Security, which is overseen by watchdog Inspector General Joseph V. Cuffari. However, POGO has uncovered evidence that Cuffari has repeatedly concealed evidence of wrongdoing by the agency, including inadequate discipline for sexual misconduct and domestic violence by CBP personnel.<sup>96</sup> DHS Secretary Mayorkas announced yet another internal review in response to POGO’s reporting, which resulted in some reforms to the disciplinary process.<sup>97</sup> The specifics are not public though, and the effectiveness of any changes is difficult to evaluate from outside the agency. Cuffari remains in place as inspector general, despite calls for this removal from POGO and his own employees, as well as a loss of confidence from several members of Congress.<sup>98</sup>

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<sup>92</sup> Chris Magnus, commissioner of Customs and Border Protection, to chief of Border Patrol and others, about Critical Incident Response Transition and Support, May 3, 2022, <https://www.cbp.gov/sites/default/files/assets/documents/2022-May/critical-incident-response-memo-0522.pdf>.

<sup>93</sup> Southern Border Communities Coalition and Alliance San Diego to congressional leadership, about investigations of Border Patrol Critical Incident Teams, August 11, 2022, [https://assets.nationbuilder.com/alliancesandiego/pages/409/attachments/original/1660253686/Letter to Congress re BPCIT Aug 2022 r1.pdf?1660253686](https://assets.nationbuilder.com/alliancesandiego/pages/409/attachments/original/1660253686/Letter_to_Congress_re_BPCIT_Aug_2022_r1.pdf?1660253686).

<sup>94</sup> 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>; U.S. Customs and Border Protection, *CBP Directive No. 4320-030B: Incident Driven Video Recording System* (August 6, 2021), <https://www.cbp.gov/sites/default/files/assets/documents/2022-Feb/CBP-Directive-4320-030B-IDVRS-signed-508.pdf>.

<sup>95</sup> Human Rights Watch, Project On Government Oversight, and Southern Border Communities Coalition to Chris Magnus, CBP commissioner, about suggested changes to CBP’s Incident-Driven Video Recording System policies, March 29, 2022, <https://www.pogo.org/letter/2022/03/letter-to-u-s-customs-and-border-protection-on-body-worn-camera-program>.

<sup>96</sup> Adam Zagorin and Nick Schwellenbach, “Protecting the Predators at DHS” [see note 53]; Nick Schwellenbach and Adam Zagorin, “DHS Watchdog Nixed Alert to Congress About Purged January 6 Texts, New Docs Show,” Project On Government Oversight, August 11, 2022, <https://www.pogo.org/investigation/2022/08/dhs-watchdog-nixed-alert-to-congress-about-purged-january-6-texts-new-docs-show>.

<sup>97</sup> Justin Doubleday, “DHS reviewing misconduct discipline processes after unpublished OIG reports come to light,” Federal News Network, April 15, 2022, <https://federalnewsnetwork.com/agency-oversight/2022/04/dhs-reviewing-misconduct-discipline-processes-after-unpublished-ig-reports-come-to-light/>; Department of Homeland Security, “Secretary Mayorkas Directs DHS To Reform Employee Misconduct Discipline Process,” Press Release, June 16, 2022, <https://federalnewsnetwork.com/agency-oversight/2022/04/dhs-reviewing-misconduct-discipline-processes-after-unpublished-ig-reports-come-to-light/>.

<sup>98</sup> Nick Schwellenbach, “DHS Watchdog Staff Call on Biden to Fire Inspector General Cuffari,” Project On Government Oversight, September 23, 2022, <https://www.pogo.org/investigation/2022/09/dhs-watchdog-staff>.

Most recently, CBP Director Chris Magnus was forced out after less than a full year on the job. Magnus reportedly refused to provide a “retention bonus” to encourage Border Patrol Chief Raul Ortiz to stay on beyond his scheduled retirement, because Ortiz repeatedly opposed Magnus’s attempts at reform.<sup>99</sup> Magnus told reporters that “some in the top leadership at DHS did not understand what reform even looked like within a law enforcement organization,” and made decisions that would have left him a “figurehead.”<sup>100</sup> His departure may jeopardize the modest reforms that CBP has announced — and further reduces the likelihood that the Biden administration will take the more drastic steps needed to protect against CBP abuses in the future.

Meanwhile, the White House has done nothing to limit Border Patrol’s authority or its budget. The administration’s draft budget for fiscal year 2023 requests an additional \$1.5 billion for CBP, including \$589 million for Border Patrol.<sup>101</sup> Much of that spending is going toward surveillance technology. Border Patrol has already installed about 175 “autonomous surveillance towers” that use thermal imaging and artificial intelligence to notify agents of potential border crossers.<sup>102</sup> A new app collects facial recognition data on asylum seekers, and “robot dogs” are at an early stage of development.<sup>103</sup>

## Worst-Case Scenarios

If a future president wanted to make full use of CBP’s authority to harm political opponents and quash dissent, how would they do so, and what could be done to prevent it?

An obvious first target would be undocumented immigrants, including people brought to the United States as children and other longtime U.S. residents as well as recent border crossers. CBP could expand the number of checkpoints and roving patrols across the border zone, particularly in major

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[call-on-biden-to-fire-inspector-general-cuffari](#); Claudia Grisales, “DHS watchdog appointed by Trump has fueled an exodus of agency lawyers, sources say,” NPR, October 12, 2022,

<https://www.npr.org/2022/10/12/1127014951/dhs-inspector-general-cuffari-trump-jan-6>.

<sup>99</sup> Nick Miroff and Maria Sachetti, “CBP commissioner says he refused resignation request from homeland security secretary,” *Washington Post*, November 11, 2022, <https://www.washingtonpost.com/national-security/2022/11/11/cbp-homeland-magnus-mayorkas/>; Joel Rose, “Top U.S. border official Chris Magnus resigns after less than a year on the job,” NPR, November 12, 2022,

<https://www.npr.org/2022/11/12/1136321045/customs-and-border-protection-chris-magnus-resigns-migrants>.

<sup>100</sup> Hamed Aleaziz, “Top border official Magnus says he’s been asked to resign but has refused,” *Los Angeles Times*, November 11, 2022, <https://www.latimes.com/politics/story/2022-11-11/border-protection-commissioner-chris-magnus-say-he-has-been-asked-to-resign-but-refuses>; Eileen Sullivan, “Top Border Official Says He Was Asked to Resign,” *New York Times*, November 11, 2022, <https://www.nytimes.com/2022/11/11/us/politics/dhs-border-official-magnus.html>.

<sup>101</sup> Aaron Reichlin-Melnick, “Biden Released His Budget for 2023—What Does It Mean for Immigration Issues,” *Immigration Impact*, April 8, 2022, <https://immigrationimpact.com/2022/04/08/biden-immigration-budget-2023/>.

<sup>102</sup> Nick Miroff, “Powered by artificial intelligence, ‘autonomous’ border towers test Democrats’ support for surveillance technology,” *Washington Post*, March 11, 2022, <https://www.washingtonpost.com/national-security/2022/03/11/mexico-border-surveillance-towers/>.

<sup>103</sup> Shawna Chen, “Biden administration using surveillance app for asylum seekers,” *Axios*, June 4, 2021, <https://www.axios.com/2021/06/04/border-asylum-seekers-facial-recognition-app>; Department of Homeland Security, Science and Technology Directorate, “Feature Article: Robot Dogs Take Another Step Towards Deployment at the Border,” press release, February 1, 2022, <https://www.dhs.gov/science-and-technology/news/2022/02/01/feature-article-robot-dogs-take-another-step-towards-deployment>.



cities, along the northern border, and along the coasts. It could select people with dark skin for secondary checkpoint inspections, have dogs “sniff” their vehicles for evidence of drugs, and force them to undergo biometric scans to verify their immigration status. Within 25 miles of a land border or coastline, CBP could question people on private property, without a warrant and without property owners’ consent (although this authority does not apply to people’s homes).<sup>104</sup>

Instead of being placed into deportation proceedings before an immigration judge, undocumented people caught at checkpoints or roving patrols could be summarily deported in a matter of weeks under a procedure called “expedited removal.” The Trump administration attempted to dramatically expand expedited removal in 2019 but was blocked by the courts until shortly before the 2020 election, and the Biden administration rescinded the expansion.<sup>105</sup> If it was reinstated, the pace of deportations could rise dramatically. In expedited removal proceedings, an immigration officer acts as both prosecutor and judge. Non-citizens are detained throughout the process, with no right to an attorney and no practical ability to gather evidence, but they have the burden of proving “to the satisfaction of an immigration officer” that they cannot legally be removed.<sup>106</sup>

Expanded CBP checkpoints could also be used for general crime control and drug interdiction, much like what CBP has engaged in in New Hampshire, Vermont, and myriad other checkpoints where Americans are apprehended for marijuana possession. It doesn’t take much to imagine how these checkpoints could be used to limit access to abortion in the wake of *Dobbs v. Jackson Women's Health Organization*. Even under an administration that supports legal abortion, existing CBP checkpoints prevent many undocumented people in Texas and Arizona from traveling to clinics to obtain abortions, a problem that actually predated *Dobbs*.<sup>107</sup> A new president could increase the federal restrictions on abortion pills, attempt to crack down on individuals bringing in the medications from Mexico, or authorize CBP to share surveillance data with state and local officials seeking to criminally investigate and punish people for getting abortions. Roving patrols could stop people within the interior of the U.S. from doing the same. Following this logic, checkpoints could be similarly weaponized against families of transgender people seeking gender-affirming care in the face of state bans.

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<sup>104</sup> 8 U.S.C. § 1357(a)(3) [see note 2].

<sup>105</sup> Scott Shackford, “Papers Please! DHS Wants Power to Deport People Faster with Less Judicial Oversight,” *Reason*, July 22, 2019, <https://reason.com/2019/07/22/papers-please-dhs-wants-power-to-deport-people-faster-with-less-judicial-oversight/>; Spencer S. Hsu, “Judge bars Trump’s fast-track deportation policy, saying threat to legal migrants was not assessed,” *Washington Post*, September 28, 2019, [https://www.washingtonpost.com/local/legal-issues/judge-bars-trump-fast-track-deportation-policy-saying-threat-to-legal-migrants-was-not-assessed/2019/09/28/cf3d237e-e1ed-11e9-b199-f638bf2c340f\\_story.html](https://www.washingtonpost.com/local/legal-issues/judge-bars-trump-fast-track-deportation-policy-saying-threat-to-legal-migrants-was-not-assessed/2019/09/28/cf3d237e-e1ed-11e9-b199-f638bf2c340f_story.html); Camilo Montoya-Galvez, “ICE moves to quickly deport more immigrants without court hearings,” *CBS News*, October 21, 2020, <https://www.cbsnews.com/news/ice-deportations-expedited-removal/>; Daniel Wiessner, “DHS withdraws Trump-era rule that expanded quick deportations,” *Reuters*, March 18, 2022, <https://www.reuters.com/legal/litigation/dhs-withdraws-trump-era-rule-that-expanded-quick-deportations-2022-03-18/>.

<sup>106</sup> 8 C.F.R. § 235.3 (2022), <https://www.law.cornell.edu/cfr/text/8/235.3>. The requirement of detention does not apply to unaccompanied children.

<sup>107</sup> Andrea Grimes, “In Texas’ Rio Grande Valley, a Reproductive Health Care Crisis Goes From Bad to Worse,” *Rewire News Group*, January 22, 2014, <https://rewirenewsgroup.com/2014/01/22/in-texas-rio-grande-valley-a-reproductive-health-care-crisis-goes-from-bad-to-worse/>.

BORTAC and other CBP agents could also be deployed against protesters again in greater numbers and in multiple cities, within or outside of the border enforcement zone. In the weeks before the 2020 election, DHS agents were instructed to be prepared to protect federal property in Washington, DC, in case of election day unrest.<sup>108</sup> CBP could also use surveillance drones, helicopters, and planes to monitor protests, as it did during the George Floyd protests, or seize and copy activists' devices at airports.<sup>109</sup>

Many of these actions would be challenged in court as violations of the Constitution. Even in the 1970s, the Supreme Court applied different rules to the Border Patrol. The current court has repeatedly narrowed women's and non-citizens' rights, even when it meant overturning years of precedent. The court has also aggressively used its "shadow docket" in support of the right-wing supermajority's political allies. These trends are likely to continue and intensify. Because the courts cannot be counted on to protect U.S. citizens and non-citizens from abuses by CBP, it is imperative for the political branches to act.

## Recommendations for the Executive Branch

There is a great deal the executive branch could do on its own to increase accountability at the agency and reduce the risk of future abuses. Critical steps include:

### 1. Limit checkpoints and shrink the border enforcement zone.

The use of permanent, suspicionless checkpoints well into the interior of the United States is inconsistent with the Fourth Amendment and the fundamental right to travel within the country. It also has limited utility for immigration enforcement. Interior checkpoints should be limited and ultimately phased out. In the meantime, at a minimum, the executive branch should undertake a rulemaking to revise the regulations governing CBP to:

- Assess *sector-by-sector* what constitutes a "reasonable distance" from the border for CBP to operate, based on the factors listed in the current regulation.<sup>110</sup> We expect that this would lead to a smaller zone of operations everywhere, and a minimal zone near major urban areas, most U.S. coastlines, and along the northern border. Measurements of the "reasonable distance" should begin at actual international boundaries, not bodies of water within the United States such as Lake Michigan.

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<sup>108</sup> Julia Ainsley, "In a first, ICE agents are poised to respond to potential Election Day unrest," NBC News, October 30, 2020, <https://www.nbcnews.com/politics/2020-election/first-ice-agents-are-poised-respond-potential-election-day-unrest-n1245486>.

<sup>109</sup> Drew Harwell, "Customs officials have copied Americans' phone data at massive scale," *Washington Post*, September 15, 2022. <https://www.washingtonpost.com/technology/2022/09/15/government-surveillance-database-dhs/>.

<sup>110</sup> Those factors are: "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." 8 C.F.R. § 287.1(b) [see note 3].

- Issue policy guidance limiting Border Patrol incursions onto private property based on the same factors.
- Narrowly and specifically define the unusual circumstances under which CBP can be authorized to operate beyond the normal “reasonable distance” from the border.
- Ensure that any remaining checkpoints are not a barrier to individuals seeking medical care and other essential services.

## 2. Ban racial and religious profiling by CBP.

In 2014, the Justice Department banned federal law enforcement agencies from engaging in profiling on the basis of race, ethnicity, religion, sexual orientation, or gender. Then-Attorney General Eric Holder described profiling as “not only wrong, it is profoundly misguided and ineffective.”<sup>111</sup> Over Holder’s objections, though, the policy made exceptions to allow consideration of race and ethnicity for activities “in the vicinity of the border” as well as in national security investigations.<sup>112</sup> Those exceptions should be removed.

## 3. Empower vigorous oversight of CBP within the executive branch.

- Ensure that the inspector general of DHS possesses the skills and mandate to vigorously and independently investigate CBP and other components of the department. In the short term, this requires removing Joseph Cuffari as DHS inspector general. Cuffari has demonstrated a clear lack of independence and has provided cover for misconduct by DHS law enforcement, including CBP.
- Sign an executive order authorizing the Department of Justice Civil Rights Division to conduct investigations to determine whether there is a pattern or practice of constitutional or statutory violations by federal law enforcement agencies, and direct that the division conduct such an investigation into Border Patrol.
- In consultation with the Civil Rights Division and the DHS Office for Civil Rights and Civil Liberties, create an independent commission of experts, including border stakeholders and advocates, to (a) reexamine individual cases of death and serious injury caused by CBP over the last 10 years, and (b) serve as a permanent civilian oversight body for CBP with power to review new investigations by internal components.

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<sup>111</sup> Sari Horwitz, “Justice Dept. announces new rules to curb racial profiling by federal law enforcement,” *Washington Post*, December 8, 2014, [https://www.washingtonpost.com/world/national-security/justice-dept-to-announce-new-rules-to-curb-racial-profiling-by-federal-law-enforcement/2014/12/07/e00eca18-7e79-11e4-9f38-95a187e4c1f7\\_story.html](https://www.washingtonpost.com/world/national-security/justice-dept-to-announce-new-rules-to-curb-racial-profiling-by-federal-law-enforcement/2014/12/07/e00eca18-7e79-11e4-9f38-95a187e4c1f7_story.html).

<sup>112</sup> Liz Goodwin, “A big loophole in Holder’s new racial profiling guidance—the border,” Yahoo! News, December 9, 2014, <https://news.yahoo.com/a-big-loophole-in-holder-s-new-racial-profiling-guidelines%E2%80%94the-border-172657057.html>.

#### 4. Increase transparency.

DHS should strengthen transparency by taking the following steps.

- Create a process for the timely disclosure of video footage from CBP officers' and agents' body cameras, dashboard cameras, and cameras within detention facilities. This should include provisions for release to individuals whose encounters with agents are recorded (as well as their family members and legal representatives); and redaction and release to the general public.
- Promptly and proactively release internal investigations and reviews into incidents by CBP's National Use of Force Review Board and CBP's Office of Professional Responsibility, as well as any deaths in custody.
- Require CBP to collect detailed information on, and publicly release quarterly summaries of, the number and location of checkpoints used by Border Patrol; the number of stops by roving patrols or at checkpoints, vehicle chases, secondary inspections, arrests, and incursions into private property by CBP; the number of individuals detained by CBP; and the length of their detention.
- Require CBP to collect detailed information about each stop, search, seizure, use of force, or arrest by its agents, including the basis and duration of the stop, and identifying characteristics of the individual stopped or searched, any arrests, complaints, or uses of force; and the badge number of any officer present. (Many state and local jurisdictions collect comparable data in an effort to enforce limits on racial profiling.)

#### 5. Address the improper contradiction between CBP's designation as a "security agency" and the recognition of its union.

The National Labor Relations Act states that union recognition is not appropriate for employees "engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security," and grants the president authority to exclude an agency or sub-agency from collective bargaining or suspend specific collective bargaining rights on those grounds.<sup>113</sup>

Since September 11, 2001, CBP has received a dramatic increase in resources in the name of national security, with the number of Border Patrol agents nearly doubling.<sup>114</sup> Its mission now explicitly includes counterterrorism. Border Patrol's website states that its "priority mission" is "preventing terrorists and

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<sup>113</sup> 5 U.S.C. § 7112(b)(6) (2022) [see note 65].

<sup>114</sup> "U.S. Border Patrol Staffing Statistics (FY 1992-FY 2020)," U.S. Customs and Border Protection, accessed December 9, 2022, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/U.S.%20Border%20Patrol%20Fiscal%20Year%20Staffing%20Statistics%20%28FY%201992%20-%20FY%202020%29%20%28508%29.pdf>.



terrorists' weapons, including weapons of mass destruction, from entering the United States.”<sup>115</sup> Its designation as a “security agency” conceals information about activities from the public.

Whether Border Patrol’s day-to-day work “directly affects national security” is a more complex question than these statements suggest. The overwhelming number of individuals arrested by CBP do not present any danger to the public. Most are families, children, and people seeking refuge from violence and hardship. But if CBP is not a national security agency, it should not receive resources, authorities, and exceptions to accountability measures that are unavailable to ordinary civilian agencies. If CBP is engaged in work that affects national security, President Biden should exercise his authority under the National Labor Relations Act to exempt its agents from collective bargaining. CBP cannot continue to have it both ways.

## **6. Limit CBP’s use of biometric and other technological surveillance, in addition to its sharing of information with state and local law enforcement.**

CBP has come to increasingly rely on invasive surveillance technology, without full public disclosure or review of the information it is collecting. This needs to change. A non-exhaustive list of steps the agency should take includes:

- Cease the collection and retention of biometric data from U.S. citizens, which raises severe Fourth Amendment concerns and is not authorized by statute.
- End compulsory DNA collection of individuals not arrested for felonies and create a process for promptly expunging DNA information.
- Place restrictions on the commercial purchase of sensitive information from data brokers and sharing of information with local law enforcement.
- Create an external, independent audit program to ensure that the agency’s data collection does not violate the Fourth Amendment or expose individuals’ private information in data breaches.
- Eliminate CBP agents’ ability to run warrantless searches of classified intelligence databases, and of information seized from telephones and laptops during airport searches.

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<sup>115</sup> “Border Patrol Overview,” U.S. Customs and Border Protection, accessed November 29, 2022, <https://www.cbp.gov/border-security/along-us-borders/overview>.

## Recommendations for Congress

As we wrote last year, more vigorous congressional oversight of CBP remains essential. Additionally, there are several clear legislative changes needed to ensure CBP operates in a manner that respects rights and prevents the agency from being used as a national police force. Congress should take the following actions through the legislative and appropriations processes.

### 1. Pass legislation to authorize lawsuits against federal officers for violating the Constitution.

During the last Congress, we endorsed the Bivens Act, which would have made it possible to sue federal officers, including CBP agents, for violating the Constitution just as state agents can be sued.<sup>116</sup> Congress should re-introduce and enact this critical change.

### 2. Pass legislation to restrict law enforcement from purchasing personal information from data brokers, and from improper use of facial recognition technology.

Two other bills that POGO supported during the last Congress should likewise be re-introduced and enacted. The Fourth Amendment Is Not For Sale Act would have prevented law enforcement from purchasing personal information from data brokers to bypass warrant requirements.<sup>117</sup> The Facial Recognition Act would have placed urgently needed restrictions on facial recognition technology, limiting its use to situations where law enforcement obtains a warrant showing probable cause that an individual has committed a serious violent felony, and preventing the use of facial recognition for immigration enforcement.<sup>118</sup> Congress should reintroduce and enact these laws or substantially similar legislation, which would go a long way to increase accountability for CBP and prevent unchecked use of the agency's resources.

### 3. Repeal or amend 40 U.S.C. § 1315, the provision used to justify the abusive use of CBP personnel in Portland, Oregon.

Our constitutional system leaves general policing to states and localities. The United States must prevent any use of federal law enforcement as an internal security service, which requires repeal of the provision that allowed DHS employees to be designated to help protect federal property. To the extent that there is a need for additional resources to protect federal property, federal protective services should rely on assistance from state and local governments, or federal agencies who have relevant jurisdiction.

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<sup>116</sup> Bivens Act of 2021, H.R. 6185, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/6185/text>.

<sup>117</sup> Fourth Amendment Is Not For Sale Act, S. 1265, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/1265/text>.

<sup>118</sup> Facial Recognition Act, H.R. 9061, 117th Cong. (2022), <https://www.congress.gov/bill/117th-congress/house-bill/9061/text>.

#### **4. Amend 8 U.S.C. § 1357(a) to require immigration officers to have “reasonable grounds” in the exercise of powers without warrant.**

This statute grants immigration officials (including CBP and U.S. Immigration and Customs Enforcement) the authority to interrogate, without a warrant, any “person believed to be an alien” without the “reasonable grounds” requirement generally applied to other law enforcement.<sup>119</sup> This invites racial profiling and violations of the Fourth Amendment.

#### **5. Pass legislation to restrict CBP’s searches of digital devices.**

Congress should pass legislation that would prevent CBP agents from searching or copying the digital contents of electronic devices at the border without probable cause or a warrant (with limited emergency exceptions).

#### **6. Strengthen oversight and transparency requirements for CBP.**

Congress should require that CBP collect and publicly release:

- Video footage from CBP officers’ and agents’ body cameras, dashboard cameras, and cameras within detention facilities after uses of force and fatalities.
- Internal investigations and reviews into incidents by CBP’s National Use of Force Review Board and CBP’s Office of Professional Responsibility, as well as any deaths in custody.
- Detailed information on, and quarterly summaries of, the number and location of checkpoints used by Border Patrol; the number of stops by roving patrols or at checkpoints, vehicle chases, secondary inspections, arrests, and incursions into private property by CBP; the number of individuals detained by CBP; and the length of their detention.

#### **7. Reduce appropriations for Border Patrol and encourage the efficient and humane processing of migrants at ports of entry.**

Border Patrol is ill-equipped for processing children, families, or asylum seekers, who form a substantial portion of individuals migrating to the United States. The shutdown of ports of entry to asylum seekers due to the COVID-19 pandemic was never justifiable as a public health measure and incentivizes crossing without authorization.<sup>120</sup> The ports should be fully reopened to asylum seekers and other vulnerable populations seeking humanitarian protection.

Reopening of ports, reducing the number of checkpoints, and shrinking the border enforcement zone should result in reducing the size of Border Patrol. This could also lead to replacing some agents with child welfare and humanitarian professionals whose expertise and qualifications are better suited for processing children, families, and other vulnerable populations. More generally, Congress should use its

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<sup>119</sup> 8 U.S.C. § 1357(a) (2022), <https://www.law.cornell.edu/uscode/text/8/1357>.

<sup>120</sup> Adam Isacson, “Three Consequences of Keeping Title 42 in Place at the U.S.-Mexico Border,” Washington Office on Latin America, May 23, 2022, <https://www.wola.org/analysis/three-consequences-of-keeping-title-42-in-place-at-the-us-mexico-border/>; My Khanh Ngo and Shaw Drake, “Title 42 is a Failure Yet Still Dominates U.S. Border Policy,” *Just Security*, June 24, 2022, <https://www.justsecurity.org/82080/title-42-is-a-failure-yet-still-dominates-u-s-border-policy/>.

appropriations powers to ensure accountability for CBP instead of writing blank checks that enable the agency to continue using their vast resources to violate rights and act with impunity.

## **Conclusion**

All these changes will be difficult. Congress and the Biden administration are unlikely to change their approach to CBP absent a great deal of public pressure, and the border feels far away to most people. But almost all of us live, or have close relatives that live, in a place where CBP claims extraordinary power. Following these recommendations would do a great deal to limit that power and prevent its misuse in the future.





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