May 4, 2023

Chairman Dick Durbin  
Ranking Member Lindsey Graham  
Senate Judiciary Committee

Chairman Jim Jordan  
Ranking Member Jerrold Nadler  
House Committee on the Judiciary

Chairman Gary Peters  
Ranking Member Rand Paul  
Senate Committee on Homeland Security & Governmental Affairs

Chairman Mark Green  
Ranking Member Bennie Thompson  
House Committee on Homeland Security

Chairman James Comer  
Ranking Member Jamie Raskin  
House Committee on Oversight and Reform

Via email

Re:  One year after the announced elimination of Border Patrol cover up units, investigations are still compromised, further eroding voter trust in border agents.

Dear Congressional Committee Leaders:

This week marks one year since Customs and Border Protection (CBP) announced that the agency would [eliminate Border Patrol Critical Incident Teams (BPCITs)], which the Southern Border Communities Coalition (SBCC) [exposed as the largest and longest standing cover up units] in the federal government. Despite the announced elimination, which went into effect in October 2022, investigations of excessive force continue to be compromised.

In at least one incident that occurred in November 2022, Border Patrol personnel were involved in investigating their own agent, raising the concern that the agency continues to intervene, undermining the independence and integrity of investigations. The incident involved a Border Patrol agent who shot and killed a person in a San Antonio apartment building parking lot, far from the border. The San Antonio Police Department stated to the media that “the investigation is ongoing and Border Patrol Management is on the scene,” which is standard procedure in incidents like this.

SBCC has sought public records such as a police investigative report, autopsy report and other records that would shed light on the involvement of Border Patrol in the investigation. We have been
denied every request. We have also sought clarity from CBP on the role that border agents or their supervisors now play in investigations of potential criminal misconduct. We do not yet have the answers we seek. We request your assistance in obtaining clarity. The public deserves to know if CBP, the largest law enforcement agency in the country, is enabling more cover ups and undermining the integrity of an agency that has yet to earn the trust of U.S. voters.

I. Voters do not trust border agents to respect rights or be held accountable.

According to a national survey of voters, only 1 in 4 trust that border agents will protect the constitutional rights of everyone, and only 1 in 4 trust that agents will be held accountable if they violate those rights. Republicans, Democrats, and Independents alike lack confidence in border agents. That is a crisis of confidence for the nation’s largest law enforcement agency. To build trust with voters across the political spectrum, Congress must address ongoing abuse and impunity.

II. There has been no reckoning for Border Patrol's widespread abuse of power.

The SBCC letter submitted to congressional oversight committees in October 2021 details how BPCITs operated to protect agents and the agency from criminal prosecution and civil liability for excessive use of force, allowing them to get away with everything, including the killing of hundreds of people and the harming of potentially thousands more. In the nearly 100 year history of border agents, few have been prosecuted and none (zero) have been convicted or held to account for taking a life while on duty.

This is due in part to the role that BPCITs and other cover up teams have played in obstructing justice by altering, destroying, and withholding evidence, as they did in the case of Anastasio Hernández Rojas. That case is the anatomy of impunity and has brought international scrutiny. It is now before the Inter-American Commission on Human Rights pending a decision.

While we appreciate that CBP eliminated BPCITs, the agency has never acknowledged the harm they caused in denying families access to justice. Nor have they held any agents responsible for obstructing justice. Meanwhile, a GAO investigation and a related congressional investigation are
underway. Instead of waiting for those to conclude, CBP has hired former BPCIT agents into the Office of Professional Responsibility (OPR) to investigate agent misconduct. Without a reckoning of past activities, the increased power and responsibility given to former BPCIT agents threatens to compromise the integrity of every investigation and undermine the security of the country.

III. With a record number of use of force incidents, the stakes are getting higher.

Since we first alerted your committees to the existence and dangers of the BPCITs in October 2021, 45 more people have died in use of force incidents involving border agents — 8 were U.S. citizens. These were only the cases identified in press releases and media reports. There may be more. In no instance that we are aware of has an agent been held accountable.

During that same time, the number of use of force incidents has risen sharply. In Fiscal Year 2021, the number of incidents averaged 63 per month. In 2022, that grew to 81 per month. In 2023, it has now grown to an average of 97 incidents per month. This is an alarming increase, especially in light of the fact that the average monthly reported assaults on agents has largely stayed the same.

![Average Monthly Incidents of Use of Force and Assaults](image)

With rising use of force incidents by border agents, it’s imperative that Congress examine the accountability structure at CBP and ensure that investigations of incidents resulting in serious injury or death are independent and impartial. Unfortunately, that is not currently the case.

IV. CBP’s accountability system is neither independent nor impartial.

CBP has left the door open for Border Patrol to stay involved in the investigations of its own agents, which runs counter to best practices and undermines those investigations. Border Patrol should never be involved. They are not criminal investigators — that role falls to the FBI or local law enforcement. Nor are they internal affairs investigators — that is the role of OPR. Any involvement by Border Patrol to investigate its own erodes public trust.

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1 CBP stated in its May 3, 2022 memo eliminating BPCITs that the agency would be “transferring interested Border Patrol agents with specialized skills to OPR.” SBCC has confirmed that former BPCIT agents have been hired.
SBCC is concerned that despite the elimination of BPCITs, other Border Patrol personnel remain part of investigations with the same ability as BPCITs to obstruct justice. In the memo announcing the elimination of BPCITs, CBP stated that Border Patrol “will maintain capabilities … to document management inquiries.” It should be noted that “management inquiries” are how CBP described the function of BPCITs and attempted to defend them before ultimately eliminating them under public pressure. Of grave concern is the fact that the elimination of these teams may be meaningless if Border Patrol is able to reconstitute them in a different form to conduct the same functions and intervene in investigations.

Of equal concern is the fact that CBP has created a supplemental oversight mechanism called the National Use of Force Review Board (NUFRB) to review incidents resulting in serious injury or death. According to a 2015 agency directive that SBCC acquired through a Freedom of Information Act Request and has now been made public, the NUFRB reviews information provided by Use of Force Incident Teams (UFITs) that explicitly included BPCITs before they were eliminated.

Keeping in mind that the NUFRB relied on BPCITs — teams that were never neutral fact finders, but rather mitigators of liability according to their own documents — the integrity of this oversight body is in question. Although BPCITs have ostensibly been eliminated, the agency directive (which has not been updated) includes other Border Patrol personnel. The directive states:

Section 5.3: The Chief Office of Border Patrol will provide qualified employees, including personnel from Critical Incident Teams or specialized teams, to be trained and participate as members of the [Use of Force Incident Team] and allow them to travel and respond as necessary, to use of force incidents in support of UFIT.

The involvement of Border Patrol in the UFITs was never limited to BPCITs and their elimination only means that other personnel may be designated to participate in investigations, which is deeply problematic. The NUFRB and UFIT were formed in direct response to congressional concerns about the accountability of border agents, prompted by a string of killings beginning with Anastasio Hernández Rojas. The CBP report to Congress lauds the NUFRB as a “robust process to investigate and review deaths and serious injuries,” that relies on UFITs “to conduct thorough investigations.” But the involvement of Border Patrol personnel in these investigations of its own agents subverts the very premise of this oversight mechanism. It is thus no surprise that the NUFRB has never found fault with an agent who has killed someone while on duty.

V. Before Congress invests any more into CBP, it must shore up its integrity.

As Congress debates whether to increase resources and responsibilities to CBP, you should remain cognizant of these critical facts:

- Voters do not trust CBP because of widespread abuse and impunity.
- Use of force incidents by border agents are on the rise, taking lives and harming people.
- The accountability system is compromised, undermining the integrity of the entire agency.
- Congress can restore faith in the voters by addressing abuse and impunity at CBP.
- Until and unless it does, Congress risks exacerbating the problem with more funding.
Public safety depends on public trust, but there can be no trust if there is no accountability. There are an unknown number of border agents, supervisors, chiefs, and leaders who have at one time participated in BPCITs — units that we now know interfered in, intervened with, and obstructed justice. These are potentially criminal acts that have gone unchecked for more than three decades. It is imperative that Congress understand the scope of involvement in these units as soon as possible. One way to do that is to look at the Border Patrol Enforcement Tracking System (BPET) which collects and stores the “special skills” of agents, including BPCIT assignments.²

To shore up integrity, we urge you to cross-check the BPET system against current personnel serving in leadership or oversight positions at DHS / CBP / BP to determine who participated in BPCITs and what entities might be compromised.

It is conceivable that most, if not every, current Border Patrol sector chief has participated in or overseen the activities of BPCITs. It’s also conceivable that former BPCIT agents now serve in positions throughout CBP, DHS, and other parts of government, including for example, the Office of Inspector General (OIG), OPR, and the NUFRB. Their footprint may be significant and may affect every oversight body. If that is the case, then every part of the accountability system is compromised. That poses a significant danger to the country.

In addition, the continued involvement of Border Patrol in investigations of its agents is deeply problematic. We urge you to determine what role the agency plays now and consider legislation to end involvement that impedes independent and impartial investigations.

A democracy depends on checks and balances, and your committees have an important role to play in exercising oversight over CBP through your investigations, hearings, and inquiries. Your actions can protect lives, strengthen the integrity of our institutions, and build faith in government.

Respectfully,

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Andrea Guerrero
Executive Director, Alliance San Diego

Cc: Kevin McCarthy, House Speaker
    Hakeem Jeffries, House Minority Leader
    Charles Schumer, Senate Majority Leader
    Mitch McConnell, Senate Minority Leader

² According to a 2017 BPET report, the system collects and stores “special skills” including “Critical Incident Investigative Team.” See page 8, FN 17 of the report.