

**Congress of the United States**  
Washington, DC 20515

January 24, 2022

The Honorable Chris Magnus  
Commissioner  
U.S. Customs and Border Protection  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20229

Dear Commissioner Magnus:

The Committee on Oversight and Reform and the Committee on Homeland Security are investigating whether teams within the U.S. Border Patrol have interfered with criminal, civil, or administrative investigations of the use of force by Border Patrol agents to protect these agents from being held accountable for potentially serious misconduct.

Congress has provided authority to conduct investigations of misconduct by Border Patrol agents to the Federal Bureau of Investigation (FBI), the Department of Homeland Security (DHS) Office of Inspector General, and the Customs and Border Protection (CBP) Office of Professional Responsibility.<sup>1</sup> Congress has not provided the U.S. Border Patrol with specific authority to conduct investigations of its agents' misconduct, and the CBP Commissioner has not publicly delegated this authority to Border Patrol.<sup>2</sup>

Despite the apparent lack of authority to investigate agent misconduct, Border Patrol appears to have created special teams of agents to investigate and collect evidence following incidents that may create criminal or civil liability, including allegations of excessive use of force. In the 2018 trial of Border Patrol Agent Lonnie Swartz for shooting and killing a teenager through a border fence, former Border Patrol Agent Gerardo Carranza testified that he had served as a member of a "Critical Incident Team" that "investigated and collected forensic data in regards to shootings, use of force incidents, collisions, [and] things like that."<sup>3</sup> He testified that the Critical Incident Team "went out and did a third-party investigation for the Border Patrol" whenever an incident occurred.<sup>4</sup>

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<sup>1</sup> 28 U.S.C. § 535 (granting authority to Federal Bureau of Investigation to investigate crimes involving government officials); 5 U.S.C. § 4 (granting authority to Inspector General to coordinate audits and investigations); 6 U.S.C. § 211(j) (authorizing Customs and Border Protection Office of Professional Responsibility to "investigate criminal and administrative matters and misconduct by officers, agents, and other employees of U.S. Customs and Border Protection").

<sup>2</sup> Under 6 U.S.C. § 211(e)(3), the CBP Commissioner may prescribe additional "duties and powers" to Border Patrol.

<sup>3</sup> *United States v. Lonnie Ray Swartz*, No. CR-15-1723-TUC-RCC-DTF (Jury Trial Day 5), Trial Tr. 8:21-25.

<sup>4</sup> *Id.* at 8:20-21.

On June 6, 2021, a Critical Incident Team was reportedly sent to respond after a Border Patrol agent shot a woman in the head in Nogales, Arizona.<sup>5</sup>

We have grave concerns about the lack of transparency in the role of Border Patrol's Critical Incident Teams. These teams are not mentioned in the most recent version of CBP's Use of Force Administrative Guidelines and Procedures Handbook. The Handbook states that incidents "may be reviewed and/or investigated by the appropriate federal, state or local law enforcement agencies."<sup>6</sup> In at least some instances, Border Patrol appears to have used Critical Incident Teams to conduct parallel investigations alongside law enforcement agencies.<sup>7</sup>

Border Patrol confirmed the existence of these teams in a press statement in November 2021, stating:

The U.S. Border Patrol maintains teams with specialized evidence collection capabilities across the southwest border. These teams consist of highly trained personnel available to respond around the clock to collect and process evidence related to CBP enforcement activities as well as critical incidents. In the case of serious incidents involving CBP personnel, members of these teams are sometimes called upon to assist investigators from CBP OPR and other local, state, and federal law enforcement agencies. This is a vitally important capability as many critical incidents involving CBP operations occur in remote locations where other agencies may be unwilling or unable to respond.<sup>8</sup>

The Committees are concerned by reports indicating that Critical Incident Teams may have obstructed appropriate investigations by law enforcement. One Critical Incident Team allegedly tampered with evidence during the 2010 investigation of the killing of Anastasio Hernandez Rojas.<sup>9</sup> In particular, the Critical Incident Team assigned to that case allegedly served an administrative subpoena for Mr. Hernandez Rojas's medical records and then refused to provide San Diego Police Department investigators with the records. The Critical Incident Team also allegedly altered the Border Patrol apprehension report to remove the narrative of the

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<sup>5</sup> Nogales Police Department, *Officer Report for Incident 210006105* (Aug. 20, 2021) (online at <https://ewscripps.brightspotcdn.com/f9/16/2812391a4d12a261a9e973990419/npd-report-nogales-bp-shooting-6-16.pdf>).

<sup>6</sup> U.S. Customs and Border Protection, *CBP Use of Force – Administrative Guidelines and Procedures Handbook* (Jan. 2021) (online at [www.cbp.gov/sites/default/files/assets/documents/2021-Jul/cbp-use-of-force-admin-guide-procedure-handbook\\_4500-002B.pdf](http://www.cbp.gov/sites/default/files/assets/documents/2021-Jul/cbp-use-of-force-admin-guide-procedure-handbook_4500-002B.pdf)).

<sup>7</sup> *United States v. Lonnie Ray Swartz*, No. CR-15-1723-TUC-RCC-DTF (Jury Trial Day 5), Trial Tr. 8:21-25.

<sup>8</sup> *Allegations of "Shadow Police Units" Employed by U.S. Border Patrol*, CBS 8 (Nov. 1, 2021) (online at [www.cbs8.com/article/news/investigations/allegations-of-shadow-police-units-employed-by-us-border-patrol/509-da6f601e-6d31-4dc8-a1fb-b900f19922ed](http://www.cbs8.com/article/news/investigations/allegations-of-shadow-police-units-employed-by-us-border-patrol/509-da6f601e-6d31-4dc8-a1fb-b900f19922ed)).

<sup>9</sup> Affidavit of James Wong (May 18, 2018), *Anastasio Hernandez Rojas v. United States*, Inter-American Commission on Human Rights (Case No. P-524-16); *Border Patrol Beat an Immigrant to Death and Then Covered It Up*, The Intercept (Feb. 4, 2021) (online at [www.theintercept.com/2021/02/04/border-patrol-killing-impunity-iachr/](http://www.theintercept.com/2021/02/04/border-patrol-killing-impunity-iachr/)).

border agent who first encountered Mr. Hernandez Rojas, and failed to preserve video footage of the incident requested by the San Diego Police Department.<sup>10</sup>

Our Committees are seeking to more fully understand the role of Critical Incident Teams following potential misconduct by Border Patrol agents, whether these teams have obstructed criminal, civil, or administrative investigations or prevented accountability for agents' misconduct, and the steps CBP is taking to ensure these teams are being used appropriately.

For these reasons, we request that you produce the following documents by February 7, 2022:

1. A list of all Border Patrol evidence collection teams, including all Critical Incident Teams, and a detailed description of their roles.
2. A detailed description of the legal authorities under which Border Patrol Critical Incident Teams operate, including a list of the federal statutes that grant these teams the authority to engage in investigations beyond evidence collection.
3. All policies and procedures, directives, guidance, hiring materials, and training materials for Border Patrol Critical Incident Teams.
4. All incident reports created by Border Patrol Critical Incident Teams from January 1, 2010, to the present.
5. All reports of potential misconduct or interference with criminal, civil, or administrative investigations by Border Patrol Critical Incident Teams or team members from January 1, 2010, to the present, and a description of all steps taken by CBP in response to these reports.

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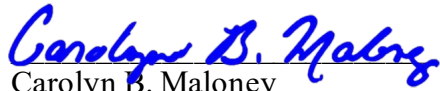
<sup>10</sup> Letter from Andrea Guerrero, Executive Director, Alliance San Diego, to Chairwoman Carolyn Maloney, Committee on Oversight and Reform (Oct. 27, 2021) (online at [https://d3n8a8pro7vhm.cloudfront.net/alliancesandiego/pages/3292/attachments/original/1635367319/SBCC\\_letter\\_to\\_Congress\\_Final\\_10.27.21.pdf?1635367319](https://d3n8a8pro7vhm.cloudfront.net/alliancesandiego/pages/3292/attachments/original/1635367319/SBCC_letter_to_Congress_Final_10.27.21.pdf?1635367319)).

Commissioner Chris Magnus

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Thank you for your attention to this matter. An attachment to this letter provides additional instructions for responding to this request.

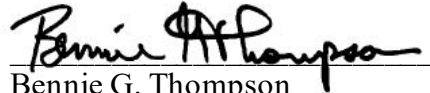
Sincerely,



Carolyn B. Maloney

Chairwoman

Committee on Oversight and Reform



Bennie G. Thompson

Chairman

Committee on Homeland Security

Enclosure

cc: The Honorable James Comer, Ranking Member  
Committee on Oversight and Reform

The Honorable John Katko, Ranking Member  
Committee on Homeland Security

## Responding to Committees' Document Requests

1. In complying with this request, produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. Produce all documents that you have a legal right to obtain, that you have a right to copy, or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party.
2. Requested documents, and all documents reasonably related to the requested documents, should not be destroyed, altered, removed, transferred, or otherwise made inaccessible to the Committees.
3. In the event that any entity, organization, or individual denoted in this request is or has been known by any name other than that herein denoted, including alternate spellings or transliterations of any names, the request shall be read also to include that alternative identification.
4. The Committees' preference is to receive documents in electronic form (i.e., CD, memory stick, thumb drive, or secure file transfer) in lieu of paper productions.
5. Documents produced in electronic format should be organized, identified, and indexed electronically.
6. Electronic document productions should be prepared according to the following standards:
  - a. The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - b. Document numbers in the load file should match document Bates numbers and TIF file names.
  - c. If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
  - d. All electronic documents produced to the Committees should include the following fields of metadata specific to each document, and no modifications should be made to the original metadata:  
  
BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,

INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,  
BEGATTACH.

7. Documents produced to the Committees should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, zip file, box, or folder is produced, each should contain an index describing its contents.
8. Documents produced in response to this request shall be produced together with copies of file labels, dividers, or identifying markers with which they were associated when the request was served.
9. When you produce documents, you should identify the paragraph(s) or request(s) in the Committees' letter to which the documents respond.
10. The fact that any other person or entity also possesses non-identical or identical copies of the same documents shall not be a basis to withhold any information.
11. The pendency of or potential for litigation shall not be a basis to withhold any information.
12. In accordance with 5 U.S.C. § 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.
13. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.
14. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
15. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) every privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author, addressee, and any other recipient(s); (e) the relationship of the author and addressee to each other; and (f) the basis for the privilege(s) asserted.
16. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (by date, author, subject, and recipients), and explain the circumstances under which the document ceased to be in your possession, custody, or control.
17. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, produce all documents that would be responsive as if the date or other descriptive detail were correct.

18. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data, or information not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.
19. All documents shall be Bates-stamped sequentially and produced sequentially.
21. Upon completion of the production, submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committees.

### **Definitions**

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, data, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, communications, electronic mail (email), contracts, cables, notations of any type of conversation, telephone call, meeting or other inter-office or intra-office communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape, or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic message including email (desktop or mobile device), text message, instant message, MMS or SMS message, message application, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.
4. The term “including” shall be construed broadly to mean “including, but not limited to.”
5. The term “Company” means the named legal entity as well as any units, firms, partnerships, associations, corporations, limited liability companies, trusts, subsidiaries, affiliates, divisions, departments, branches, joint ventures, proprietorships, syndicates, or other legal, business or government entities over which the named legal entity exercises control or in which the named entity has any ownership whatsoever.
6. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual’s complete name and title; (b) the individual’s business or personal address and phone number; and (c) any and all known aliases.
7. The terms “relating to” and “referring or relating to,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is pertinent to that subject in any manner whatsoever.
8. The term “involving”, with respect to any given subject, means sending, receiving, or being copied (CC or BCC), or being the subject matter on any documents or communications described in the request.
9. The term “employee” means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.
10. The term “individual” means all natural persons and all persons or entities acting on their behalf.