



Customs and Border Protection Accountability

U.S. Customs and Border Protection (CBP) was at the heart of some of the greatest abuses of the last four years, personified in stories that we cannot forget: The sound of children sobbing after being separated from their parents at the border and the images of countless human beings trapped in open-air cages and indoor cells. The imperative for reform cannot be overstated.

Installing new leadership at the agency and effectuating limited changes will not be enough. CBP's culture of abuse is entrenched. For years, the ACLU and other researchers have identified patterns of harassment, discrimination, and even violence by CBP officers.¹

"Xenophobic nationalism is widespread," and derogatory comments are often accompanied by threatened or actual physical violence.² Since January 2010, at least 102 people—including some U.S. citizens—have died following encounters with CBP personnel.³ CBP agents almost never face consequences for their actions, and some deaths go unreported altogether.⁴ Efforts to hold CPB agents accountable for even the murder of individuals have failed; in February 2020, the the Supreme Court ruled that family of a 15-year-old boy shot and killed by a border agent through the border fence could not sue for damages.⁵ While many CPB agents do conduct themselves lawfully, it is also well established that there are far too many agents who bully LGBTQ people and children, equate migrants to animals, and ridicule parents trying to protect their children. They operate with impunity, knowing that they are unlikely to be held accountable for this conduct or even more serious abuses.⁶

CBP's systemic failures are especially stark when it comes to its detention of adults and children. In the past two years, at least seven children have died in CBP custody or shortly after being released, often after receiving delayed medical care or being denied care altogether. Border Patrol agents subject pregnant people to physical mistreatment, verbal abuse, and severe delays in medical care, if it is provided at all. In February 2020, a woman in Border Patrol custody was

¹ See, e.g., Sarah Thompson, "Administrative Complaint Series Reflects Horrors of CBP Detention," ACLU San Diego & Imperial Counties, Sept. 15, 2020, <https://bit.ly/2HhaFG6>.

² See, e.g., 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> (quoting University of Arizona sociologist Daniel Martinez, who asserts there "seems to be a pervasive culture of cruelty aimed at immigrants within CBP. This isn't just a few rogue agents or 'bad apples.'").

³ See Southern Border Communities Coalition, "Deaths by Border Patrol," https://www.southernborder.org/deaths_by_border_patrol (last updated February 5, 2020).

⁴ Bob Ortega and Rob O'Dell, "Deadly border agent incidents cloaked in silence: Republic investigation finds little public accountability in Southwest Border killings," *The Republic*, December 16, 2013, available at http://archive.azcentral.com/news/politics/articles/20131212arizona-border-patrol-deadly-force-investigation.html?nclick_check=1; Jesse Franzblau, "The Border Is A Dark Zone For Government Accountability," *HuffPost*, Nov. 6, 2018, https://www.huffpost.com/entry/opinion-trump-border-troops_n_5be07332e4b01ffb1d04c240?guccounter=1; Bea Bischoff, "Why Do Children Keep Dying in U.S. Custody? Maybe Because Nobody Is Holding CBP Accountable," *Slate*, May 30, 2019, <https://slate.com/news-and-politics/2019/05/migrant-children-deaths-cbp-customs-border-patrol-supreme-court-mesa.html>.

⁵ See *Hernandez v. Mesa*, 140 S.Ct. 735 (2020).

⁶ See, e.g., Grace Panetta, "Border Patrol officials reportedly forced a Honduran migrant to walk around a detention center holding a sign reading 'I like men' in Spanish," *Business Insider*, July 5, 2019, <https://www.businessinsider.com/detained-migrant-forced-hold-sign-reading-i-like-men-report-2019-7>.

forced to give birth to her baby while standing up, holding on to the side of a trash can in a Border Patrol station near San Diego.⁷

Border Patrol stations lack bedding, showers, and staff trained to interact with or assist traumatized or otherwise vulnerable populations. People held in these facilities endure freezing temperatures, inedible food (spoiled or still-frozen), insufficient potable water, overcrowding, and deprivation of medicine and basic hygienic supplies. Even as CBP complained in summer 2019 that its horrific detention conditions were a result of inadequate funding, it spent emergency funds Congress allocated for the care of adults and children on dirt bikes and dog food—instead of medical care, food, and sanitary conditions.⁸

CBP also has a long track record of misapplying, ignoring, or willfully violating asylum law. CBP officers frequently fail to ask about fear of persecution and fail to refer individuals who express a fear of return to the asylum process, as required by Congress.⁹ CBP personnel also confiscate crucial, often irreplaceable, personal documents and have lied on government forms.¹⁰

Implementing the Trump administration’s disastrous Remain in Mexico policy, Border Patrol agents sent asylum seekers back to Mexico with fake future court dates.¹¹ Border Patrol agents even listed “Facebook” as the address for asylum seekers on their paperwork.¹²

The Trump administration also tasked CBP with carrying out credible fear interviews, replacing trained asylum officers with CBP officers. CBP’s mission and responsibilities are incompatible with the sensitive, non-adversarial nature of credible fear screening interviews, which should be conducted by USCIS asylum officers. Having a CBP officer conduct a credible fear interview is like having an arresting police officer also sit as a judge.¹³

The new administration can help ensure these abuses never happen again. It will require bold reforms in an agency climate where fearmongering has too often excused cruelty and impunity.

⁷ Ema O’Connor, “A Woman Gave Birth In A Border Patrol Station Still Wearing Her Pants. Now the Agents Involved Are Being Accused of Abuse,” *Buzzfeed News*, April 8, 2020, <https://www.buzzfeednews.com/article/emaconnor/pregnant-woman-birth-border-patrol-aclu-complaint>; “Re: U.S. Customs and Border Protection and Border Patrol’s Abuse and Mistreatment of Detained Pregnant People,” ACLU of San Diego and Imperial Counties and Border Rights Center, Jan. 22, 2020, <https://www.aclusandiego.org/wp-content/uploads/2020/01/2020-01-22-OIG-Complaint-1-FINAL-1.pdf>.

⁸ GOV’T ACCOUNTABILITY OFF., B-331888, U.S. CUSTOMS AND BORDER PROTECTION – OBLIGATIONS OF AMOUNTS APPROPRIATED IN THE 2019 EMERGENCY SUPPLEMENTAL (July 11, 2020), <https://www.gao.gov/products/B-331888>.

⁹ See “Deportations in the Dark: Lack of Process and Information in the Removal of Mexican Immigrants,” American Immigration Council, September 2017, <https://bit.ly/379KzQ7>.

¹⁰ John Washington, “Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims,” *The Intercept*, Aug. 11, 2019, <https://theintercept.com/2019/08/11/border-patrol-asylum-claim/>.

¹¹ Gustavo Solis, “U.S. border agents wrote fake court dates on paperwork to send migrants back to Mexico,” *Los Angeles Times*, Nov. 7, 2019, <https://lat.ms/317V96g>.

¹² Adolfo Flores, “Border Patrol Agents Are Writing ‘Facebook’ As A Street Address for Asylum-Seekers Forced to Wait in Mexico,” *Buzzfeed News*, Sept. 26, 2019, <https://www.buzzfeednews.com/article/adolfoflores/asylum-notice-border-appear-facebook-mexico>.

¹³ See Julie Veroff, “Asylum Officers Are Being Replaced by CBP Agents,” ACLU, May 6, 2019, <https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/asylum-officers-are-being-replaced-cbp-agents>; “Allowing CBP to Conduct Credible Fear Interviews Undermines Safeguards to Protect Refugees,” Human Rights First, April 2019, https://www.humanrightsfirst.org/sites/default/files/CBP_Credible_Fear.pdf.

Just as former President Barack Obama issued an executive order on his first day in office that ended the CIA's role in detention and prohibited torture and ill treatment, President-elect Joe Biden should take a bold step by issuing a day one executive order that ends CBP's role in detention and processing of asylum seekers, effectively prohibits family separations, and requires accountability for abuses—notwithstanding the opposition's scaremongering about migrant “surges” at the southern border.

Recommendations to the President

First 100 Days

The president should issue an executive order that ends CBP's participation in detention and processing of asylum seekers, effectively prohibits family separations, and requires accountability for civil and human rights abuses.

1. End CBP's role in detention. The president's order should instruct the Department of Homeland Security (DHS) to issue a directive strictly prohibiting CBP components from detaining individuals for any period beyond the time required for initial processing, which should in no case exceed 12 hours from time of initial apprehension.
 - Any individuals apprehended by Border Patrol or placed into the custody of CBP's Office of Field Operations should be immediately transferred, following initial processing, to a non-law enforcement facility for categorization of their case and further processing of any available immigration claims.
 - Any alternative processing model for asylum seekers and other migrants at the border should not include the following:
 - Extending CBP's period of custody or assigning CBP officers to facilities that restrict freedom of movement.
 - Undue restrictions on access of NGOs, pro bono legal providers, independent medical and child welfare officers, or other service providers.
2. End CBP's role in the processing of asylum seekers. CBP should no longer be charged with the following:
 - Completing initial screening interviews (Form I-213).
 - Completing credible fear interviews.
 - Issuing any immigration paperwork.
 - Discussing immigration options with individuals apprehended.
3. End CBP's role in family separation. The administration should direct all relevant federal agencies to take every step possible to promote the immediate reunification of families separated by the Trump administration's family separation policy, including full support for adult guardians who wish to return to the United States for reunification purposes. As redress, the administration should grant families lawful immigration status enabling them to safely remain in the United States if they choose to do so and work with Congress to create a pathway to citizenship for these families.
 - Establish a fund out of the existing DHS budget to provide trauma-informed care to all families subjected to the family separation policy.
 - End CBP's authority to make family separation determinations. Reallocate existing CBP resources to hire state-licensed child welfare professionals to make determinations when there is a question with respect to the family relationship or whether there is a danger to the child. Any determination by child welfare professionals resulting in separation must be provided by a written decision and include the following:
 - Confirmation that screening was conducted in private and in person

- Identification of any risk of trafficking, serious and imminent physical harm, or basis for believing the accompanying adult is not the parent or guardian
- Provision of a written determination to every individual in the family unit in their primary language detailing the outcome of and reason for the determination
- Establish an appeal process for review of any separation, with the opportunity to appeal to federal district court any separation.
- If a separation occurs, there must be detailed information recorded and shared across agencies (DHS, Department of Justice, and Department of Health and Human Services) to maintain data and facilitate reunification or release to a sponsor. Review should be required by the appropriate state court handling child welfare cases. Each month, DHS should share information regarding the separation of families at the border, including location and reason for separation, with the relevant congressional committees and publicly on its website.
- End the referral and prosecution of individuals under 8 U.S.C. 1325 and 1326.

Beyond the First 100 Days

The president should commit to the following measures to increase effective oversight, accountability, and transparency across the agency.

1. DHS should overhaul CBP's hiring, training, and discipline protocols, including through the following measures:
 - Require CBP officers, including Border Patrol agents, to wear badges with visible numbers at all times while on duty; identify themselves by their full name, rank, and command (as applicable) to all individuals they encounter; and provide that information in writing when requested.
 - Require CBP agents and officers to use body-worn cameras, as governed by appropriate policies, to protect privacy and ensure fair, transparent, and reliable use, as set forth in the ACLU Model Act on body-worn cameras.¹⁴
 - Issue a moratorium on all new Border Patrol hires and reduce the number of Border Patrol agents to a maximum of 10,000 nationwide within two years. Direct CBP to work toward a reduction in agents to below 5,000, reflecting a return to pre-1994 staffing levels.¹⁵
 - Require annual certifications for all existing Border Patrol agents in the following topics: use of force, sexual violence and sex discrimination, foreign languages (particularly Spanish); cultural competence & bias/racism training; working with traumatized and vulnerable populations; and the limited role of immigration enforcement officers in the screening of individuals for potential immigration relief.
2. DHS should create a new unified complaint process and public disciplinary guidelines, including:
 - An online complaint form, a mobile device application, and a toll-free number to receive *any* immigration or border-related complaint, in multiple languages. All methods should permit complainants to upload or send photo, video or other supporting evidence. The web address, app name, and phone number should be displayed at all ICE and CBP

¹⁴ A MODEL ACT FOR REGULATING THE USE OF WEARABLE BODY CAMERAS BY LAW ENFORCEMENT, ACLU, Oct. 2020, <https://www.aclu.org/other/model-act-regulating-use-wearable-body-cameras-law-enforcement>.

¹⁵ See Border Patrol Strategic Plan 1994 and Beyond, July 1994, <https://www.hsdl.org/?view&did=721845>.

detention facilities (including Border Patrol stations), ports of entry, interior checkpoints, and on marked DHS vehicles.

- A uniform process to review and investigate all immigration- and border-related complaints, including written confirmation of receipt within 24 hours; screening and assessment procedures; procedures for ensuring prompt assignment of a neutral investigator; a requirement that all components turn over relevant records (including video and audio files) to investigators within 14 calendar days; and written resolution of complaints, including any criminal prosecution and/or finding of civil liability, within three months of receipt.
 - A publicly accessible national, standardized database of complaints, including written resolutions—providing information on any criminal prosecution and/or finding of civil liability—which protects complainants’ privacy.
 - An annual public report on trends in complaints, including data on complaint outcomes and plans to address identified trends.
3. The CBP Office of Professional Responsibility should develop and publish disciplinary guidelines for all CBP officials. The guidelines should mirror best practices in other law enforcement agencies, including provision for suspension and/or termination for egregious misconduct and for lesser misconduct that is repeated. The guidelines should also clarify the disciplinary progression for all forms of misconduct, including abuse of authority, lying, excessive use of force, etc.
4. Reform CBP and limit its use of lethal force. CBP should strengthen its use-of-force standards to prohibit agents and officers from using deadly force unless necessary, as a last resort, to prevent imminent death or serious bodily injury, and only after all reasonable alternatives have been exhausted.
- CBP should adopt a standardized shooting review process that utilizes incident mapping and analysis software.
 - DHS should ensure robust transparency on CBP use-of-force incidents, including by:
 - Requiring the agency to make public the facts of any use-of-force incident that results in serious injury or death within 24 hours (whether of an officer or a member of the public).
 - Requiring the agency to collect and publish on a quarterly basis data on all use-of-force incidents regardless of outcome, including location, type(s) of force used, reason/justification for use of force, number of officers involved, number of victims (and age and gender of each victim), whether medical care was provided (and if so, by whom and where), agency review of incident, and any disciplinary or other agency actions or outcomes.
 - Creating a policy to impose a duty to report use of force by peers and supervisors and a duty to intervene when feasible to stop other officers from using force in violation of agency standards and the law. The policy should prohibit retaliation.
 - Commissioning an independent review of all use-of-force fatalities in the last 10 years to identify patterns and practices of use-of-force misuse.