

**Congress of the United States**  
**House of Representatives**

COMMITTEE ON OVERSIGHT AND REFORM

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**MEMORANDUM**

**October 30, 2020**

**To: Members of the Committee on Oversight and Reform**

**Fr: Chairwoman Carolyn B. Maloney**

**Re: Notice of Intent to Issue Subpoena to Customs and Border Protection**

This memorandum provides Committee Members with notice of my intent to issue a subpoena to Customs and Border Protection (CBP) for documents it has been withholding from the Committee for more than a year. These documents include information about dozens of CBP employees who engaged in misconduct by participating in secret Facebook groups that shared racist, sexually violent, dehumanizing, and abhorrent material. They made these vile posts not only about immigrants—including a father and daughter who drowned in the Rio Grande—but also about a Member of our Committee.

Chairman Elijah E. Cummings first requested these documents in July 2019. Since that time, CBP has refused to produce any documents that identify these employees or the specific abuses they engaged in, instead choosing to withhold these documents or redact them to conceal this information from the Committee.

The Trump Administration has not set forth any valid legal basis to withhold this information. One of the most recent reasons the Administration has given for its overt obstruction is a fear that the identities and abuses of these employees could become public. In communications with the Committee, the Trump Administration has expressed more concern about protecting the reputations of employees who made racist and sexually depraved posts than the wellbeing of the children and families they interact with on a daily basis.

Even in cases in which the Trump Administration itself has determined that employees should be disciplined, suspended, or even fired, the Administration continues to maintain that it will not allow the Committee to know who these employees are, what specific violations they have been disciplined for, what their roles in CBP were, and, if they are still employed, whether they continue working with children and detainees. Moreover, based on the limited information produced to the Committee, it is evident that the Trump Administration significantly reduced the punishment of many of these employees, while at the same time shielding them from Congressional oversight.

The Trump Administration’s position is legally baseless. The Committee has direct jurisdiction over federal employees and agency disciplinary procedures, and the Committee has an extensive history under both Republican and Democratic Administrations of examining wrongdoing by federal employees—as well as the discipline imposed or not imposed—in order to determine whether legislative reforms are warranted. Such oversight is especially critical for law enforcement personnel who serve in positions of power over vulnerable populations, including children.

It is unclear why the Trump Administration is going to such extreme lengths to protect these employees who posted racist and sexually violent material, but President Trump himself has set the example of publicly and repeatedly defending similar actions by himself and others. For all of these reasons, the Committee will issue a subpoena to compel Mark Morgan, the Chief Operating Officer and Senior Official Performing the Duties of the Commissioner of CBP, to produce complete and unredacted copies of all documents described in the attached schedule.

## **I. BACKGROUND ON INVESTIGATION**

For more than a year, the Committee has been investigating reports of despicable postings by dozens of CBP employees in secret Facebook groups, including the “I’m 10-15” group, which had more than 9,500 members and declared that it was intended for Border Patrol employees to post content that is “Funny, serious and just work related.”<sup>1</sup>

The “I’m 10-15” Facebook group included numerous posts about killing and harming immigrants and children. One video of a piece of meat wrapped in foil and cooked over a flame included the caption: “Little tonk blanket ideas!” The foil resembles a mylar blanket that Border Patrol agents provide to immigrant children, and the word “tonk” reportedly is “Border Patrol slang for migrants, referring to the sound a flashlight makes when it connects with a migrant’s skull.” Group members also joked about targeting immigrants with alligators, referring to them as “Medieval solutions to a modern problem.”<sup>2</sup>

A Congressional delegation touring a Texas immigration detention facility sparked a wave of racist and sexually violent activity in the Facebook group. One commenter, who reportedly was a supervisory agent, wrote, “Fuck the hoes,” while another group member called on Border Patrol agents to throw a “burrito at these bitches.”<sup>3</sup> Multiple images posted in the

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<sup>1</sup> See, e.g., *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019) (online at [www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes](http://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes)); *Border Patrol Agents Tried to Delete Racist and Obscene Facebook Posts. We Archived Them.*, The Intercept (July 5, 2019) (online at <https://theintercept.com/2019/07/05/border-patrol-facebook-group/>); *2nd Customs and Border Protection-Connected Secret Facebook Group Shows Mocking Images*, CNN (July 5, 2019) (online at [www.cnn.com/2019/07/05/politics/cbp-second-facebook-group-images/index.html](http://www.cnn.com/2019/07/05/politics/cbp-second-facebook-group-images/index.html)).

<sup>2</sup> *Border Patrol Agents Tried to Delete Racist and Obscene Facebook Posts. We Archived Them.*, The Intercept (July 5, 2019) (online at <https://theintercept.com/2019/07/05/border-patrol-facebook-group/>).

<sup>3</sup> *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, ProPublica (July 1, 2019) (online at [www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes](http://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes)).

Facebook group depicted a Member of this Committee being violently sexually abused and raped.<sup>4</sup>

As law enforcement officials serving in positions of power over vulnerable populations, including children, CBP employees must abide by the CBP Standards of Conduct, which state: “Certain conduct, on or off-duty, may subject an employee to appropriate disciplinary action.” The standards continue:

In fulfilling its mission, CBP and its employees must sustain the trust and confidence of the public they serve. ... The conduct of CBP employees must reflect the qualities of ... courtesy and promptness when dealing with and serving the public; and a standard of personal behavior that reflects positively upon, and will be a credit to, both CBP and its employees. ... Employees will not make abusive, derisive, profane, or harassing statements or gestures, or engage in any other conduct evidencing hatred or invidious prejudice to or about another person or group on account of race, color, religion, national origin, sex, sexual orientation, age, or disability.<sup>5</sup>

CBP acknowledged that these posts violated CBP’s standards and agency policy, writing to the Committee:

[P]osts demeaning of migrants and Members of Congress were wholly unacceptable. They reflect neither the core values CBP employees swear to uphold nor the high standard of conduct and professionalism expected of every CBP employee. I want to assure you CBP is committed to swiftly investigating the allegations and taking appropriate corrective action, up to and including removal from Federal service, against any current employee(s) determined to have violated Agency policy.<sup>6</sup>

## **II. COMMITTEE EFFORTS TO OBTAIN DOCUMENTS FROM CBP**

On July 3, 2019, Committee staff requested a briefing from CBP on what steps it was taking “in response to the activity by agents in the ‘I’m 10-15’ Facebook group.”<sup>7</sup> CBP staff responded the same day, refusing to provide a briefing and claiming that they could not provide information while internal investigations were ongoing.<sup>8</sup>

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<sup>4</sup> *Id.*; *Border Patrol Agents Tried to Delete Racist and Obscene Facebook Posts. We Archived Them.*, The Intercept (July 5, 2019) (online at <https://theintercept.com/2019/07/05/border-patrol-facebook-group/>).

<sup>5</sup> Customs and Border Protection, *CBP Directive No. 51735-013A* (Mar. 13, 2012) (online at [www.cbp.gov/sites/default/files/assets/documents/2018-Nov/cbp-standards-conduct-2012.pdf](http://www.cbp.gov/sites/default/files/assets/documents/2018-Nov/cbp-standards-conduct-2012.pdf)).

<sup>6</sup> Letter from Acting Assistant Commissioner Bradley F. Hayes, Customs and Border Protection, to Chairman Elijah E. Cummings, Committee on Oversight and Reform (Sept. 26, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Cummings%20Response%20-%20Sep26%20-%20Final%20%281%29.pdf>).

<sup>7</sup> Email from Staff, Committee on Oversight and Reform, to Staff, Customs and Border Protection (July 3, 2019).

<sup>8</sup> Email from Staff, Customs and Border Protection, to Staff, Committee on Oversight and Reform (July 3, 2019).

On July 18, 2019, during questioning at a hearing before the Committee, Kevin McAleenan, the Acting Secretary of the Department of Homeland Security (DHS), testified that these posts were “unacceptable” and that CBP’s internal investigation was “proceeding very aggressively.” When asked when the Committee could receive details on the outcome of CBP’s internal investigation, he responded: “I would say probably this month or early next month, we’ll be able to update on the result of those investigations.”<sup>9</sup>

On July 31, 2019, Chairman Cummings sent a letter to CBP requesting documents relating to these employees and their actions, as well as the results of any disciplinary cases completed by the Office of Professional Responsibility (OPR). He also formally requested a briefing on these matters.<sup>10</sup>

On August 7, 2019, CBP briefed Committee staff, but continued to refuse to provide any information about individual cases. CBP officials claimed that they would not provide documents to the Committee while internal disciplinary investigations were ongoing.<sup>11</sup> On August 15, 2019, CBP staff sent an email to Committee staff reiterating that “CBP will not be producing any documentation while this case is under investigation.”<sup>12</sup>

On September 23, 2019, Chairman Cummings wrote to CBP again to renew the Committee’s request for these documents and to debunk the agency’s claim that it could not provide information while its own internal investigation was ongoing. He wrote:

CBP staff have suggested that the agency will not produce any documents while internal disciplinary investigations are ongoing. As my staff has repeatedly explained, the existence of internal investigations does not relieve CBP of its responsibility to comply with legitimate document requests from the Committee—especially when Members of this Committee were the targets of these attacks.

The Committee is not seeking internal investigative documents that would interfere in any way with the agency’s disciplinary procedures. In addition, CBP staff informed Committee staff that several of the internal investigations are already closed. More than a month has passed since that briefing, yet no documents have been produced.<sup>13</sup>

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<sup>9</sup> Committee on Oversight and Reform, *Hearing with Acting Secretary of Homeland Security Kevin K. McAleenan* (July 18, 2019) (online at <https://oversight.house.gov/legislation/hearings/with-the-acting-secretary-of-homeland-security-kevin-k-mcaleenan>).

<sup>10</sup> Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Mark Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, Customs and Border Protection (July 31, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-31.EEC%20to%20Morgan-CBP%20re%20Secret%20Facebook%20Group.pdf>).

<sup>11</sup> Briefing by Staff, Customs and Border Protection, to Staff, Committee on Oversight and Reform (Aug. 7, 2019).

<sup>12</sup> Email from Staff, Customs and Border Protection, to Staff, Committee on Oversight and Reform (Aug. 15, 2019).

<sup>13</sup> Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Mark Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, Customs and Border Protection (Sept. 23, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-09->

In light of CBP's refusal to produce the documents, Chairman Cummings also requested transcribed interviews with ten CBP employees who participated in these Facebook groups.<sup>14</sup>

On September 26, 2019, CBP sent a response letter refusing to produce any documents "related to open OPR investigations." CBP also refused to make CBP employees available for interviews, claiming inaccurately that its production of a handful of policy, training, and historical documents "obviates the Committee's stated need for the interviews requested."<sup>15</sup>

Over the following months, the Committee repeatedly sought to obtain the requested documents and schedule the interviews, but CBP staff refused.<sup>16</sup> Committee staff called DHS and CBP staff at least 10 times and emailed at least 15 times to follow up on these requests.

On November 18, 2019, CBP staff wrote to inform Committee staff that "105 cases have been closed through the disciplinary process."<sup>17</sup> However, CBP continued to refuse to produce any documents for any of these closed cases. On January 22, 2020, CBP informed Committee staff during a telephone call that they had collected responsive documents, but they refused to say if or when the documents would be produced.<sup>18</sup>

On February 18, 2020, Chairwoman Carolyn Maloney sent a third letter asking for the documents and interviews requested by the Committee. She wrote that "CBP has been obstructing the Committee's investigation by making baseless and shifting legal claims in order to avoid producing critical documents and witnesses." The letter stated: "The Committee now insists on full compliance with all of its previous requests, or we will be forced to consider compulsory process."<sup>19</sup>

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23.EEC%20to%20Morgan-CBP%20re%20Facebook%20Group%20%281%29.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> Letter from Acting Assistant Commissioner Bradley F. Hayes, Customs and Border Protection, to Chairman Elijah E. Cummings, Committee on Oversight and Reform (Sept. 26, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Cummings%20Response%20-%20Sep26%20-%20Final%20%281%29.pdf>).

<sup>16</sup> *See, e.g.*, Email from Staff, Committee on Oversight and Reform, to Staff, Customs and Border Protection (Sept. 27, 2019) (stating that "the Committee would like to begin scheduling transcribed interviews"); Email from Staff, Committee on Oversight and Reform, to Staff, Customs and Border Protection (Nov. 6, 2019) (stating that "We would like to follow up on the requests from the July 31 and September 23 letters to Mr. Morgan"); Call with Staff, Committee on Oversight and Reform, and Staff, Customs and Border Protection (Nov. 7, 2019) (CBP staff stated that they did not plan to move forward with interviews).

<sup>17</sup> Email from Staff, Customs and Border Protection, to Staff, Committee on Oversight and Reform (Nov. 18, 2019).

<sup>18</sup> Call with Staff, Committee on Oversight and Reform, and Staff, Customs and Border Protection (Jan. 22, 2020).

<sup>19</sup> Letter from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, to Mark Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, Customs and Border Protection (Feb. 18, 2020) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-02-18.CBM%20to%20Morgan-USCBP%20re%20Documents%20and%20TIs.pdf>).

On February 21, 2020, CBP staff offered to make two supervisory agents available for transcribed interviews on a call with Committee staff. CBP staff also offered a closed-door Committee Member briefing with Border Patrol Chief Rodney S. Scott instead of the transcribed interview requested by Chairman Cummings.<sup>20</sup>

On March 3, 2020, CBP sent a response letter that included “the final disposition of the majority of the cases that were opened.” CBP renewed its offer for a briefing for Committee Members with Chief Scott “in lieu of a Transcribed Interview.” The letter also stated: “I want to assure you that CBP has been and remains committed to swiftly investigating the allegations made, and taking appropriate corrective action, up to and including removal from Federal service.”<sup>21</sup>

However, CBP refused to provide unredacted documents corresponding to the agents they offered for transcribed interviews or for Chief Scott, preventing the Committee from determining what conduct they engaged in or whether they were disciplined.

During a call on March 19, 2020, Department staff claimed that the redacted materials were “predecisional,” despite the documents being the “final dispositions” of the cases. Staff also claimed inaccurately that there was an “across the board agency policy” not to release the names of law enforcement personnel.<sup>22</sup>

On April 17, 2020, Committee staff sent an email making clear that CBP needed to provide unredacted documents prior to the transcribed interviews, but CBP refused.<sup>23</sup>

On July 17, 2020, CBP officials informed Committee staff that they had completed their disciplinary review of at least 136 cases, yet they still withheld information about the employees involved and their specific abuses.<sup>24</sup>

On July 20, 2020, as part of an official public statement expressing concern about CBP’s ongoing obstruction and the extent of its redactions, the Committee publicly released one document showing that an employee’s discipline was reduced from a termination to a seven-day suspension. This document contained no identifying information about the employee or the

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<sup>20</sup> Call with Staff, Committee on Oversight and Reform, and Staff, Customs and Border Protection and Department of Homeland Security (Feb. 21, 2020).

<sup>21</sup> Letter from Deputy Assistant Commissioner Stephanie Talton, Customs and Border Protection, to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Mar. 3, 2020) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs.pdf>).

<sup>22</sup> Call with Staff, Committee on Oversight and Reform, and Staff, Customs and Border Protection and Department of Homeland Security (Mar. 19, 2020).

<sup>23</sup> Email from Staff, Committee on Oversight and Reform, to Staff, Customs and Border Protection (Apr. 17, 2020) (“As we discussed on our calls on March 9 and March 19 it is important to have the unredacted documents for the TIs and this will help avoid bringing in these employees for multiple interviews”).

<sup>24</sup> Email from Staff, Customs and Border Protection, to Staff, Committee on Oversight and Reform (July 17, 2020).

abuses the employee committed.<sup>25</sup>

In response, on July 22, 2020, CBP informed Committee staff that it would not provide any of the redacted information unless the Committee agreed never to release any of the redacted information publicly. In an email to Committee staff, CBP staff asserted:

Given the unfortunate recent leak/release of information from the Committee, we cannot ensure that appropriate confidentiality will be placed in the information we provide, thereby placing employees in unnecessary jeopardy of harassment and worse. Until some appropriate measures are taken to ensure against future disclosures to the public, and ensure the health and safety of CBP personnel, we must continue to provide information in appropriately redacted form.<sup>26</sup>

On August 4, 2020, CBP staff sent another email reiterating this position:

Per my July 22 email below, until some appropriate measures are taken to ensure against future disclosures to the public, and ensure the health and safety of CBP personnel, we must continue to provide information in appropriately redacted form.<sup>27</sup>

On September 9, 2020, CBP wrote again arguing that the Committee somehow had forfeited its right to obtain any additional documents from CBP because the Committee released a single document in July to demonstrate the unreasonableness of CBP's redactions. CBP wrote:

The documents released by the Committee were produced for the Committee's use in conducting oversight and were marked not to be released without prior written approval by CBP. The Committee failed to secure this approval prior to releasing the documents.<sup>28</sup>

### **III. NO LEGAL BASIS TO WITHHOLD AND CONCEAL INFORMATION**

When this investigation began, CBP claimed that it could withhold information sought by the Committee while disciplinary actions were ongoing. As the Committee explained to CBP on multiple occasions, the Committee has an extensive history of conducting its own independent investigations—separate and apart from any ongoing disciplinary actions the agency may be conducting. Nevertheless, even if the Committee were to accept the agency's misplaced argument, it is now moot because the disciplinary process is complete.

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<sup>25</sup> Committee on Oversight and Reform, *Press Release: New Document Shows CBP Cut Deals with Border Patrol Agents Who Engaged in Misconduct* (July 20, 2020) (online at <https://oversight.house.gov/news/press-releases/new-document-shows-cbp-cut-deals-with-border-patrol-agents-who-engaged-in>).

<sup>26</sup> Email from Staff, Customs and Border Protection, to Staff, Committee on Oversight and Reform (July 22, 2020).

<sup>27</sup> Email from Staff, Customs and Border Protection, to Staff, Committee on Oversight and Reform (Aug. 4, 2020).

<sup>28</sup> Email from Staff, Customs and Border Protection, to Staff, Committee on Oversight and Reform (Sept. 9, 2020).

After CBP's initial argument disappeared, CBP began claiming that it has the right to withhold information unless Congress agrees never to make it public. This argument is also without merit. The Committee—not CBP—has the authority to determine what information the Committee will make public. There is no legal basis for CBP to withhold from Congress the identity of federal employees who have been fired or otherwise disciplined for these atrocious actions. The Department should not be concealing from Congress the identity of racists, sexists, or violent extremists in its midst. Public opprobrium is not a valid legal basis to obstruct Congress from conducting its Constitutional oversight and legislative responsibilities.

Between March 3, 2020, and September 24, 2020, CBP produced documents showing that it has now taken final disciplinary action against dozens of employees, including firing them, suspending them, and issuing Letters of Reprimand for their conduct. CBP has produced to the Committee final disposition documents in 106 cases. Based on the documents obtained to date, it appears that CBP fired four employees, suspended 37 employees, and issued Letters of Reprimand to ten employees. At least two additional cases have been completed without the documents being provided to the Committee, including one suspension.<sup>29</sup>

Yet, CBP continues to conceal:

- The names, roles, and responsibilities of employees who have been fired;
- The identities and abuses of those who were disciplined, but remain on the job;
- Information regarding the specific misconduct of the employees;
- Proposed penalties for misconduct and any mitigating factors considered in reducing their punishments; and
- The names and roles of supervisors that signed off on punishment reductions.

CBP also failed to produce full sets of documents pertaining to these cases. CBP provided final disposition documents with extensive redactions and withheld many underlying documents, such as letters proposing discipline, interview transcripts, employee responses, copies of social media posts in the Facebook groups, and other correspondence.

#### **IV. COMMITTEE'S BIPARTISAN HISTORY OF INVESTIGATING EMPLOYEE MISCONDUCT AND AGENCY DISCIPLINARY PROCEDURES**

The Committee has an extensive history of obtaining information about federal employees who engage in misconduct, as well as the manner in which agencies investigate and impose discipline for that misconduct. The Committee has an established record of obtaining a wide range of documents for these purposes, including but not limited to personnel files and disciplinary materials relating to personnel who work in law enforcement. Because law enforcement personnel forcibly arrest, place in custody, and imprison others—including children—as part of their official duties, it is critically important that the Committee have the

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<sup>29</sup> Email from Staff, Customs and Border Protection, to Staff, Committee on Oversight and Reform (July 29, 2020); Email from Staff, Customs and Border Protection, to Staff, Committee on Oversight and Reform (Sept. 23, 2020).

ability to investigate employee misconduct and evaluate agency oversight when determining whether legislative reforms are necessary.

For example, under Chairmen Darrell Issa and Jason Chaffetz, the Committee investigated Operation Fast and Furious and received personnel files for law enforcement agents at the Bureau of Alcohol, Tobacco, Firearms and Explosives who were accused of misconduct.<sup>30</sup>

The Committee also conducted a bipartisan investigation into sexual misconduct by Drug Enforcement Administration (DEA) agents, including events involving prostitutes in Colombia. On April 6, 2015, Republican Chairman Chaffetz and Democratic Ranking Member Elijah Cummings sent a joint letter to the DEA Administrator requesting:

A list of all DEA employees against whom disciplinary action was taken, a description of the disciplinary actions taken against them, and the current status of those employees.<sup>31</sup>

Chairman Chaffetz explained why the Committee was requesting documents about the employee misconduct and the agency's disciplinary process:

We have to understand issue by issue what is happening. We need to understand how these people are being held accountable. There should be no question about the severity of the punishment.<sup>32</sup>

The Department of Justice responded to the bipartisan letter, writing:

While the Department does not typically release documents related to individual misconduct investigations, we recognize the Committee's interest in understanding DEA's process for investigating allegations of misconduct and effectuating disciplinary action where appropriate.<sup>33</sup>

The Committee received the names of DEA law enforcement personnel in this investigation.

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<sup>30</sup> *Committee on Oversight and Government Reform, United States House of Representatives v. Lynch*, No. 1:2012cv01332 - Document 117 (D.D.C. Jan. 19, 2016) (online at <https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2012cv01332/155625/117/>).

<sup>31</sup> Letter from Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, Committee on Oversight and Government Reform, to Administrator Michele M. Leonhart, Drug Enforcement Administration (Apr. 6, 2015) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2015-04-06.Chaffetz%20EEC%20to%20Leonhart%20re%20Sexual%20Misconduct%20by%20DEA%20Agents%20%28002%29.pdf>).

<sup>32</sup> *DEA Agents Had 'Sex Parties' with Prostitutes, Watchdog Says*, Politico (Mar. 26, 2015) (online at [www.politico.com/story/2015/03/dea-sex-parties-colombia-report-116413](http://www.politico.com/story/2015/03/dea-sex-parties-colombia-report-116413)).

<sup>33</sup> Letter from Assistant Attorney General Peter J. Kadzik, Department of Justice, to Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, Committee on Oversight and Government Reform (Apr. 13, 2015) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/HOGR%20%20DOJ%20reponse%20%20to%20April%206%20letter%20re%20OIG%20Report%20-%204.13.2015%20%28004%29.pdf>).

The Committee also investigated numerous incidents of misconduct by U.S. Secret Service (USSS) personnel. As part of this investigation, Chairman Chaffetz and Ranking Member Cummings requested “a list of all misconduct allegations received from 2010 to the present against any employee of the USSS.”<sup>34</sup>

The Committee rejected the Secret Service’s initial attempt to redact employee names at the GS-13 level and below.<sup>35</sup> As Chairman Chaffetz stated at the time:

All of the names are redacted. I mean, it’s just list after list of redactions. And my question to members on this panel and to the Congress—to those that are testifying, what is it that they don’t think they should share with Congress? Because I don’t—I don’t think there should be anything.<sup>36</sup>

The Committee received documents from USSS that included the names of law enforcement personnel in this investigation.

## **V. CONCEALING THE IDENTITIES AND ABUSES OF FIRED EMPLOYEES**

CBP produced to the Committee documents showing that four employees were terminated from their positions, yet the agency has completely redacted their identities and details about their specific abuses.

### **A. Fired Agent #1**

CBP produced to the Committee a termination letter sent to a Supervisory Border Patrol Agent in Calexico, California whose identity was redacted in order to conceal it from the Committee. According to this document, the employee was terminated for Conduct Unbecoming a Supervisory Border Patrol Agent. The employee was informed that the “postings at issue were inappropriate and had a nexus to your employment.” The document also stated: “The nature of your posts and your repeated display of poor judgement has destroyed my confidence in your ability to perform your duties.” The document continued:

In your interview with OPR Special Agents, you referred to your postings as “just having fun.” In your written reply, you indicate your postings were “good natured.” Your

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<sup>34</sup> Letter from Chairman Jason Chaffetz and Ranking Member Elijah E. Cummings, Committee on Oversight and Government Reform, Chairman Ron DeSantis and Ranking Member Stephen F. Lynch, Subcommittee on National Security, to Director Joseph P. Clancy, Secret Service (Feb. 18, 2015) (online at <https://republicans-oversight.house.gov/wp-content/uploads/2015/05/House-Oversight-Letter-to-Dir.-Clancy-USSS-Doc-Req.-due-4-1.pdf>).

<sup>35</sup> Memorandum from Democratic Staff to Democratic Members of the Full Committee, *Hearing on Document Production Status Update, Part II* (Apr. 18, 2016).

<sup>36</sup> Committee on Oversight and Government Reform, *Hearing on Document Production Status Update, Part II*, 114th Cong. (Apr. 19, 2016) (online at [www.govinfo.gov/content/pkg/CHRG-114hhrg25502/html/CHRG-114hhrg25502.htm](http://www.govinfo.gov/content/pkg/CHRG-114hhrg25502/html/CHRG-114hhrg25502.htm)).

continued assertion as to the innocuous nature of your postings leads me to believe there is no reasonable basis for expecting rehabilitation.<sup>37</sup>

The document also stated:

Your misconduct was notorious. Your postings received national and world-wide attention. The tremendous media attention resulted in significant negative public, media and Congressional scrutiny, which undermines for U.S. Customs and Border Protection and its mission.<sup>38</sup>

Despite the fact that CBP has completed its disciplinary process, made these findings, and terminated this employee, the agency insists that the Committee may not have access to information in these documents that would identify the individual or the specific abuses this employee committed. As a result, the Committee is being hampered in its efforts to examine how this supervisor was able to engage in such conduct, as well as the extent to which other employees above or below this supervisor may have been involved in or were aware of these actions.

**B. Fired Agent #2**

CBP produced a second termination letter for Conduct Unbecoming a Border Patrol Agent at the Deming Station in New Mexico. The document stated: “Your inappropriate posts show bias and prejudice based on gender, national origin, and political affiliation.” It added that the agent’s “posts both on the Facebook group ‘I’m 10-15’ and on your own personal Facebook timeline were entirely inappropriate.” The letter then stated: “CBP may be obligated to disclose this misconduct to the Department of Justice (DOJ) and it could qualify as *Giglio*,” which requires certain information to be disclosed when a law enforcement officer testifies in court. Finally, the letter stated: “The offensive images and captions you shared on Facebook are extremely disgraceful.”<sup>39</sup>

Again, despite the fact that CBP concluded its disciplinary process, made these findings, and terminated this employee, the agency maintains that the Committee may not have access to information in these documents that identifies this agent or the specific abuses in which this employee engaged.

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<sup>37</sup> Letter from Chief Patrol Agent, Department of Homeland Security, to Supervisory Border Patrol Agent (Oct. 11, 2019) (online at [https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs\\_FN%2038%2C%2039.pdf](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs_FN%2038%2C%2039.pdf)).

<sup>38</sup> *Id.*

<sup>39</sup> Letter from Chief Patrol Agent, Department of Homeland Security, to Border Patrol Agent (Dec. 20, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs%20FN%2040.pdf>).

### **C. Fired Agent #3**

CBP produced a third termination letter for an agent at the Del Rio Sector of Carrizo Springs Station in Texas. The document stated that the agent's "derogatory post tarnished our reputation and undermined our credibility." It also stated:

Due to the nature of your duties and the low expectation of recovery from the negative media attention your post brought to the Agency; my confidence in your ability to perform the duties of your position is depleted and there is no potential for rehabilitation.<sup>40</sup>

Yet again, CBP redacted information about the agent's identity, as well as information about the employee's specific abuses.

### **D. Fired Agent #4**

CBP produced a fourth termination letter for a Border Patrol Agent from the Laredo North Station in Texas. The letter highlighted "the serious and notorious nature of your misconduct." It also stated:

Your posting at issue was inappropriate and had a nexus to your employment when you posted in a Facebook group intended to consist of Border Patrol Agents. In addition, your improper social media post has brought negative media attention to the Agency, which undermines the Agency's ability to effectuate its mission. Further, your misconduct in this case could affect your credibility, hindering your ability to fulfill your law enforcement duties.<sup>41</sup>

Again, CBP redacted the employee's identity, as well as specific information about the agent's misconduct.

## **VI. REDUCTION OF DISCIPLINARY PENALTIES**

Although CBP has withheld or concealed information about specific individuals and the abuses they engaged in, the limited information produced to the Committee shows that CBP significantly reduced penalties for numerous employees who they determined engaged in misconduct. The documents indicate that CBP reduced three firings to suspensions, reduced the duration of 19 suspensions, and reduced one suspension to a Letter of Reprimand. In 24 additional cases, CBP redacted the proposed punishments so the Committee is unable to determine whether the proposed penalties were for terminations or whether the length of additional suspensions were reduced.

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<sup>40</sup> Letter from Deciding Official, Customs and Border Protection, to Border Patrol Agent (Dec. 3, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Facebook%20Documents-%20June%2012%202020%20FN%2041.pdf>) (Committee added redaction identifying employee representative).

<sup>41</sup> Letter from Law Enforcement Operations, Border Patrol, to Border Patrol Agent (Nov. 8, 2019) (online at [https://oversight.house.gov/sites/democrats.oversight.house.gov/files/FN%2042\\_Redacted.pdf](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/FN%2042_Redacted.pdf)) (Committee added redaction identifying employee representative).

According to CBP, the disciplinary process begins with OPR investigating an employee's actions and compiling an investigative report for each case. When OPR finishes its report, it is sent to CBP's Office of Human Resources Management (HRM), which is responsible for administering discipline. Employees receive a proposal notice informing them of their proposed punishment, the reasoning for the disciplinary punishment, and their rights to representation. The Discipline Review Board then uses the investigative report and the employee's response to determine whether to uphold the employee's charges and punishment.<sup>42</sup> The deciding official, who is a part of the Discipline Review Board, may choose between the maximum penalty or a reduced punishment. In most cases, the employee may appeal the decision, and a union also may challenge the disciplinary decision issued to one of its members.<sup>43</sup>

#### **A. Reducing Firings to Suspensions**

CBP produced to the Committee documents showing that CBP reduced at least three proposed terminations to suspensions despite the fact that all of the underlying charges in these three cases were sustained. Yet, as a result of the agency's redactions and withholding of underlying documents, it is unclear who these employees are, what specific misconduct they committed, where within CBP they currently work, or why their proposed terminations were converted to suspensions.

CBP produced to the Committee three "Last Chance Agreements" that reduced terminations to suspensions lasting between 7 and 30 days:

- The first Last Chance Agreement "sustained all of the charges in its Final Decision removal letter relating to Conduct Unbecoming a Border Patrol Agent." Yet, the employee's termination was reduced to a 30-day suspension with a probationary period of one year.<sup>44</sup>
- The second Last Chance Agreement "sustained all of the charges in its Final Decision removal letter relating to Conduct Unbecoming a Border Patrol Agent and Failure to Report." Yet, the employee's termination was downgraded to a 20-day suspension with a probationary period of one year.<sup>45</sup>

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<sup>42</sup> Email from Assistant Commissioner Bradley F. Hayes, Customs and Border Protection, to Staff, Committee on Oversight and Reform (Oct. 2, 2019).

<sup>43</sup> *Id.*

<sup>44</sup> Customs and Border Protection, Last Chance Agreement (Nov. 6, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs%20FN%2045.pdf>).

<sup>45</sup> Customs and Border Protection, Last Chance Agreement (Dec. 16, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs%20FN%2046.pdf>) (Committee added redaction identifying employee representative).

- The third Last Chance Agreement states that “the deciding official has sustained the removal.” Yet, the employee’s removal was converted to “a seven (7) calendar-day suspension” with a probationary period of two years.<sup>46</sup>

## **B. Reducing the Length of Suspensions**

Documents produced to the Committee show that CBP reduced the length of suspensions for 19 employees, but CBP redacted these documents to conceal the identity of these employees, their specific abuses, and the reasons for reducing their suspensions.

In one case, an employee’s suspension was reduced from 20 days to 5 days with a probationary period of one year.<sup>47</sup> Another employee’s suspension was reduced from 14 days to 5 days with a probationary period of two years.<sup>48</sup> In some cases, suspensions were reduced more than once. For example, the Discipline Review Board reduced the suspension in a letter proposing discipline, and in the same letter offered to reduce the suspension further through a so-called Abeyance Agreement.<sup>49</sup>

A CBP spokesperson stated publicly that CBP had a total of 38 suspensions, which “generally range from three to 14 days.”<sup>50</sup> However, based on the documents produced to the Committee, more than half of these suspended employees were offered suspensions lasting only between one to three days, and 35 were offered reduced punishments.

## **C. Letters of Reprimand and Letters of Caution**

Based on documents obtained by the Committee, CBP issued ten Letters of Reprimand. A Letter of Reprimand was given as a reduced punishment in nine of the cases. In eight cases, the original punishment proposed was redacted, so the Committee cannot determine whether the proposed penalties were terminations or suspensions. In all cases, CBP concealed who these employees are, what specific misconduct they committed, where within CBP they currently work, and why the penalties were reduced.

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<sup>46</sup> Customs and Border Protection, Last Chance Agreement (Feb. 6, 2020) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Last%20Chance%20Agreement.pdf>).

<sup>47</sup> Customs and Border Protection, Abeyance Agreement (Dec. 19, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs%20FN%2048.pdf>).

<sup>48</sup> Customs and Border Protection, Abeyance Agreement (Nov. 29, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs%20FN%2049.pdf>) (Committee added redaction identifying employee representative).

<sup>49</sup> Letter from Deciding Official, Customs and Border Protection, to Border Patrol Agent (Nov. 25, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs%20FN%2050.pdf>).

<sup>50</sup> *After a Year of Investigation, The Border Patrol Has Little to Say About Agents’ Misogynistic and Racist Facebook Group*, ProPublica (Aug. 5, 2020) (online at [www.propublica.org/article/after-a-year-of-investigation-the-border-patrol-has-little-to-say-about-agents-misogynistic-and-racist-facebook-group](http://www.propublica.org/article/after-a-year-of-investigation-the-border-patrol-has-little-to-say-about-agents-misogynistic-and-racist-facebook-group)).

In one case, CBP produced to the Committee documents showing that CBP concluded that a charge against a Border Patrol Agent at the Ysleta Station in El Paso, Texas “is fully supported and is sustained.” Yet, the discipline for this employee was reduced from a suspension to a Letter of Reprimand. CBP redacted the identity of this employee and information about the specific abuses in which the employee engaged.<sup>51</sup>

CBP also issued eight Letters of Caution, which are not disciplinary in nature. One employee received a Letter of Caution because the Discipline Review Board Member “considered your assertion that your comments were unconventional law enforcement humor.”<sup>52</sup> In another case, an employee received a Letter of Caution for not reporting “For Official Use Only (FOUO) information” posted on the “I’m 10-15” Facebook group.<sup>53</sup> CBP redacted the identities of these employees and information about their misconduct.

Finally, it has been publicly reported that former Border Patrol Chief Carla Provost was a member of the “I’m 10-15” Facebook group and posted information to the site.<sup>54</sup> However, it is unclear from the documents produced to the Committee what steps, if any, she took in response to these abhorrent posts. On November 14, 2019, CBP Deputy Commissioner Robert Perez sent Chief Provost a letter stating that there was “insufficient evidence” to support an administrative action against her.<sup>55</sup>

## VII. ISSUANCE OF SUBPOENA

After more than 15 months, CBP has demonstrated its unwillingness to comply voluntarily with the Committee’s investigation. I am attaching a copy of the subpoena, which I provided to the Ranking Member earlier today as part of our consultation process.

The Committee on Oversight and Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate “any matter” at “any time” under

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<sup>51</sup> Letter from Chief Patrol Agent, Border Patrol, to Border Patrol Agent (Jan. 7, 2020) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs%20FN%2052.pdf>).

<sup>52</sup> Letter from Discipline Review Board Member, Customs and Border Protection, to Border Patrol Agent (Oct. 7, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs%20FN%2053.pdf>).

<sup>53</sup> Letter from Discipline Review Board Member, Customs and Border Protection, to Border Patrol Agent (Aug. 8, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs%20FN%2054.pdf>).

<sup>54</sup> *Border Patrol Chief Carla Provost Was a Member of Secret Facebook Group*, The Intercept (July 12, 2019) (online at <https://theintercept.com/2019/07/12/border-patrol-chief-carla-provost-was-a-member-of-secret-facebook-group/>).

<sup>55</sup> Letter from Deputy Commissioner Robert Perez, Customs and Border Protection, to Chief Carla L. Provost, Border Patrol (Nov. 14, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/USCBP.030320.Response%20to%20CBM%20re%20Documents%20and%20TIs%20FN%2056.pdf>).

House Rule X. The Committee has jurisdiction over the “Federal civil service, including intergovernmental personnel; and the status of officers and employees of the United States, including their compensation, classification, and retirement.”<sup>56</sup>

The Supreme Court has made clear that Congress has broad authority to inquire about a wide array of topics that could be the subject of legislation and appropriations:

The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and farreaching [sic] as the potential power to enact and appropriate under the Constitution.<sup>57</sup>

This broad investigative authority extends to misconduct by CBP employees and CBP’s actions in investigating and administering discipline for this misconduct. Congress has frequently legislated on these types of issues in the past,<sup>58</sup> is actively considering current legislative proposals,<sup>59</sup> and will continue legislating on these issues in the future.

For example, in 2018, Congress passed, and the President signed into law, legislation resulting in part from Chairman Chaffetz’s and Ranking Member Cummings’ investigation of the Secret Service, which is discussed above.<sup>60</sup> H.R. 3731, the Secret Service Recruitment and Retention Act, addressed Secret Service misconduct by requiring a study of the Secret Service’s implementation of recommendations made by the USSS Protective Mission Panel, “in particular those items pertaining to training and personnel.”<sup>61</sup> The panel called for the Secret Service to “[i]mplement a disciplinary system in a consistent manner that demonstrates zero tolerance for failures that are incompatible with its zero-failure mission” and to “[h]old forces accountable for performance.”<sup>62</sup> At the same time, Ranking Member Cummings and Rep. John Katko pressed for legislation to fully compensate Secret Service employees for overtime hours they worked in providing protective services to top government officials.<sup>63</sup>

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<sup>56</sup> House rule X, clause 1(n)(1).

<sup>57</sup> *Barenblatt v. U.S.*, 360 U.S. 109, 111 (1959).

<sup>58</sup> *See, e.g.*, Civil Service Reform Act, Pub. L. No. 95-454, §7501 - 7514 (1978).

<sup>59</sup> *See, e.g.*, H.R. 3348, Modern Employment Reform, Improvement, and Transformation Act of 2019; H.R. 354, Federal Employee Accountability Act of 2019.

<sup>60</sup> *See, e.g.*, Committee on Oversight and Government Reform, *United States Secret Service: An Agency in Crisis*, 114th Cong. (Dec. 9, 2015) (H. Rept. 114-385) (“The Committee found that one year after the Panel released its report, however, several serious concerns remain. Many USSS employees told Committee staff that USSS has not implemented a ‘culture of accountability,’ as recommended by the Panel.”).

<sup>61</sup> Secret Service Recruitment and Retention Act, Pub. L. No. 115-160 (2018).

<sup>62</sup> Joseph Hagin, Thomas Perrelli, Danielle Gray, Mark Filip, *Executive Summary to Report from the United States Secret Service Protective Mission Panel to the Secretary of Homeland Security* (Dec. 15, 2014) (online at [www.dhs.gov/sites/default/files/publications/14\\_1218\\_uss\\_s\\_pmp\\_0.pdf](http://www.dhs.gov/sites/default/files/publications/14_1218_uss_s_pmp_0.pdf)).

<sup>63</sup> Committee on Oversight and Reform, *Press Release: Katko, Cummings Lead Bipartisan Bill to Fund Overtime Pay for Secret Service* (Sept. 11, 2017) (online at <https://oversight.house.gov/news/press-releases/katko->

Similarly, in 2017, the House of Representatives passed H.R. 2131, Fixing Internal Response to Misconduct Act, which was introduced by Committee Member Clay Higgins.<sup>64</sup> The bill would require DHS to develop a Department-wide policy for discipline and would help “DHS to identify and address causes of persistent employee misconduct more effectively.”<sup>65</sup>

The Committee may make recommendations on the merits of these and various other legislative proposals and help tailor them to ensure efficiency and effectiveness towards their intended goals.

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cummings-lead-bipartisan-bill-to-fund-overtime-pay-for-secret-service); Representative John Katko, *Press Release: Bipartisan Katko Legislation Signed Into Law* (Apr. 6, 2018) (online at <https://katko.house.gov/media-center/press-releases/bipartisan-katko-legislation-signed-law>).

<sup>64</sup> H.R. 2131, Fixing Internal Response to Misconduct Act (2017).

<sup>65</sup> *Id.*; Representative Clay Higgins, *Press Release: Higgins’ Bill to Promote Culture of Responsibility at DHS Passes House* (June 22, 2017) (online at <https://clayhiggins.house.gov/media/press-releases/higgins-bill-promote-culture-responsibility-dhs-passes-house>).