

EXHIBIT A

The ESTATE OF Anastacio HERNANDEZ–ROJAS, by its personal representative Daisy HERNANDEZ, et al.,
Plaintiffs,

v.

UNITED STATES of America,
Defendant.

Civil No. 11cv522 L(DHB).

United States District Court,
S.D. California.

Signed Sept. 29, 2014.

Background: Estate of deceased arrestee brought action against Border Patrol agents, alleging various constitutional violations. Defendants moved for summary judgment.

Holdings: The District Court, M. James Lorenz, J., held that:

- (1) genuine issue of material fact existed as to whether physical abuse of arrestee chilled future exercise of First Amendment rights;
- (2) genuine issue of material fact existed as to whether arrestee’s speech was substantial factor in decision to deport arrestee immediately and to continue to use of force on arrestee;
- (3) arrestee’s right to be free from retaliation by law enforcement after exercise of his First Amendment speech rights was clearly established;
- (4) genuine issue of material fact existed as to whether Border Patrol agents used excessive force;
- (5) arrestee’s right was clearly established;
- (6) deliberate indifference standard applied; and

- (7) genuine issue of material fact existed as to whether agents acted with deliberate indifference.

Motion denied.

1. Arrest ⇌68.1(4)

Constitutional Law ⇌1170

The Fourth Amendment, not the First Amendment, is the only proper basis for an excessive force or false arrest claim. U.S.C.A. Const.Amends. 1, 4.

2. Federal Civil Procedure ⇌2491.5

Genuine issue of material fact existed as to whether physical abuse of arrestee by Border Patrol agents after arrestee requested medical assistance, complained of mistreatment, and cried out for help chilled future exercise of First Amendment rights, precluding summary judgment in *Bivens* action against agents alleging retaliation in violation of his First Amendment speech rights. U.S.C.A. Const.Amend. 1.

3. Federal Civil Procedure ⇌2491.5

Genuine issue of material fact existed as to whether arrestee’s speech requesting medical care, complaining of mistreatment by Border Patrol agents, and asking for help was substantial factor in decision to deport arrestee immediately and to continue to use of force on arrestee, precluding summary judgment in *Bivens* action against agents alleging retaliation in violation of arrestee’s First Amendment speech rights. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇌1802

United States ⇌50.10(3)

Arrestee’s right to be free from retaliation by law enforcement after exercise of his First Amendment speech rights was clearly established at time that Border Patrol agents allegedly physically abused arrestee after he requested medical aid, complained of mistreatment, and cried out for help, for purposes of determining

whether agents were entitled to qualified immunity in *Bivens* action alleging violations of the First Amendment. U.S.C.A. Const.Amend. 1.

5. Federal Civil Procedure ⇌2491.5

Genuine issue of material fact existed as to whether Border Patrol agents used excessive force on arrestee, precluding summary judgment in *Bivens* action against agents, alleging violations of the Fourth Amendment after arrestee died. U.S.C.A. Const.Amend. 4.

6. United States ⇌50.10(3)

Arrestee's right to not have law enforcement press their weight on him, not remove the pressure when he cried for help, and use stun gun on him while he was on the ground, handcuffed, and compliant was clearly established at time of incident between arrestee and Border Patrol agents, for purposes of determining whether agents were entitled to qualified immunity in *Bivens* action against agents, alleging excessive force in violation of the Fourth Amendment. U.S.C.A. Const. Amend. 4.

7. Constitutional Law ⇌3910, 3911

In determining whether deliberate indifference is sufficient to shock the conscience for a Fourteenth Amendment due process claim, or whether the more demanding standard of purpose to harm is required, the critical consideration is whether the circumstances are such that actual deliberation is practical; where an officer faces fast paced circumstances presenting competing public safety obligations, the purpose to harm standard must apply, but, at the other end of the continuum is the deliberate indifference standard that requires a meaningful opportunity for actual deliberation. U.S.C.A. Const.Amend. 14.

8. Federal Civil Procedure ⇌2491.5

A court may determine at summary judgment in a Fourteenth Amendment due process claim whether a law enforcement officer had time to deliberate, such that the deliberate indifference standard applies, or instead had to make a snap judgment because he found himself in a quickly escalating situation, such that the purpose to harm standard applies, so long as the undisputed facts point to one standard or the other. U.S.C.A. Const.Amend. 14.

9. Constitutional Law ⇌4537

Deliberate indifference, rather than intent to harm, standard applied to determine whether Fourteenth Amendment due process right of familial association of arrestee's children was violated by Border Patrol agents during incident with arrestee in which arrestee died; 20 minutes passed between when arrestee arrived at border area with agents and when arrestee was subject to stun gun and had his legs zip-tied, giving agents time to consider how to deal with arrestee. U.S.C.A. Const. Amend. 14.

10. Federal Civil Procedure ⇌2491.5

Genuine issue of material fact existed as to whether Border Patrol agents acted with deliberate indifference to substantial risk of serious harm to arrestee in using batons and stun guns on arrestee, as well as taking and holding him to the ground while his arms were handcuffed behind him, precluding summary judgment in *Bivens* action against agents by arrestee's children, alleging violations of their Fourteenth Amendment due process right to familial association after arrestee died. U.S.C.A. Const.Amend. 14.

11. Constitutional Law ⇌3911

"Deliberate indifference" in violation of Fourteenth Amendment due process occurs when an official acted or failed to act despite his knowledge of a substantial risk

of serious harm. U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

12. Federal Civil Procedure ⇄2491.5

Genuine issue of material fact existed as to whether conduct by Border Patrol agents, including use of stun gun, was substantial factor in causing arrestee's death, precluding summary judgment in *Bivens* action against agent by arrestee's children, alleging violations of their Fourteenth Amendment due process right to familial association. U.S.C.A. Const. Amend. 14.

Eugene G. Iredale, Grace S. Jun, Julia Yoo, Iredale & Yoo, APC, Guadalupe Valencia, San Diego, CA, for Plaintiffs.

Storm Peyton Anderson, Barton H. Hegeler, Barton H. Hegeler, Attorney at Law, A.P.C., Charles V. Berwanger, Gordon and Rees, Dane Joseph Bitterlin, Hugh Anthony McCabe, Neil Dymott Frank McFall & Trexler, APLC, John P. McCormick, Konrad Muth Rasmussen, McCormick and Mitchell, Daniel R. Shinoff, William B. Shinoff, Stutz Artiano Shinoff and Holtz, Richard Tolles, Law Offices of Richard Tolles, San Diego, CA, Ann E. Harwood, Kristina L. Morrison, U.S. Attorney General, Phoenix, AZ, for Defendant.

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT [doc. nos. 145, 146, 147, 151, 152, 153, 184, 185, 197, 201]

M. JAMES LORENZ, District Judge.

Currently pending are the individual defendants' motions for summary judgment.

The motions are fully briefed and are considered without oral argument.

I. Background

On March 23, 2012, Plaintiffs, the Estate of Anastacio Hernandez-Roja, which is for the benefit of the children of decedent ("Anastacio"), filed the operative third amended complaint ("TAC"). [ELECTRONIC CASE FILING ADMINISTRATIVE POLICIES AND PROCEDURES M # 53.] Plaintiffs assert fourteen causes of action: five of the causes of action are alleged constitutional violations under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and the remaining nine are brought under the Federal Tort Claims Act and the Alien Tort Claims Act. Plaintiffs seek general and special damages, punitive damages, and injunctive or declaratory relief.

The initial complaint and the first amended complaint were brought against the United States of America and Does 1–50. The second amended complaint [doc. # 16] named individual defendants with a numbering system. In their joint motion for protective order, [doc. # 41], the parties agreed to use a "star numbering system for each of the individually named defendants at least through the discovery phase of litigation." *Id.* at 2. The TAC continued the use of the numbering system. After a telephonic status conference with the magistrate judge, the requirement that the parties use a star numbering system for each individually named defendant was lifted, except as to defendant Gabriel Ducoing. (Order filed July 29, 2013. [doc. # 242]) The magistrate judge ordered supplemental briefing with respect to the continued application of the star numbering system to defendant Ducoing. After full review of the matters presented, the magistrate judge found that the numbering system would no longer apply to

Ducoing. In an effort to clarify the identities of the individual defendants, the Court will use the individual defendants' names rather than the star numbering system.¹

Plaintiffs allege that their father, Anastacio, a 42-year old Mexican national, died as a result of physical abuse by Defendants. (TAC ¶ 28.)² On May 28, 2010, United States Border Patrol agents arrested Anastacio and his brother on United States land near the Mexican border. (*Id.* ¶¶ 43–44, 46.) Those agents then transported the men to the Border Patrol Detention Facility and turned them over to two of the defendants, Border Patrol Agent Philip Krasielwicz (“Krasielwicz”) and Border Patrol Agent Gabriel Ducoing (“Ducoing”). (*Id.* ¶¶ 57, 59.)

After Ducoing ordered Anastacio to empty his water jug, the agent allegedly slapped the jug from Anastacio's hand. (TAC ¶¶ 62, 64.) Following Anastacio's complaint to the agent about the slap, Ducoing allegedly grabbed Anastacio, pushed him against a wall, and “repeatedly kicked the inside of Anastacio's ankles.” (*Id.* ¶¶ 65–67.) Anastacio requested medical treatment and an opportunity to appear before an Immigration judge. (*Id.* ¶¶ 72–73.) Ducoing did not comply with Anastacio's requests. (*Id.* ¶ 74.)

After being taken to the processing area, Anastacio complained to two Border Patrol agents about Ducoing's treatment and requested medical attention and the opportunity to appear before an Immigration Judge. (TAC ¶¶ 75–76.) Anastacio then reiterated his complaints and requests to Border Patrol Supervisor Ishmael Finn (“Finn”). (*Id.* ¶ 78.) In response, Finn ordered Krasielwicz and Ducoing to immediately remove Anastacio from the United States. (*Id.* ¶ 82.) The agents drove Anastacio to a border area known as “Whiskey 2,” took him out of the car, and allegedly pushed him against the car and “tried to throw him to the ground.” (*Id.* ¶¶ 86, 88.) Immigration Enforcement Agent Harinzo Naraisnesingh (“Naraisnesingh”) and Immigration Enforcement Agent Piligrino (“Piligrino”) arrived and struck Anastacio “repeatedly” with batons. (*Id.* ¶ 89.) Border Patrol Agent Derrick Llewellyn (“Llewellyn”) arrived and allegedly punched Anastacio “repeatedly.” (*Id.* ¶ 90.) The five agents threw Anastacio to the ground and handcuffed him. (*Id.* ¶ 91.) While Anastacio was lying on his stomach and in handcuffs, the agents allegedly “punched, kicked and stepped on Anastacio's head and body.” (*Id.* ¶ 92.)

1. The following table identifies the individual defendants by title and star number, name, and motion for summary judgment docket number:

Customs and Border Protection Agent 7663	Jerry Vales	# 201
Border Patrol Agent V325	Gabriel Ducoing	# 146
Border Patrol Agent V315	Philip Krasielwicz	# 145
Immigration Enforcement Agent Piligrino	Andre Piligrino	# 185
Immigration Enforcement Agent 7G2186	Harinzo Naraisnesingh	# 184
Border Patrol Agent L	Derrick Llewellyn	# 152
Customs and Border Protection Agent B	Alan Boutwell	# 151
Customs and Border Protection Officer S	Kurt Sauer	# 153
Border Patrol Supervisor Finn	Ishmael Finn	# 147
Border Patrol Supervisor 1199	Guillermo E. Avila	# 197
Border Patrol Supervisor 168	Edward C. Caliri	# 197
Custom & Border Protection Supervisor CAQ03175	Ramon DeJesus	# 197

2. The Court provides the factual background from allegations in the TAC because many of the facts as presented by the various defendants are significantly at odds with plaintiffs'

version of events as well as co-defendants' accounts.

While this was taking place, a group of civilians formed. (TAC ¶ 93.) The civilians took photographs and videos of the events and screamed for the agents to stop. (*Id.* ¶¶ 94–95.) Anastacio cried out for help and begged for the agents to stop. (*Id.* ¶ 98.) Plaintiffs allege that U.S. Customs and Border Protection Supervisor Ramon DeJesus (“DeJesus”) confiscated bystanders’ phones and erased the photographs and videos. (*Id.* ¶ 96.)

Agents Alan Boutwell (“Boutwell”) and Kurt Sauer (“Sauer”), along with the five original agents on the scene, allegedly struck a Anastacio. (TAC ¶ 102.) After Border Patrol Supervisors Guillermo E. Avila (“Avila”) and Edward C. Caliri (“Caliri”) arrived, they allegedly “permitted and encouraged the agents to continue abusing Anastacio.” (*Id.* ¶¶ 103–105.) Customs and Border Patrol Officer Jerry Vales (“Vales”) shot Anastacio with his Taser gun four or five times. (*Id.* ¶ 107, 114.) Llewellyn, Boutwell, and Sauer then allegedly beat Anastacio and “ziptied his legs to his already handcuffed hands, putting him in a ‘hog tied’ position on his stomach.” (*Id.* ¶ 115.)

Plaintiffs allege that as a result of these events, Anastacio suffered a heart attack and ultimately died. (TAC ¶¶ 116, 118.) Dr. Glenn Wagner, San Diego County Chief Medical Examiner, performed an autopsy and ruled that the death was a homicide. (Plfs’ Exh. 43.) Dr. Marvin Pietruszka performed another autopsy and found several injuries to Anastacio’s body, including broken ribs and large hematomas. (Plfs’ Exh. 44.) Dr. Pietruszka also ruled the death a homicide and found “the cause of death to be lack of oxygen to the brain brought on by a heart attack.” (*Id.* ¶ 119.)

II. Summary Judgment Standard

Summary judgment is appropriate under Rule 56(c) where the moving party

demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* FED. R. CIV. P. 56(C); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.1997). A dispute about a material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party’s case on which that party will bear the burden of proof at trial. *Id.* at 322–23, 106 S.Ct. 2548. “Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.1987).

“The district court may limit its review to the documents submitted for the purpose of summary judgment and those parts of the record specifically referenced therein.” *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir.2001). Therefore, the court is not obligated “to scour the record in search of a genuine issue of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir.1996) (citing *Richards v. Combined Ins. Co. of*

Am., 55 F.3d 247, 251 (7th Cir.1995)). If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating “that there is some metaphysical doubt as to the material facts.” *Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.1995) (“The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient.”) (citing *Anderson*, 477 U.S. at 242, 252, 106 S.Ct. 2505). Rather, the nonmoving party must “go beyond the pleadings” and by “the depositions, answers to interrogatories, and admissions on file,” designate “specific facts showing that there is a genuine issue for trial.” *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548 (quoting Fed. R.Civ.P. 56(e)).

When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348. “Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he [or she] is ruling on a motion for summary judgment.” *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505.

III. Evidentiary Objections

Before turning to the merits of defendants' motions, the Court notes that both parties have submitted objections to various evidentiary materials.

A. Defendants' Joint Objections to Plaintiffs' Exhibits

Defendants' joint objections characterize plaintiffs' evidence as being unsupported assertions, misstatements of testimony, speculative, argumentative, not authenticated, or misleading. (*See* Objections filed October 1, 2013.)

“At summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial.” *Nevada Dept of Corr. v. Greene*, 648 F.3d 1014, 1019 (9th Cir.2011) (citing *Block v. City of Los Angeles*, 253 F.3d 410, 418–19 (9th Cir.2001)) (internal quotations omitted). The focus is on the admissibility of the evidence's contents, not its form. *Fonseca v. Sysco Food Servs. of Arizona, Inc.*, 374 F.3d 840, 846 (9th Cir.2004); *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir.2003).

Unauthenticated documents cannot be considered in a motion for summary judgment, *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 533 (9th Cir.2011) (citing *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir.2002)) (quotation marks omitted), and therefore, lack of proper authentication can be an appropriate objection where the document's authenticity is genuinely in dispute. But an inquiry into authenticity concerns the genuineness of an item of evidence, not its admissibility, *Orr*, 285 F.3d at 776, and documents may be authenticated by review of their contents if they appear to be sufficiently genuine. *Las Vegas Sands, LLC*, 632 F.3d at 533 (citing *Orr*, 285 F.3d at 778 n. 24) (quotation marks omitted).

“Objections to evidence on the ground that it is irrelevant, speculative, and/or argumentative, or that it constitutes an improper legal conclusion are all duplicative of the summary judgment standard

itself” and are thus “redundant” and unnecessary to consider here. *Burch v. Regents of Univ. of California*, 433 F.Supp.2d 1110, 1119 (E.D.Cal.2006); see *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505 (“Factual disputes that are irrelevant or unnecessary will not be counted.”).

In ruling on summary judgment, the Court considers the evidence submitted in support of and opposition to the motion, it does not rely on the parties’ characterization of the evidence. See *Dalton v. Straumann Co. USA Inc.*, 2001 WL 590038, at *4 (N.D.Cal. May 18, 2001) (“Statements of undisputed facts, as in this case, are generally unhelpful. It is on the underlying declarations, depositions and exhibits that the court will rely.”).

As the case law noted above makes clear, defendants’ objections concerning unsupported assertions or misstatements of testimony, or evidence being speculative or argumentative, or not properly authenticated, or statements that appear to be misleading are without merit at the summary judgment stage. In reviewing the present motions for summary judgment and plaintiffs’ response, the Court has given attention to the evidence presented and the applicable Rules of Evidence. Having therefore considered the objections and case law, the Court overrules defendants’ joint objections.

B. Plaintiffs’ Motion to Strike Expert Opinions

Within their consolidated opposition to the motions, plaintiffs move to strike the expert reports of Urey Patrick and Gary Vilke, and a declaration by defense expert Mark Kroll. (Opp. at 104.) This is procedurally improper under the Civil Local Rules. Because a “motion to strike” buried within an opposition is not a properly filed motion, which requires an independent briefing schedule, defendants are not

given an adequate opportunity to respond to the motion and the Court is deprived a full briefing on the matter. Accordingly, the Court will not consider plaintiffs’ request to strike the expert reports and expert declaration.

IV. Qualified Immunity

The doctrine of qualified immunity shields government officials from civil liability so long as their conduct does not violate clearly established constitutional rights of which a reasonable person would have been aware under the circumstances. See *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). Qualified immunity balances the need to hold public officials accountable for irresponsible exercises of power and the need to shield officials from harassment, distraction, and liability for reasonable performance of their duties. See *id.* Qualified immunity analysis is a two-step process: courts must determine whether a plaintiff alleges a constitutional violation, and whether the right at issue was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Which of the two steps should be addressed first rests in the sound discretion of the court. *Pearson*, 555 U.S. at 236, 129 S.Ct. 808.

A. First Amendment Retaliation Claim

[1] Defendants argue that plaintiffs’ first amendment retaliation claim should be dismissed because any use of force claims must be analyzed under the Fourth Amendment objective reasonableness standard. In so contending, defendants rely on *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *Graham* provided that “[A]ll claims that law enforcement officers have used excessive

force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment. . . .” *Id.* at 395, 109 S.Ct. 1865. In other words, the Fourth Amendment, not the First Amendment, is the only proper basis for an excessive force or false arrest claim. Although correct, plaintiffs’ retaliation claim alleges a First Amendment violation and does not assert a retaliation claim based on the Fourth Amendment. Therefore, defendants’ motion seeking dismissal of the retaliation claim under the First Amendment is denied.

1. Constitutional Violation

The First Amendment forbids government officials from retaliating against individuals for speaking out. *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir.2010) (citing *Hartman v. Moore*, 547 U.S. 250, 256, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006)); *see also*, *U.S. v. Poocha*, 259 F.3d 1077 (9th Cir.2001) (The First Amendment protects verbal criticism, challenges, and profanity directed at police officers.).

To recover under a *Bivens* action for such retaliation, a plaintiff must prove: (1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity, and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action. *Id.*; *see also* *Skoog v. County of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006) (To prevail on a First Amendment retaliation claim, a plaintiff must show that 1) the defendant’s action “would chill or silence a person of ordinary firmness from future First Amendment activities” and 2) the defendant’s “desire to cause the chilling effect was a but for cause of the defen-

dant’s action.”); *see also* *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013). The Ninth Circuit has held that “retaliatory police action such as an arrest or search and seizure would chill a person of ordinary firmness from engaging in future First Amendment activity.” *Ford*, 706 F.3d at 1193.

a. Chilled Speech

[2] In the present case, plaintiffs allege that while at the Processing Center, Anastacio requested medical care and complained about physical mistreatment by agents. Anastacio asked Ducoing why he had kicked him. (Ducoing Decl., Exh. D.) Krasielwicz overheard the conversation that occurred between Anastacio and Ducoing. (Krasielwicz Depo., Exh. C.) Jose Galvan, a non-party, was fingerprinting Anastacio when Anastacio complained about his ankle, saying he had pins in his ankle. (Galvan Decl., Exh. F) Krasielwicz called Supervisor Finn. When Anastacio told Finn that one of his agents had kicked his ankle and complained of his mistreatment and requested medical care, Finn told Anastacio he would be returned to Mexico immediately, bypassing standard procedures. This statement is supported by both Ducoing and Krasielwicz (*Id.*; Krasielwicz Decl.) In his deposition, Finn states that a supervisor, such as himself, is obligated to report any complaints to the Office of the Inspector General; however, Finn also declares that he had never received a complaint during his tenure that began in 2009. Finn noted that it’s a common practice if a prisoner is making complaint against an agent, then obviously, that agent is not going to have any more contact with that prisoner. (Plft’s Exh. 7.) Finn ordered both Ducoing and Krasielwicz to escort Anastacio to Whiskey 2.

In his deposition, Finn also stated that when a prisoner asks for medical care—the right to see a doctor or medical techni-

cian—it is the discretion of the agent or supervisor to determine whether medical care is offered. Further, Finn acknowledged that he did not allow Anastacio to have any medical treatment although he remembered “first hearing of the leg injury from Anastacio himself.” (*Id.*) But Finn denied that Anastacio told him that his ankle had been kicked by one of the agents that day. The declaration of Robinson Ramirez, however, states that he heard Anastacio tell Finn that one of the agents had hurt his ankle. (Finn, Exh. 5.) Galvan also told Finn that Anastacio was kicked by Ducoing or Krasielwicz. Finn acknowledges that Anastacio was not combative but he “was being argumentative.” He additionally denies Anastacio ever asked to use the phone. It is therefore undisputed that Anastacio did not receive medical care; nor did Finn process, investigate, or report Anastacio’s claim of mistreatment. Anastacio also asked repeatedly to use a phone but that too was denied. Agent Cardenas noted that Krasielwicz repeatedly told Anastacio to be quiet and stop talking. (Cardenas Decl.)

Ultimately, once they arrived at the border crossing—“Whiskey 2”—Ducoing and Krasielwicz contend in their declarations or depositions that Anastacio’s behavior changed as the handcuffs were removed, *e.g.*, he was not throwing punches but was pushing the agents and would not go down. (Ducoing & Krasielwicz Decls.) It is unclear whether Anastacio was protesting his mistreatment and crying out in pain when he was next subjected to baton strikes by Piligrino and Narainesingh, who along with Ducoing and Krasielwicz, also grappled with Anastacio to take him to the ground. According to Krasielwicz, Piligrino and Narainesingh, they all fell to the ground, with Anastacio falling on Krasielwicz’s legs. (Krasielwicz Decl.) Krasielwicz states that only one of the ICE agents was hitting Anastacio with a baton.

Anastacio was screaming “ayuda me” which means “help me” in English. (Krasielwicz Decl., Narainesingh Depo.) Krasielwicz and Ducoing both requested that the baton strikes cease. (Ducoing & Krasielwicz Decls.)

Another Border Patrol Agent, Llewellyn, arrived and the five agents took Anastacio to the ground on his stomach and succeeded in getting Anastacio in handcuffs behind his back. (*Id.*) During this time Anastacio “continued to scream for help in Spanish.” (Ducoing & Krasielwicz Decls.) Ducoing then states that he called Finn to tell him what had transpired and was told to bring Anastacio back so charges could be pressed and a caged unit would be sent. (*Id.*) When Ducoing returned to Anastacio, who remained face down and handcuffed behind the back, the agents still were physically holding him down. (Ducoing Decl.)

The caged unit arrived and according to Ducoing, “we picked” up Anastacio who “started kicking and fighting us again.” (*Id.*) Ducoing states that Anastacio arched his back and hit his head against the window when they attempted to get him in the caged unit. At that point, Ducoing stated “we” knew we could not put him in the vehicle so they laid Anastacio on the ground, on his stomach, while still handcuffed. Ducoing and Krasielwicz assert that they stepped away from Anastacio at that point while the other officers continued to hold Anastacio face down on the ground. (Krasielwicz & Ducoing Decl.)

In deposition testimony, Sergio Gonzalez-Gomez, who was on the bridge watching the incident, stated he told his friend Humberto Navarrete, “You know what? We’ve got to help out here. They’re asking for help.” “Q Who was asking for help? A Well, the decedent.” (Gonzalez-Gomez Depo. at 66.) Osvaldo Chavez also

testified that Anastacio was screaming for help, “ayuda” in Spanish. All of the civilian witnesses to the events testify similarly. Avila noted that Anastacio was yelling “you are hurting me” and “you are killing me.” (Avila Decl.) But only Avila states that Anastacio was using foul language. (*Id.*)

Vales arrived with his Taser and told everyone to stay away from Anastacio. (*Id.*) Only Narainesingh heard Vales give Anastacio a warning that he was going to be tasered. Krasielwicz states that Vales told Anastacio to “stop resisting.” (*Id.*) Ducoing and Krasielwicz both acknowledge they could no longer see Anastacio on the ground when Vales first deployed the Taser but according to Ducoing, after the first Taser shot, Anastacio stood up and started yelling again. (*Id.*) What Anastacio was screaming was left unsaid by Ducoing and Krasielwicz. The audio of Allison Young videotape provides evidence that Anastacio continued to do no more than ask for help. At that point, Vales tasered Anastacio again and Anastacio went down to the ground, rolling 20–25 feet breaking the taser wires. (*Id.*) According to Ducoing, Anastacio was continuing to scream but was on his back and because Anastacio was not “complying with orders,” Vales attempted to drive stun³ Tasers can be deployed in either dart mode or drive-stun mode Anastacio. (*Id.*) Ducoing stated that Anastacio was rolled over again. Ducoing does not mention when Anastacio’s legs were ziptied by Boutwell and Sauer, but states Anastacio lost consciousness.

Supervisor DeJesus arrived during the use of the Taser. He noted that multiple agents were holding Anastacio down even though he was face down and handcuffed. (DeJesus Depo. at I-003.) Additionally,

DeJesus agreed with the question: “[u]p until the time when that drive stun was either applied or attempted to be applied, your testimony, as I understand it, is Anastacio was constantly resisting.” (*Id.*) It is undisputed the Supervisor defendants, Avila, Caliri and DeJesus, did not act to intervene in the situation, and it is further uncontested that they heard Anastacio’s cries for help, as did Boutwell and Sauer and the other defendants.

Anastacio’s questioning of the various agents for what he perceived to be physical mistreatment and an unlawful attack and crying out for help falls “squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech . . . is categorically prohibited by the Constitution.” *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir.1990). Taking plaintiffs’ allegations as true, along with the deposition and declaration testimony, and the videotape recorded by Allison Young, Anastacio was repeatedly calling out “help me” rather than offering resistance and because of his continued pleas for assistance, defendants physically abused Anastacio. Thus, a reasonable jury could conclude that all the officers’ acts “would chill or silence a person of ordinary firmness from future First Amendment activities.” A rational jury could find that defendants chilled the future exercise of First Amendment rights when Anastacio was seized and repeatedly injured.

b. Causation

In order to show a constitutional violation under the First Amendment, there must be a substantial causal relationship between the constitutionally protected activity and the adverse action. Plaintiffs correctly point out that the issue of causa-

3. Tasers can be deployed in either dart or probe mode, or in drive stun mode. Drive

stun mode is deployed with the Taser directly against the target’s body.

tion is generally for the trier of fact but they further contend that they have provided sufficient evidence for the jury to infer that the defendants' retaliatory motive was the cause of their actions.

The causation element of a First Amendment retaliation claim requires plaintiffs to show that protected conduct was the substantial or motivating factor underlying the defendant's adverse action. *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir.2009) "To show the presence of this element on a motion for summary judgment, [plaintiff] need only 'put forth evidence of retaliatory motive, that, taken in the light most favorable to him, presents a genuine issue of material fact as to [defendants'] intent. . . . *Id.* (quoting *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir.2003)).' Recognizing that the ultimate fact of retaliation for the exercise of a constitutionally protected right rarely can be supported with direct evidence of intent, . . . courts have found sufficient complaints that allege a chronology of events from which retaliation may be inferred." *Murphy v. Lane*, 833 F.2d 106, 108 (7th Cir.1987) (quoting *Benson v. Cady*, 761 F.2d 335, 342 (7th Cir.1985)). "[T]iming can properly be considered as circumstantial evidence of retaliatory intent." *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir.1995).

[3] Here, plaintiffs have presented sufficient evidence that raises and supports a First Amendment retaliation claim. The various video and deposition evidence demonstrates that Anastacio repeatedly, indeed almost constantly, asked for help and cried out in pain while unable to move or act aggressively. The retaliation for his utterances and cries is demonstrated beginning with Anastacio's initial complaints about Ducoing hurting his ankle, the denial of medical care, to Finn's decision to immediately deport Anastacio after being told of his injury in contravention of policy,

the continuing use of physical force, being tasered multiple times while face down on the ground, handcuffed, surrounded by multiple officers. This provides a reasonable inference that plaintiffs' protected act was a substantial factor underlying defendants' adverse acts and a jury could so find. Plaintiffs have provided facts that "would chill or silence a person of ordinary firmness from future First Amendment activities" and defendants' desire to cause the chilling effect was a substantial cause of the defendant's action.

2. Clearly Established Right

As the Court has determined, plaintiffs have alleged a constitutional violation—retaliation in violation of the First Amendment—against all the defendants; therefore, the next question is whether the right at issue was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

[4] It is clearly established that police officers may not use their authority to retaliate against protected speech, even if probable cause to arrest exists. *Ford* at 1195–96. In *Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1378 (9th Cir.1990), the Court held that it was clearly established that police officers may not use their authority to punish an individual for exercising his First Amendment rights. And *Skoog v. Cnty. of Clackamas*, 469 F.3d 1221, 1235 (9th Cir.2006) "clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action." Thus, Ninth Circuit precedent has long provided notice to law enforcement officers that it is unlawful to use their authority to retaliate against individuals for their protected speech.

3. Conclusion

Taking as true plaintiffs' allegations along with plaintiffs' and defendants' evidence, plaintiffs have alleged a violation of Anastacio's clearly established First Amendment right "to be free from police action motivated by retaliatory animus." *Ford*, 706 F.3d at 1196. Further, that right was clearly established at the time of the incident. Accordingly, none of the defendants are entitled to summary judgment on qualified immunity.

B. Excessive Force and Wrongful Death

Plaintiffs bring their excessive force cause of action under the Fourth Amendment against defendants Krasielwicz, Ducoing, Piligrino, Narainesingh, Llewellyn, Sauer, and Boutwell. (TAC at 18.)

1. Constitutional Violation

All claims that law enforcement officers used excessive force, either deadly or non-deadly, in the course of an arrest, investigatory stop, or other seizure of a citizen are to be analyzed under the Fourth Amendment and its standard of objective reasonableness. See *Blanford v. Sacramento County*, 406 F.3d 1110, 1115 (9th Cir.2005); *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir.1996); see also *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir.2003); *Robinson v. Solano County*, 278 F.3d 1007, 1009 (9th Cir.2002) (en banc). "An objectively unreasonable use of force is constitutionally excessive and violates the Fourth Amendment's prohibition against unreasonable seizures." *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir.2011) (citing *Graham v. Connor*, 490 U.S. 386, 394–96, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)); see also *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921 (9th Cir.2001) ("The Fourth Amendment provides an objective reason-

ableness standard in the excessive force context.")

Determining the reasonableness of an officer's actions is a highly fact-intensive task for which there are no per se rules. *Scott v. Harris*, 550 U.S. 372, 383, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) As the Supreme Court noted in *Graham*, "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation," *Graham*, 490 U.S. at 397, 109 S.Ct. 1865, and "these judgments are sometimes informed by errors in perception of the actual surrounding facts." *Torres*, 648 F.3d at 1124. Thus, the *Graham* Court adopted "the perspective of a reasonable officer on the scene . . . in light of the facts and circumstances confronting him." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865. Standing in the shoes of the 'reasonable officer,' [the court asks] whether the severity of force applied was balanced by the need for such force considering the totality of the circumstances, including (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. *Torres*, 648 F.3d at 1124 (citing *Graham*, 490 U.S. at 396, 109 S.Ct. 1865.) The most important of these factors is whether the suspect poses an immediate threat to the safety of the officers or others. *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir.1994). "[Courts] balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865. Thus, the Fourth Amendment reasonableness standard requires a court to balance the amount of force applied against the need for the use of that force. *Billington*

v. Smith, 292 F.3d 1177, 1185 (9th Cir. 2002).

“In circumstances where the individual against whom the alleged excessive force was used is unable to testify because he has died, it is well-established that the court may not simply accept what may be a self-serving account by the police officer.” *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994). Rather, “[i]t must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer’s story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.” *Id.* Thus, “[t]he judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiffs, to determine whether the officers’ stories is internally consistent and consistent with other known facts.” *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir.2005)

As the *Torres* Court noted, [t]he standard on summary judgment review requires that we “draw all reasonable inferences in favor of . . . the nonmoving party,” and prohibits us from “substitut[ing] [our] judgment concerning the weight of the evidence for the jury.” *Torres*, 648 F.3d at 1125 (quoting *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir.2003)) “Because the reasonableness standard ‘nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, [the Ninth Circuit has] held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.’” *Id.* (quoting *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir.2002) (citing *Liston v. Cnty. of Riverside*, 120 F.3d 965, 976 n. 10 (9th Cir.1997))).

a. Nature and Quality of Intrusion

[5] The gravity of a particular intrusion on an individual’s Fourth Amendment rights depends on the type and amount of force inflicted. *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir.1994). Here, it is undisputed that Anastacio was unarmed, no contraband was found in his possession, and he was placed in handcuffs for all of the encounters with defendants except during his transport from the Processing Center to Whiskey 2. Taking as true that Ducoing kicked Anastacio’s ankles, Anastacio told Finn about his medical needs which Ducoing and Krasielwicz were aware of, Ducoing and Krasielwicz permitted the intrusive beating of plaintiff by Pilgrino and Narainesingh with batons even though moments earlier they indicated that all was well. Llewellyn also participated with Ducoing, Krasielwicz, Pilgrino, and Narainesingh in beating and kicking Anastacio, and holding him on the ground with their body weight pressing on his back and neck. Vales then tasered Anastacio even though Anastacio remained handcuffed, face down, and as the video and civilian witnesses attest, passive but for crying out for help. Sauer and Bauer acknowledge that they restrained Anastacio’s legs after he was tasered, and they then ziptied an unresponsive Anastacio’s legs. The autopsy report of Dr. Glenn Wagner noted abrasion/contusions of face, forehead, abdomen, hands and lower legs, the paraspinal soft tissue of the neck showed acute muscular hemorrhage, and the anterior abdominal wall shows acute hemorrhage, and the soft tissue adjacent to the adrenal gland was also hemorrhagic. and listed manner of death, homicide. Dr. Pietruszka’s autopsy report indicates Anastacio had five broken ribs, extensive hematomas, contusions and abrasions.

The type and amount of force used was a grave intrusion on Anastacio’s Fourth Amendment rights.

b. Governmental Interests

1. Severity of the Crime

Plaintiffs contend that the crime of illegally crossing the border is a non-severe, nonviolent crime. But defendants each argue that the actual crime to which they were responding was assault on an officer or officers, a felony crime. The officers all allege that Anastacio was an out-of-control individual who was, at all times, violent and unresponsive to their commands. The deposition testimony of Ashley Young and the video recordings she took, along with the depositions of Sergio Gonzalez-Gomez and Humberto Navarrete strongly counter the officers' testimony during the height of the altercation. A reasonable jury could find that Anastacio did not assault any of the officers but rather was reacting to the infliction of unwarranted and severe pain.

2. Immediate Threat to Safety

Although the officers all contend that Anastacio posed a great threat to the safety of officers, a reasonable jury could find that an unarmed, handcuffed man, who was face down on the ground, was not a threat to Ducoing, Krasielwicz, Piligrino, Narainesingh or Llewellyn or when Boutwell, Sauer or Vales arrived surrounding Anastacio. The sheer number of officers available at the scene demonstrates rather strongly that there was no objectively reasonable threat to the safety of any one other than Anastacio.

3. Actively Resisting Arrest or Attempting to Evade Arrest by Flight

Defendants contend that Anastacio was actively resisting arrest throughout his time at Whiskey 2. However, the video evidence submitted provides, at a minimum, that Anastacio was not resisting arrest or attempting to evade arrest.

4. Presence of a warning: Presence of a warning

"[T]he giving of a warning or failure to do so is a factor to be considered in applying the *Graham* balancing test." *Deorle v. Rutherford*, 272 F.3d 1272, 1284 (9th Cir. 2001). "[W]arnings should be given, when feasible, if the use of force may result in serious injury." *Id.* Vales repeatedly told Anastacio to stop resisting but such a statement is not a warning to Anastacio that he would be tasered. Defendant Narainesingh alone testified that Vales told Anastacio to "Stop resisting, I'm going to TASER you." (Plfs' Exh. 8 at 55). Assuming that "stop resisting" can function as a warning or Vales actually said "I'm going to TASER you," it was given to a man who was face down, on the ground, was passive, was crying out "help me," with his hands cuffed behind his back. Taking plaintiffs' allegations as true, a reasonable jury could find that the "warning" did not appear to be based on seeking Anastacio's compliance or stopping an immediate threat to officers, but was instead used to cover Vales' intent to use unnecessary and excessive intermediate force, the Taser, on Anastacio.

Balancing the nature and quality of the intrusion and the governmental interest, the use of force by each defendant was not objectively reasonable.

2. Clearly Established

[6] As discussed above, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (quoting *Saucier*, 533 U.S. at 201-202, 121 S.Ct. 2151). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

In the case of *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir.2003), the Court held that some force was justified in restraining a mentally ill individual so he could not injure himself or officers, but once he was handcuffed and lying on ground without offering resistance, officers who knelt on him and pressed their weight against his torso and neck despite his pleas for air used excessive force. As the *Drummond* Court further pointed out: “The officers—indeed, any reasonable person—should have known that squeezing the breath from a compliant, prone, and handcuffed individual despite his pleas for air involves a degree of force that is greater than reasonable.” *Id.* In the present case, several years after *Drummond* was announce, the officers here had notice that once Anastacio was on the ground, prone, handcuffed, and not resisting the officers, they could not hold Anastacio down by pressing their weight against him and when they did not remove the pressure, despite Anastacio’s cries for help, the force used was unreasonable. The right to be free from excessive force under facts similar to the present case, was clearly established at the time of the incident.

Defendant Vale also argues, along with the other defendants, that the use of a Taser was not clearly established in May 2010. Plaintiff contends that the controlling law at the time of the incident was set forth in *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir.2010). In *Bryan*, the Court concluded that the officer used excessive force when, on July 24, 2005, he deployed his X26 Taser in dart mode to apprehend [plaintiff] for a seatbelt infraction, where Bryan was obviously and noticeably unarmed, made no threatening statements or gestures, did not resist arrest or attempt to flee, but was standing inert twenty to twenty-five feet away from the officer. See *Bryan v. MacPherson*, 608 F.3d 614,

618 (9th Cir.2010). The Court continued by noting that the X26 taser and similar devices, when used in dart mode, constitute an “intermediate, significant level of force that must be justified by the governmental interest involved.” *Id.* at 622. Nevertheless, the Court also concluded that defendant was entitled to qualified immunity “because this principle was not clearly established in 2005 when defendant deployed his Taser on plaintiff.” See *id.* at 629. The *Bryan* Court also noted that “use of the X26 taser and similar devices in dart mode constitutes an intermediate, significant level of force that must be justified by the governmental interest involved.” *Bryan*, 608 F.3d at 622.

As plaintiffs correctly note, the original *Bryan* decision was withdrawn and superseded on denial of reh’g, 630 F.3d 805 (9th Cir.2010). In the 2010 decision, which was issued shortly after the death of Anastacio, the Court re-affirmed that defendant was entitled to qualified immunity because the use of a Taser was not clearly established in 2005, when the defendant used the Taser on plaintiff. As the 2010 *Bryan* decision further noted: although we did not alter our holding that Officer MacPherson used excessive force on Bryan, we concluded that, based on “recent statements [in other circuit opinions] regarding the use of tasers, and the dearth of prior authority,” a “reasonable officer in Officer MacPherson’s position could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances Officer MacPherson confronted in July 2005.” *Id.* at 629. Therefore, the later *Bryan* decision did not reverse that the use of the X26 taser and similar devices in dart mode constitutes an “intermediate, significant level of force that must be justified by the governmental interest involved.” *Bryan*, 608 F.3d at 622. As a result, on May 28, 2010, the use of a

Taser on a suspect who was neither a flight risk nor a immediate threat to officers was clearly established.

Further, the testimony of defendants⁴ supports that their training indicated that the use of a Taser could likely subject a person to positional restraint asphyxia. (See e.g., Plaintiffs' Exh. 52, Sauer Depo. at 44.) In *Drummond*, the Court noted that "[a]lthough such training materials are not dispositive, we may certainly consider a police department's own guidelines when evaluating whether a particular use of force is constitutionally unreasonable." *Id.* at 1059.

In sum, the record shows that Vales was on notice that the use of a Taser as a pain compliance device on an individual who was already knocked to the ground, was handcuffed, and compliant had a substantial risk of death or serious bodily injury. Viewing the evidence in the light most favorable to Plaintiffs, Vales had "fair warning" that the force he used, multiple deployments of the Taser, was constitutionally excessive even absent a Ninth Circuit case presenting the same set of facts.

3. Conclusion

The Ninth Circuit has repeatedly cautioned lower courts to take care in deciding excessive force cases at the summary judgment stage. The standard on summary judgment review requires that the Court "draw all reasonable inferences in favor of plaintiffs', the nonmoving party," and prohibits "substitut[ing] [our] judgment concerning the weight of the evidence for the jury's." *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th

Cir. 2003). Because an excessive force claim almost always requires a jury to sift through disputed factual contentions and police misconduct cases almost always turn on the jury's credibility determinations, summary judgment in excessive force cases is granted sparingly. Given the disputed issues of material fact addressed above, the Court will deny summary judgment on the ground of qualified immunity.

D. Right of Association Claim

Plaintiffs' fifth cause of action for familial association is asserted against all defendants except the United States.

1. Violation of a Constitutional Right

Plaintiffs allege that defendants' excessive use of force and deadly force deprived them of the familial association with their father. The potential constitutional violation involves Anastacio's children's Fourteenth Amendment due process right to associate with their father. See *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir.1991) ("The Ninth Circuit recognizes that a parent has a constitutionally protected liberty interest under the Fourteenth Amendment in the companionship and society of his or her child. . . ."); see also *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 371 (9th Cir.1998).

[7] In order to address whether defendants committed a constitutional violation, the Court must first decide the appropriate standard of culpability to apply to determine whether defendants' conduct "shocks the conscience" under the Fourteenth Amendment's Due Process Clause. See *County of Sacramento v. Lewis*, 523

4. The Court notes that Vales declined to answer questions at his deposition on the basis of his Fifth Amendment right to avoid incrimination. During his deposition, Vales was asked about a basic certification course in the use of the Taser and a test he took on November 19, 2008, entitled "United States Customs

and Border Protection Electric Control Device Basic Certification Courts." The question asked was whether Vales was taught as part of his Taser training that if the subject stops resisting an officer, the use of the Taser must stop. (Plaintiffs' Exh. 51.)

U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Then, the Court must determine whether each defendants' conduct meets that standard of culpability. "The level of culpability required to meet the conscience-shocking standard depends on the context." *See id.* at 850, 118 S.Ct. 1708 ("[d]eliberate indifference that shocks in one environment may not be so patently egregious in another"). In determining whether "deliberate indifference" is sufficient to shock the conscience, or whether the more demanding standard of "purpose to harm" is required, "the 'critical consideration [is] whether the circumstances are such that actual deliberation is practical.'" *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir.2008) (quoting *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372 (9th Cir.1998)). Where an officer faces "fast paced circumstances presenting competing public safety obligations, the purpose to harm standard must apply." *Id.* at 1139. At the other end of the continuum is the "deliberate indifference" standard. This standard requires a meaningful opportunity for actual deliberation. *Id.* at 1138; *see also Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir.2010).

[8] Defendants here argue they are not liable for a due process violation without plaintiffs establishing the "purpose to harm" standard. But plaintiffs contend the deliberate indifference standard is appropriate because the evidence shows that the situation was one in which "actual deliberation [was] practical." *Porter*, 546 F.3d at 1137. A court may determine at summary judgment whether the officer had time to deliberate (such that the deliberate indifference standard applies) or instead had to make a snap judgment because he found himself in a quickly escalating situation (such that the purpose to harm standard applies), "so long as the undisputed facts point to one standard or

the other." *Chien Van Bui v. City and County of San Francisco*, 61 F.Supp.3d 877, 901, 2014 WL 3725843, *14 (N.D.Cal. 2014) (quoting *Duenes v. City of Manteca*, 2013 WL 6816375, at *14 (E.D.Cal. Dec. 23, 2013)).

[9] Defendants acknowledge that approximately 20 minutes passed between the time Anastacio arrived at Whiskey 2 and the time he was tasered and had his legs ziptied. Narainesingh testified that after the handcuffs were placed on Anastacio and he was face down, on the ground, Narainesingh, Krasielwicz, Piligrino and Ducoing held Anastacio down with their knees and hands during this time. The video evidence shows that when Vales arrived, Anastacio was continuing to cry out in pain and was seeking assistance but was inactive. Thus, this was a situation that was de-escalating over a significant amount of time. This evidence supports a finding that defendants had ample time to deliberate and plan how to deal with Anastacio. Accepting plaintiffs' evidence as true, there was sufficient time for defendants to consider with deliberation whether to continue to hold Anastacio forcefully face down, to taser him several times, and to place his legs in zipties before finally turning him on his back. Because the circumstances permitted the defendants time to fully consider the potential consequences of their conduct, deliberate indifference is the appropriate standard.

[10, 11] "Deliberate indifference occurs when an official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Solis v. County of Los Angeles*, 514 F.3d 946, 957 (9th Cir.2008). "Whether [the officers] had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that [the officers] knew of a sub-

stantial risk from the very fact that the risk was obvious.” *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). The Court therefore considers whether plaintiffs have alleged facts which, when taken as true, demonstrate that defendants created a substantial risk of serious harm by forcibly holding Anastacio down for an extended period of time while his hands were cuffed behind his back, and he was not resisting. And finding this situation, whether Vales tasered Anastacio several times despite his knowledge of a substantial risk of serious harm and whether the supervisory defendants, Avila, Caliri and DeJesus, failed to intervene in the tasing of a passive, handcuffed man who was faced down on the ground. Here, a jury could reasonably find that the defendants acted with deliberate indifference when Narainesingh and Piligrino used batons on Anastacio as he was being held by Ducoing and Krasielwicz; when Narainesingh, Piligrino, Ducoing and Krasielwicz, and Llewellyn took Anastacio to the ground and held him there; and when Sauer and Boutwell zip-tied his legs while his arms were cuffed behind him.

“A person deprives another of a constitutional right, where that person does an affirmative act, participates in another’s affirmative acts, or omits to perform an act which that person is legally required to do that causes the deprivation of which complaint is made.” *Dietzmann v. City of Homer*, 2010 WL 4684043, *18 (D.Alaska 2010) (quoting *Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir.2007) (citing *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978))). The “requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional

injury.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir.2013) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743–44 (9th Cir. 1978)).

Here, the appropriate standard to be applied is the deliberate indifference standard because the evidence, including video and deposition testimony of bystanders, shows that the situation was one in which “actual deliberation [was] practical. If the plaintiffs’ allegations are believed, the events both before and at Whiskey 2 occurred over a 20 minute period where Anastacio was incapacitated for most of that time, the situation was not escalating, and Anastacio could not flee or harm anyone.

2. Causation

Defendants contend that plaintiffs’ Fifth Amendment claim must fail because plaintiffs cannot establish causation. Plaintiffs assert that they need to show that defendants’ conduct was a substantial factor in causing Anastacio’s death, *i.e.*, that evidence shows that the acts were so closely related to the deprivation of the plaintiff’s rights as to be the moving force that caused the ultimate injury—in this case, Anastacio’s death.

“The substantial factor standard . . . has been embraced as a clearer rule of causation [than the “but-for” test]—one which subsumes the “but-for” test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact.” *Sementilli v. Trinidad Corp.*, 155 F.3d 1130, 1136 (9th Cir.1998) (Nelson, J., concurring), quoting *Rutherford v. Owens-Illinois, Inc.*, 16 Cal.4th 953, 969, 67 Cal. Rptr.2d 16, 941 P.2d 1203 (1997).

[12] Dr. Wagner’s initial autopsy gave a diagnosis of anoxic encephalopathy due to resuscitated cardiac arrest, due to acute myocardial infarct, due to physical alterca-

tion with law enforcement officers and with contributing facts of hypertensive cardiomyopathy and acute methamphetamine intoxication. Based on Dr. Wagner's diagnosis, defendants contend there is no showing that their behaviors were a substantial factor in causing Anastacio's death. Further, defendants argue that plaintiffs' expert cannot demonstrate substantial factor causation and therefore, plaintiffs have failed to make a showing sufficient to establish an element essential to their case which entitles defendants to summary judgment.

Plaintiffs rely on the medical opinion of Dr. Pietruszka to show Anastacio's injuries and death, including but not limited to those from the Taser, were caused to a reasonable degree of medical probability by defendants' actions. Both Dr. Pietruszka's and Dr. Wagner's diagnoses suggests concurrent causes of fact. There is nothing in case law that suggests that when multiple factors are involved in injury or death, that a single cause must be asserted to meet the substantial factor test as defendants suggest here. Nevertheless, the Supervisory defendants point to Dr. Pietruszka's deposition testimony where he states that he is unable to opine to a reasonable degree of medical probability that the taser in this case caused Mr. Hernandez' [sic] death in the sense that it was a but-for cause of death. (Supervisory Defendants' Exh. 17.)

Defendants overlook that Dr. Pietruszka, in his deposition, stated:

[W]e don't know what would have happened had they just left him alone, not tasered him, gotten him to a hospital in enough time. . . . I think that is the cumulation of all the factors player—played a role, And I—it's difficult to—to eliminate or separate the factors completely. . . . And just as in many—many questions that deal with multiple—either

multiple injuries or multiple complex physiologic processes, we cannot separate and remove any of those processes from the ultimate effect because they play some role, they—they cause some effect which may have been sufficient to—to cause the ultimate effect. So I—I believe that just cannot be separated.

(Dr. Pietruszka's Depo. at 171–172.)

As pointed out by plaintiffs, the Ninth Circuit recently found that the trial court erred by weighing the evidence and concluding that defendants' conduct was not a substantial factor in the decedent death. *Krechman v. County of Riverside*, 723 F.3d 1104 (9th Cir.2013). In *Krechman*, defendants argued that plaintiff died of natural causes unrelated to plaintiff's interaction with police by presenting expert testimony. Plaintiff also provided expert testimony demonstrating that the decedent's death was caused by excessive force. There was evidence of blunt-impact injuries on the torso, head, arms, and legs; bleeding in an internal muscle of the victim's ear; and the victim's heart was enlarged, which put him at a higher risk for cardiac arrhythmia. He also testified that the confrontation itself was a stressor that contributed to the arrhythmia that caused the victim's death. Another expert for the plaintiffs testified that there are two ways the encounter with police could have led to the victim's death: depending on what the jury believed the facts to be, the officers' actions could have caused "restraint asphyxia, compressing the chest for too long with too much weight" or the altercation could have caused an "adrenaline increase causing a cardiac arrhythmia from the stress of the exertion and the fear and pain associated with the restraint process."

Here, the expert testimony is conflicting, as it was in *Krechman*. Because there is no undisputed evidence concerning Anastacio's cause of death or even the cause of

his injuries, the Court cannot find that defendants' are entitled to summary judgment. Further, because plaintiffs have come forward with expert testimony concerning substantial factor causation, plaintiffs have made a showing sufficient to establish an essential element to their case.

3. Conclusion

Based on the medical expert testimony, the Court concludes that plaintiffs have presented evidence that defendants' actions were a substantial factor in causing Anastacio's injuries and death sufficient to create a material issue of dispute. Therefore, defendants' motion for summary judgment on plaintiffs' associational claims are denied.

E. FAILURE TO SUPERVISE AND TO INTERVENE

Plaintiffs allege in their fourth cause of action that the Supervisory defendants Avila, Caliri and DeJesus failed to properly supervise and intervene when they arrive at Whiskey 2 and found Anastacio being tasered while face down, his hands cuffed behind him, and not resisting. "Liability under section 1983 [or *Bivens*] arises only upon a showing of personal participation by the defendant." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989). "[O]fficers [nonetheless] have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen." *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir.2000). However, "officers can be held liable for failing to intercede only if they had an opportunity" to do so. *Id.*

The Supervisory defendants assert that when they arrived at the scene, they saw officers struggling with a suspect who was violently resisting arrest, "not for a minor border crossing violation, but for the serious federal felony of physically assaulting

[Ducoing and Krasielwicz] when he struck at them and pinned [Ducoing] against the fence near the return gate." (Avila, Caliri and DeJesus MSJ Ps & As at 18.) There is no evidence that any of the Supervisory defendants had any knowledge of the earlier incident to which they refer.

In his declaration, Avila noted that his "role as supervisor was to observe and must sure that nothing too crazy happened." (Avila Decl.) As a result of his observation, he "believed that the officers were acting appropriately." (*Id.*) Caliri and DeJesus agree. But the videotape recording of the events along with civilian eye witnesses provide evidence that is directly contrary to the Supervisory defendants's contention that Anastacio was acting violently or aggressively. Further, it is undisputed that the Supervisory defendants had the opportunity to intervene.

As pointed out throughout this discussion, there are a multitude of factual issues in dispute in this action. The Court will not grant summary judgment to the Supervisory defendants in such a situation.

V. Conclusion

Based on the foregoing discussion, defendants' motions for summary judgment on the issue of qualified immunity are **DENIED** as follows:

1. Re: Plaintiffs' First Amendment Retaliation claim, the motion is **DENIED** as to all individual defendants;
2. Re: Plaintiffs' Fourth Amendment Excessive Force claim is **DENIED** as to the Ducoing, Krasielwicz, Piligrino, Narainesingh, Llewellyn, Vales, Boutwell, and Sauer;
3. Re: Plaintiffs' Right of Association claim, the motion is **DENIED** as to Ducoing, Krasielwicz, Piligrino, Narainesingh, Llewellyn, Vales, Boutwell, and Sauer;

and the Supervisory defendants, Avila, Caliri, and DeJesus.

4. The Supervisory defendants' motion for summary judgment on the claim of failure to supervise and to intervene is **DENIED**.

It is further Ordered that the parties shall jointly contact the chambers of Magistrate Judge Bartick within three days of the filing of this Order to schedule a mandatory settlement conference.

IT IS SO ORDERED.



M. G., et al., Plaintiffs,

v.

**METROPOLITAN INTERPRETERS
AND TRANSLATORS, INC., J. C., L.
L., R. P., M. L., B. A., United States of
America, Eileen Zeidler, Sondra Hes-
ter, Darek Kitlinski, William R. Sher-
man, Defendants.**

**Case Nos. 12cv0460 JM(MDD), 13cv1891
JM(MDD), 13cv1892 JM(MDD).**

United States District Court,
S.D. California.

Signed Oct. 24, 2014.

Background: Employees of translation services provider brought action against employer, its vice-president, and coworkers, alleging violations of the Employee Polygraph Protection Act (EPPA), as well as claims for civil conspiracy and negligent misrepresentation. Defendants moved for summary judgment.

Holdings: The District Court, Jeffrey T. Miller, J., held that:

(1) employer violated the EPPA;

(2) coworkers were not employers under the EPPA;

(3) vice-president was an employer under the EPPA; and

(4) a fact issue existed as to whether employer acted recklessly.

Motion granted in part and denied in part.

1. Labor and Employment ⇌819

Employer violated the Employee Polygraph Protection Act (EPPA), and thus was liable for damages, where it required employees to submit to or take a polygraph examination, inquired into the results of the polygraph examinations, and discharged employees who failed or refused to take the polygraph examination. Employee Polygraph Protection Act of 1988, § 3(1–3), 29 U.S.C.A. § 2002(1–3).

2. Labor and Employment ⇌857

Employees' coworkers who were involved with and helped to administer polygraph examinations were not "employers" within the meaning of the Employee Polygraph Protection Act (EPPA), and thus were not liable for violations of the EPPA stemming from the examinations; coworkers were not responsible for requiring polygraph examinations, did not possess unilateral power to terminate any employees and did not set the pay scale for employees. Employee Polygraph Protection Act of 1988, § 3(1, 2), 29 U.S.C.A. § 2002(1, 2).

3. Labor and Employment ⇌86

As a matter of law, co-employees, even if supervisors, are not deemed qualified employers for purposes of liability under the Employee Polygraph Protection Act (EPPA). Polygraph Protection Act of 1988, § 2 et seq., 29 U.S.C. § 2001 et seq.

EXHIBIT B

<https://www.dropbox.com/sh/qwz8a50ls769jsr/AAB9CS6hAcFXehppcGCqDQjFa?dl=0>

EXHIBIT C



Use of Force Policy Handbook

Office of Training and Development

October 2010

HB 4500-01B



U.S. Customs and
Border Protection

**For Official Use Only
Law Enforcement Sensitive**

FOREWORD FROM THE COMMISSIONER

I am very pleased to bring you the first version of the *U.S. Customs and Border Protection Use of Force Policy Handbook*. This Policy supersedes the *U.S. Customs Firearms and Use of Force Handbook* (CIS HB 4500-01A) dated March 2003; the *U.S. Customs and Border Protection Interim Use of Force and Firearms Guidelines* dated October 11, 2004; the *INS Firearms Policy* dated 19 February 2003; the *U.S. Customs Firearms and Use of Force Training Policy* (CD 4510-017A) dated December 17, 2001; the *24 Hour Carry of Firearms by Office of Field Operations Personnel* (ENF-3-FO RDJ) dated March 3, 2000; and the *U.S. Immigration and Customs Enforcement Interim Firearms and Use of Force Policies* dated July 7, 2004 (as they applied to CBP components transferred from U.S. Immigration and Customs Enforcement).

This *Handbook* sets forth the Policy for use of force within U.S. Customs and Border Protection (CBP). It was developed to provide all CBP personnel a single, unifying use of force reference, while enabling CBP operational component leadership to address use of force related issues unique to their respective workplace environments and adopt more detailed operational guidance.

This Policy reflects CBP's commitment to balance the need to secure America's borders with the need to preserve individual liberties as prescribed by law. CBP adheres to the Department of Homeland Security's *Use of Deadly Force Policy* and *Commitment to Race Neutrality in Law Enforcement Activities* statements, which are attached as appendices and referenced throughout the body of this Policy.

CBP will provide legal support to the extent authorized by the Constitution and federal law for CBP personnel involved in civil or criminal legal actions as a result of performing duties under this policy, provided that actions were taken in good faith and with a reasonable belief in the lawfulness of the actions taken.

Representation by the Department of Justice is available to present and former federal employees sued, subpoenaed, or charged in a personal capacity for actions taken within the scope of their federal employment. Department of Justice representation is contingent upon a finding that the employee's actions giving rise to the suit reasonably appear to have been performed within the scope of employment, and it is in the interest of the United States to provide the requested representation. The Department of Justice is responsible for making final determinations with respect to these criteria. CBP's views on each of these elements are considered in making a decision on a request for representation. Representation requests should be coordinated through the Office of Chief Counsel.

In addition, emergency, interim legal representation for federal law enforcement officials is made available by the Department of Justice in the immediate aftermath of a shooting or other use of force involving serious physical injury. These requests should be coordinated through the Office of Chief Counsel as well.

Suggestions for future updates to this Policy should be sent to the Director of the Use of Force Policy Division.

Additional copies of this *Policy Handbook* may be obtained by submitting CBP Form 205 (Graphics, Printing and Reproduction Services Request) to the Printing, Graphics and Distribution Branch, Logistics Division.

This Policy sets forth guidance for CBP personnel, and does not create any right, privilege, or benefit for any person or party.

A handwritten signature in black ink, appearing to read "John Berry". The signature is fluid and cursive, with a large initial "J" and "B".

Commissioner
U.S. Customs and Border Protection

FOREWORD FROM THE ASSISTANT COMMISSIONER, OFFICE OF TRAINING AND DEVELOPMENT


This document, the *U.S. Customs and Border Protection Use of Force Policy Handbook*, is the result of a collaborative process between U.S. Customs and Border Protection (CBP) operational components, and CBP's steward for use of force and threat management policy, the Office of Training and Development (OTD).

As specified in the *Handbook*, OTD, through the Use of Force Policy Division (UFPD), is responsible for the development and articulation of all CBP use of force policy. As the CBP lead for use of force and threat management policy, UFPD ensures that each CBP policy, directive, and procedure describing when and how CBP employees use force is in conformance with the provisions of this Policy, which incorporates the *DHS Use of Deadly Force Policy* (Appendix II), and the *DHS Commitment to Race Neutrality in Law Enforcement Activities* (Appendix III).

As specified in the Policy, no testing, evaluation or procurement of any firearm, weapon system, ammunition, or other use of force device is permitted without the concurrence of UFPD. Properly tested and procured firearms, weapons systems and use of force devices are to be accounted for and inventoried in accordance with inventory guidelines specified in this Policy, and in other directives and guidelines established by UFPD.

Finally, as specified in this Policy, UFPD is responsible for developing, maintaining, and approving all use of force training.

By conforming to standard use of force policies, procedures, training, and equipment, CBP personnel are able to more effectively and professionally protect themselves and the public they serve. As CBP personnel, this *Handbook* serves as your authoritative reference for firearms and use of force related issues. Therefore, you must become intimately familiar with its contents.



Assistant Commissioner
Office of Training and Development

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Chapter 1: Compliance with the U.S. Customs and Border Protection (CBP) Use of Force Policy

A. Implementation ¹

1. For the purposes of this Policy, the term "Authorized Officers/Agents" includes:
 - a. CBP Officers;
 - b. Border Patrol Agents;
 - c. Air Interdiction and Marine Interdiction Agents;
 - d. Internal Affairs Special Agents and Investigators; and
 - e. Other qualified CBP personnel as designated by the Assistant Commissioners of the operational components or the Chief, Office of Border Patrol (hereinafter referred to as "Assistant Commissioners" or "ACs"), the Commissioner and the Director of UFPD.
2. Additional qualified CBP personnel may be designated as armed personnel by the ACs of the operational components, the Commissioner and the Director of UFPD, but are not considered to be Authorized Officers/Agents and may carry CBP-authorized weapons only during duty hours and in performance of their official duties.
3. Within thirty days of issuance, Responsible Officials (ROs) shall provide a copy of this policy to all Authorized Officers/Agents. Within 30 days of receipt, Authorized Officers/Agents shall sign a statement (see Appendix I) acknowledging receipt, comprehension and the obligation to comply with the policy. Violation of the CBP Use of Force Policy may constitute grounds for disciplinary action. The signed acknowledgement shall be forwarded to the officer's/agent's duty station for inclusion in the officer's/agent's local personnel file.
4. ROs shall ensure that supervisors and managers review and discuss the contents of this policy with each officer/agent under their supervision.
5. Trainee officers/agents shall be issued a copy of this policy at their respective academies and shall be provided a course of instruction to ensure their comprehension of its elements. Trainee officers/agents shall sign a statement acknowledging receipt, comprehension and the obligation to comply with the policy at the completion of training. The signed acknowledgement shall be forwarded to the officer's/agent's duty station for inclusion in the officer's/agent's local personnel file.

¹ Border Patrol Agents should refer to Appendix VIII.

6. Authorized Officers/Agents shall complete the Use of Force Policy training course on the Virtual Learning Center (VLC) as well as have the opportunity to discuss the new Use of Force Policy with instructors at their next firearms and intermediate force training date.

Questions regarding the Use of Force Policy that cannot be answered locally may be submitted in writing to the Director of the Use of Force Policy Division (UFPD). UFPD may issue periodic clarifications of the Use of Force Policy based upon the questions submitted.

7. Authorized Officers/Agents shall, at a minimum, review the concepts and responsibilities of the Use of Force Policy annually, and shall be given a reasonable opportunity to read the Use of Force Policy during duty hours.
8. Officers/agents who encounter use of force issues in the field that are not addressed in this policy are expected to exercise reasonable judgment.
9. As changes to this policy occur, additional acknowledgement forms shall be issued, signed and collected, as required by the Director of UFPD.
10. Any and all actions taken in performance of the duties and responsibilities of the CBP Use of Force Policy that have an impact on bargaining unit employees will be taken in accordance with the terms of the applicable collective bargaining agreement. Nothing in this Policy is to be interpreted to invalidate or interfere with the existing rights and protections of employees under the law and under applicable collective bargaining agreement(s).

Chapter 2: Authority to Carry Firearms

A. Authorities

The authority to carry a CBP-authorized firearm is provided by 8 U.S.C. § 1357, 8 C.F.R. § 287.8 and § 287.9, and 19 U.S.C. § 1589(a).

B. Authorized Officers/Agents

To carry firearms, Authorized Officers/Agents must:

1. Be designated to carry a firearm, individually or as a class, by the Commissioner of CBP;

A component Assistant Commissioner (AC) may request an individual designation by submitting a written justification requesting this designation to the Commissioner, through the AC of the Office of Training and Development (OTD). This justification shall be forwarded to the Director of UFPD for comment prior to submission to the Commissioner.

2. Be issued a badge and credentials to bear firearms;
3. Have successfully completed the basic law enforcement training required as a condition of employment with CBP, including basic firearms training, or have successfully completed a substantially equivalent training program approved by the AC of OTD and the Director of UFPD;
4. Maintain proficiency, as set forth in Chapter 6 of this *Policy Handbook*, in the use of firearms they are permitted to carry and adhere to the provisions of the policy governing the use of force; and
5. Meet all other requirements and standards set forth in the Use of Force Policy.

C. Carriage of Firearms

A component AC may request an individual designation for CBP personnel to carry privately owned CBP-authorized firearms by submitting a written justification requesting this designation to the Commissioner, through the AC of OTD. This justification shall be forwarded to the Director of UFPD for comment prior to submission to the Commissioner. Absent a specific individual or group designation from a component AC, new requests for CBP personnel to carry privately owned, CBP-authorized firearms shall not be approved.

1. Authorized Officers/Agents, when carrying a CBP-authorized firearm(s), are required to carry their CBP badge and credentials authorizing them to bear firearms. This requirement does not apply to officers/agents involved in an

authorized undercover operation or when approved in writing by the officer's/agent's immediate supervisor.

2. Authorized Officers/Agents are required to carry a CBP-authorized handgun during duty hours in the performance of their normal duties, unless operational circumstances preclude use of these handguns, such as when engaged in certain authorized undercover activities or when operating in specified restricted areas. Only those handguns listed in Appendix IV, CBP-Authorized Firearms and Intermediate Force Devices, and specifically approved by the AC of each operational component may be carried.
3. An Authorized Officer/Agent shall be issued only one primary handgun appearing in Part A of Appendix IV. Based upon availability within an operational component, [REDACTED] with the concurrence of the AC of that operational component. An Authorized Officer/Agent shall not [REDACTED] without the concurrence of the operational component and the Director of UFPD.
4. Except as provided herein, Authorized Officers/Agents shall carry [REDACTED] on their person at a time. Written authorization to [REDACTED] at the same time must be obtained from the RO with the concurrence of the respective operational component AC. Authorization to [REDACTED] at the same time shall be based on factors including, but not limited to, types of duty performed, location of assignment and justification submitted. Such written authorizations may be continuing in nature, and may apply to more than one officer/agent, such as a group of officers/agents assigned to the same type of duty or assignment. A copy of all such authorizations shall be placed in the local personnel file of each of the officers/agents authorized to [REDACTED] at the same time. A copy shall also be provided to the local Primary Firearms Instructor/Inventory Officer (PFI) and to UFPD.
5. Authorized Officers/Agents are authorized to carry a CBP-approved handgun off-duty subject to the provisions of this policy. Only those handguns listed in Appendix IV, CBP-Authorized Firearms and Intermediate Force Devices and specifically approved by the AC of each operational component may be carried.
6. Based on the duty assignment, Authorized Officers/Agents may be issued shoulder-fired weapons (SFWs) as determined necessary by the operational component ACs (or their designees). Officers/agents have the option to carry such weapons at the discretion of management based on operational considerations. Only the firearms listed in Appendix IV and approved by the respective operational component AC may be carried. Authorized Officers/Agents are not authorized to carry any personally owned SFWs or special weapons while on duty.

7. In special circumstances, when unarmed CBP personnel are required to provide service in areas of substantial risk, armed Authorized Officer/Agents shall provide an appropriate level of security, up to and including the formation of a security detail.
8. The AC of the respective operational component may, with concurrence of UFPD, approve requests from an RO for a non-standard firearm during an approved undercover operation or operational activity. With this approval, the PFI may issue for carry a UFPD-provided non-standard firearm to an Authorized Officer/Agent designated to act in an undercover capacity, for the term of the approved undercover operation or until revoked by the RO or the Director of UFPD. A non-standard firearm is one not specified as an authorized firearm in Appendix IV.
9. Authorized Officers/Agents shall carry their CBP-authorized handgun(s) fully loaded at all times. Semiautomatic pistols shall be carried with a round in the chamber and the magazine loaded to capacity. When authorized, revolvers shall be carried with all chambers loaded. Officers/agents are authorized to use only CBP-issued ammunition for carry, whether on or off-duty.
10. Authorized Officers/Agents, when in uniform and on-duty, shall carry a minimum [REDACTED] fully loaded, spare magazines for their primary handgun.
11. Authorized Officers/Agents may carry their CBP-authorized firearms twenty-four (24) hours a day in accordance with the provisions of this Policy.
12. Only Authorized Officers/Agents may discharge a CBP-issued firearm, except during CBP-authorized training, events or activities and military and/or law enforcement joint operations.

D. Flying Armed on a Commercial Aircraft

1. Authorized Officers/Agents may carry their CBP-authorized firearms in the cabin of commercial aircraft. Such carriage is governed by 49 C.F.R. § 1544.219: Carriage of accessible weapons.
2. Each officer/agent who carries a firearm while traveling on board a commercial aircraft must complete the CBP-approved Law Enforcement Officers Flying Armed training course. This course will be readily available to all Authorized Officers/Agents.
3. Any officer/agent traveling aboard an aircraft while armed must at all times keep their weapon:
 - a. Concealed and out of view, [REDACTED], if the armed Authorized Officer/Agent is not in uniform; or

- b. On their person, if the armed Authorized Officer/Agent is in uniform.
- 4. No officer/agent may place a weapon in an overhead storage bin.
- 5. Under no circumstances shall an Authorized Officer/Agent relinquish their CBP-authorized handgun to the pilot or any member of the flight crew, or allow the weapon to be stored in the crew compartment of the aircraft. If an Authorized Officer/Agent is directed by anyone to check their authorized handgun, the officer/agent should request assistance from the appropriate security officials in order to resolve the issue: first, the airport's Ground Security Coordinator (GSC) and then the TSA Federal Security Director (FSD). Any officer/agent who has been denied boarding shall notify their immediate supervisor at the earliest practicable time. A written report of this denial shall be forwarded to the Director of UFPD, through the RO, outlining the details of the occurrence. Further guidance on issues of this nature is available in the CBP-approved Law Enforcement Officer Flying Armed training.
- 6. The TSA and FAA do not permit any chemical agents in the cabin of a commercial aircraft. As provided by 49 C.F.R. § 175.10, self-defense spray (mace or pepper spray) may be carried in checked baggage, provided the container does not exceed four (4) fluid ounces and has a positive means to prevent accidental discharge. Chemical agents shall be carried aboard CBP aircraft only in accordance with CBP Air Operations Handbook (AOH) guidelines.

E. Private Citizens

Nothing in this policy shall be construed as interfering with the right of Authorized Officers/Agents as private citizens to carry a personally-owned firearm for personal use. Officers/agents must comply with all applicable federal, state, and local laws when exercising this right.

F. Alcohol and Medication

- 1. Authorized Officers/Agents are prohibited from consuming alcoholic beverages while carrying CBP-authorized weapons, except when engaged in authorized undercover activities necessitating the consumption of alcoholic beverages. In these cases, the consumption of alcoholic beverages shall be limited to an amount that does not impair the officer's/agent's judgment.
- 2. Authorized Officers/Agents shall not carry a firearm while taking medication that impairs their judgment and/or ability to safely carry, control or use a firearm.

G. Revocation of Authorization to Carry Firearms

- 1. The authority to carry a firearm can be revoked by the CBP Commissioner AC of an operational component or the appropriate RO.

2. Temporary revocations will be based on reliable evidence. Permanent revocations will be based on substantiated evidence.
3. Credentials may be temporarily or permanently revoked (and be subsequently reinstated) by the CBP Commissioner, AC of an operational component or the appropriate RO.
 - a. The revocation of credentials results in the automatic revocation of the authorization to carry a CBP-issued firearm.
 - b. The revocation of the authorization to carry a firearm does not automatically result in the revocation of credentials.
4. Situations that warrant the temporary or permanent revocation of the authority to carry firearms and/or credentials include, but are not limited to:
 - a. The failure to demonstrate proficiency with firearm(s) or other mandatory training requirements without an authorized exception as outlined in Chapter 6B. All such revocations must be accomplished in strict accordance with the procedures set forth therein;
 - b. Medical conditions that impede the safe and effective use of a firearm. In such circumstances the Authorized Officers/Agents may have the authorization to carry a firearm temporarily revoked. A medical evaluation in accordance with regulations must take place before a permanent revocation occurs;
 - c. Evidence of substance abuse. Such determinations will be made in accordance with the CBP Drug Free Workplace Policy;
 - d. Evidence of the commission of a felony;
 - e. Evidence of the commission of an act of domestic violence;
 - f. Evidence of unlawful violent behavior;
 - g. Evidence of serious breaches of CBP integrity or security policies;
 - h. Evidence of a credible threat to use a firearm to commit a crime; and/or
 - i. Any conduct, which is in violation of applicable federal law, that meets the criteria outlined in Section 7 below.
5. In addition to the examples listed above, the appropriate RO may revoke the authority to carry a CBP-issued firearm when the revocation is in the best interests of CBP and/or the officer/agent. Such authority will be reasonably exercised.

6. When the authority to carry a CBP-issued firearm(s) is temporarily revoked by a supervisor, the supervisor shall inform the RO, in writing, within twenty-four (24) hours of such action, identifying the officer/agent involved and the circumstances of the revocation.
7. When the authority to carry a firearm is revoked, the RO shall provide the officer/agent with a written notification explaining the reason(s) for the revocation, the nexus between their conduct (performance or condition) and the threat to the safety of the employee or others, and any limitations on the performance of duties and the duration of the revocation. This written notification will be provided as soon as practicable and may either precede or follow the action (bargaining unit employees should refer to Appendix VII or VIII).
8. When the authority to carry firearms is permanently or temporarily revoked, officers/agents shall not perform assignments that normally require the carriage of a firearm. Permanent revocation of firearms and/or credentials may be grounds for reduction in grade, reassignment or removal, as determined appropriate by CBP.
9. If the revocation of a CBP-authorized firearm(s) extends beyond seventy-two (72) hours, the RO shall provide written notification to the respective operational component AC, identifying the officer/agent involved and explaining the circumstances of the revocation. When the AC of an operational component is the RO, notification to the next level of management is not required, but a permanent record of the action must be maintained.
10. If the revocation of a CBP-authorized firearm(s) extends beyond seventy-two (72) hours, the RO shall formally suspend the authorization to carry any firearm in accordance with Chapter 2.G. Additionally, the revocation shall be recorded in the CBP firearms information tracking system.
11. Officers/agents whose authority to carry a firearm has been temporarily revoked due to any of the circumstances listed in Chapter 2.G or any officer/agent suspended indefinitely while under investigation shall turn in all CBP-issued firearms. Managers, Supervisors and/or Firearms Instructors are authorized to immediately revoke authorization to carry a firearm from an officer/agent if any of the circumstances listed in Chapter 2.G apply.

H. Domestic Violence Convictions (Lautenberg Amendment)

1. Pursuant to 18 U.S.C. § 922(g)(9), it is illegal for anyone, including a federal law enforcement officer, who has been convicted of a misdemeanor crime of domestic violence to possess any firearm or ammunition.

2. It is the responsibility of any Authorized Officer/Agent arrested for, or charged with, a crime of domestic violence to promptly report their arrest or charge to their immediate supervisor. During the period pending disposition of the domestic violence case, officers/agents shall not be permitted to possess or carry any CBP-issued firearms or ammunition.
 3. The Authorized Officer's/Agent's supervisor shall ensure that all CBP-issued firearms and ammunition are immediately turned over to the PFI for storage pending final disposition of such a domestic violence arrest or charge.
- I. Protective Orders Governing an Officer/Agent
1. Pursuant to 18 U.S.C. § 922(g)(8), it is illegal for anyone, including a federal law enforcement officer, who is subject to a court order (restraining order, protective order, etc.) to possess any firearm or ammunition.

Chapter 3: Authorizing and Approving Officials

A. Responsible Officials (ROs)

1. A RO is responsible for all aspects of the CBP use of force program as it relates to the offices and personnel under his or her supervision, and for ensuring compliance with the CBP Use of Force Policy by all officers/agents within his or her area of responsibility.
2. Each RO has primary responsibility for inventory control, maintenance, and security of all CBP use of force equipment within his or her area of responsibility.
3. Each RO shall designate a Primary Firearms Instructor/Inventory Officer (PFI), a Primary Intermediate Force Instructor (PIFI) and/or Co-Authority (COA) to manage the firearms and ammunition program within his or her area of responsibility. These designees are responsible for overseeing the shipment, receipt, issuance and the periodic inventory of use of force equipment.
4. The ROs are:
 - a. Chief, Office of Border Patrol (OBP);
 - b. Assistant Commissioner, Office of Field Operations (OFO);
 - c. Assistant Commissioner, Office of Air and Marine (OAM);
 - d. Assistant Commissioner, Office of Internal Affairs (IA);
 - e. Assistant Commissioner, Office of Training and Development (OTD);
 - f. Chief Patrol Agents (CPA);
 - g. Directors, Field Operations (DFO);
 - h. Directors, Air Operations and Marine Operations (DAO, DMO);
 - i. Division Directors, Internal Affairs (IA);
 - j. Division Directors, Office of Training and Development (OTD); and
 - k. Other officials designated in writing by the Commissioner.

B. Director of UFPD

1. The Director of UFPD has primary responsibility to:
 - a. Direct all aspects of the CBP use of force and firearms program, including intermediate force equipment²;
 - b. Direct the development and implementation of CBP use of force and firearms policies and procedures;
 - c. Direct the technical and evaluation aspects of the CBP use of force and firearms programs;
 - d. Direct the development of the training curriculum and the training of CBP firearms instructors, armorers, defensive tactics instructors and other related training;
 - e. Direct the development and presentation of training for all CBP Special Response Teams (SRTs) and other related training;
 - f. Direct the collection and storage of qualification and instructor certification records;
 - g. Establish the procedures for the selection, training, and certification of armorers, firearms instructors, intermediate force instructors, and other advanced instructors;
 - h. Oversee all CBP armories and direct the maintenance, repair, and alteration of all CBP-issued and authorized firearms; and
 - i. Oversee the control and accountability of all firearms, ammunition, ordnance, intermediate force devices and body armor.
2. The Director of UFPD is responsible for overseeing the acquisition of all CBP-issued firearms, ammunition, ordnance, intermediate force equipment and body armor. No CBP component or individual officer/agent or employee is authorized to solicit, accept or otherwise acquire or dispose of CBP-issued firearms, ammunition, ordnance, intermediate force equipment and/or body armor outside of authorized CBP equipment procurement and distribution procedures for any CBP purpose or operation without the written consent of the Director of UFPD.

² As used in this Policy, the term "intermediate" when used to describe (among other things) devices, equipment and force, has the same meaning as the term "non-deadly" used in the same context at 8 C.F.R. § 287.8 and § 287.9.

C. The UFPD Incident Review Committee

1. The UFPD Incident Review Committee is authorized to review any incident in which use of force is employed, whether by a CBP employee or directed at such an employee. The primary role of this Committee is to allow qualified experts an opportunity to perform an internal analysis of these incidents. Accordingly, this Committee will not make any recommendations concerning disciplinary or adverse actions.

Through a deliberative process, the Committee will identify trends that may impact the use of force procedures and policies employed by CBP to protect its personnel, property and operations.

2. The UFPD Incident Review Committee members are:
 - a. The Director of UFPD, who serves as committee chair; and
 - b. A representative of each operational component or the RO's designee.
3. The UFPD Incident Review Committee shall meet at the discretion of the Director of UFPD, when sufficient use of force data is assembled to warrant the convening of the Committee.

D. Primary Firearms Instructor (PFI)

The PFI is designated by the RO to perform the following administrative functions as required:

1. Coordinate the scheduling of other Firearms Instructors (FIs) and/or Range Safety Officers (RSOs) to assist with firearms training, familiarization and qualification.
2. Train and verify that RSOs are prepared to perform their duties as prescribed by the Director of UFPD. The purpose of the RSO program is to enhance and maintain safety on the firing line during routine structured firearms training. At no time shall an RSO be used in lieu of a certified firearms instructor for conducting advanced tactical courses of fire or for teaching new weapon systems.
3. Oversee the shipment, receipt, transfer and issuance of firearms at the location they are assigned within the CBP firearms information tracking system and conduct periodic physical inventories of weapons, ammunition and related equipment and verify the results in the tracking system.
4. Input qualification scores into the CBP firearms information tracking system or ensure input either by FIs or designated administrative personnel.

E. Primary Intermediate Force Instructor (PIFI)

The PIFI is designated by the RO to perform the following administrative functions as required:

1. Coordinate the scheduling of other CBP Intermediate Force Instructors (IFIs) and to assist with intermediate force training, intermediate force device familiarization and certification.
2. Train and verify that the IFIs are prepared to perform their duties as prescribed by the Director of UFPD. The purpose of the IFI program is to enhance and maintain a safe environment during routine, structured intermediate force training. Only CBP-certified instructors shall be used to conduct approved, formalized certification/re-certification training.
3. Oversee the shipment, receipt, transfer and issuance of intermediate force devices at the location they are assigned and conduct periodic inventories of stored devices, training aids and related equipment.
4. Input assigned Training Records and Enrollment Network (TRAEN) code(s) into TRAEN for all appropriately qualified officers/agents.

Chapter 4: Use of Force

A. General Guidelines

1. Only that force which is both reasonable and necessary may be used in any given situation. Reasonable means that there are objective reasons that justify the degree of force to be used in the given situation, up to and including deadly force. The "reasonableness" of a particular use of force is judged from the perspective of a reasonable officer/agent on the scene, and its calculus must embody an allowance for the fact that law enforcement officers/agents are often forced to make split-second decisions about the amount of force necessary in a particular situation. Necessary means that some force is required to carry out one's duties as a law enforcement officer/agent.
2. Authorized Officers/Agents are to act in a professional manner and therefore shall not carelessly or unnecessarily display firearms and/or intermediate force devices. The authority to carry this equipment carries with it an obligation and responsibility to exercise discipline, restraint and good judgment.
3. The *DHS Commitment to Race Neutrality in Law Enforcement Activities* is contained in Appendix III and is applicable to all situations where officers/agents exercise their use of force authority.
4. Although the wording may be slightly different in the regulations set forth at 8 C.F.R. § 287.8 and § 287.9 (first promulgated by the former Immigration and Naturalization Service) CBP has determined that these regulations, as they apply to Authorized Officers/Agents, are consistent with the intent of the Use of Force Policy.

B. CBP Use of Force Continuum

1. The CBP Use of Force Continuum is a force model used to illustrate the levels of force an Authorized Officer/Agent may need to utilize to gain control over a subject. The CBP Use of Force Continuum is set forth in Appendix V.
2. It is not necessary to mechanically apply every step of the CBP Use of Force Continuum. An officer/agent may have to rapidly escalate or de-escalate through the Continuum, depending on the totality of the circumstances present.

Totality of circumstances refers to all factors existing in each individual case. These factors include, but are not limited to, the level of training, mental attitude, strength, age, the size of the officer/agent and the size of the subject. Additional factors may include the weapon(s) involved, presence of other officers/agents, subjects or bystanders and environmental conditions. In some situations, the proper initial response might be the application of deadly force.

3. Due to the unique circumstances and individual differences present in every potential confrontation, different officers/agents may have different responses to the same situation, all of which may be reasonable and necessary.

C. Use of Deadly Force

1. The *Department of Homeland Security Policy on the Use of Deadly Force* governs the use of deadly force by all DHS officers/agents and employees. The complete DHS policy is contained in Appendix II.
2. Authorized Officers/Agents may use deadly force only when necessary, that is, when the officer/agent has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer/agent or to another person.
3. If feasible, and if to do so would not increase the danger to the officer/agent or others, a verbal warning to submit to the authority of the officer/agent shall be given prior to the use of deadly force.
4. Discharging a firearm at a person shall be done only with the intent of stopping that person from continuing the threatening behavior that justifies the use of deadly force.
5. Deadly force is not authorized solely to prevent the escape of a fleeing subject. Deadly force against a fleeing subject is only authorized, in accordance with the paragraphs above, if there is probable cause to believe that:
 - a. The subject has inflicted or threatens to inflict serious physical injury or death; and
 - b. The escape of the subject poses an imminent threat of death or serious physical injury to the officer/agent or to another person.
6. Firearms shall not be fired solely to disable vehicles, vessels, aircraft or other conveyances. The only exception is that Authorized Officers/Agents, when conducting maritime law enforcement operations, may use specifically authorized firearms and ammunition to disable moving vessels or other maritime conveyances.
7. Deadly force may be used against the driver or other occupant of a moving motor vehicle, vessel, aircraft or other conveyance only when:
 - a. The officer/agent has a reasonable belief that the subject of such deadly force poses an imminent danger of death or serious physical injury to the officer/agent or to another person and the hazard of an uncontrolled conveyance has been taken into consideration before firing; or

- b. The public safety benefits of using deadly force outweigh the risks to the safety of the officers/agents and/or of other persons.
- 8. Deadly force may be directed against dangerous or vicious animals in self-defense or in defense of others. Deadly force may also be used to euthanize an animal that appears to be seriously injured or diseased. In doing so, the officer/agent must be able to justify the use of deadly force to prevent the animal from additional suffering, eliminate a public health risk or to ensure public safety.
- 9. The use of firearms to discharge chemical munitions or specially designed breaching munitions against structures does not constitute the use of deadly force, unless it is reasonable to believe that the use of such force may place individuals at substantial risk of death or serious physical injury.
- 10. Warning shots are not permitted, except as follows:
 - a. Warning shots may be used by Authorized Officers/Agents conducting maritime law enforcement operations, only as a signal for a vessel to stop (see Chapter 8).
 - b. Warning shots may be used by Authorized Officers/Agents conducting aviation law enforcement operations only as a signal to an aircraft to change course and follow direction to leave airspace (see Chapter 8).
- 11. In maritime situations where Authorized Officers/Agents believe that they are in imminent danger of being rammed, and the ramming or attempt to ram is believed to be intentional, CBP personnel can invoke deadly force in self-defense in the circumstances set forth below and in Chapter 8. To stop a ramming by using deadly force, the following criteria must be met:
 - a. The subject vessel must pose an imminent threat of serious physical injury or death to CBP personnel;
 - b. The ramming attempt must appear to the officer/agent to be intentional. If not specifically threatened, the intent to ram may be reasonably inferred based on facts and circumstances, including but not limited to the following:
 - (1) An uncooperative and belligerent attitude toward generalized warnings or orders to "heave to;" or
 - (2) An uncommunicative vessel which refuses to respond to CBP queries, signals, or presence, and does not appear to have difficulties in maneuvering, such as when a sudden change of course is obviously made to collide with the CBP vessel; and
 - c. The CBP vessel cannot prevent the ramming by maneuvering clear.

D. Use of Intermediate Force³

Authorized Officers/Agents shall be trained in alternative methods and tactics for handling resisting subjects that may be used when the use of deadly force is not appropriate. Such alternative methods and tactics include physical tactics, such as hand-to-hand combat, and weapons such as the Collapsible Straight Baton (CSB) or Oleoresin Capsicum (OC) spray.

1. Intermediate force is defined as that force that is neither likely nor intended to cause death or serious physical injury.
2. Authorized Officers/Agents may use intermediate force when reasonable and necessary to:
 - a. Protect themselves or other persons from bodily harm;
 - b. Restrain or subdue a resisting detainee or subject;
 - c. Make an arrest;
 - d. Prevent escape; and/or
 - e. Enforce compliance with a lawful order.

E. Emergency Situations

In threatening, emergent situations, Authorized Officers/Agents are authorized to use any weapon available, appropriate to the level of force required, for self-defense or the defense of another person. However, this statement does not authorize the carrying of any weapon for duty use that is not authorized and listed in Appendix IV.

F. Employee Assistance Program (EAP)

1. **It is CBP policy to strongly encourage the use of EAP.**
2. A supervisor shall advise the employee that the EAP is available for consultation in the event of a violent confrontation involving an Authorized Officer/Agent.

³ As noted previously, as used in this Policy, the term "intermediate" when used to describe (among other things) devices, equipment and force, has the same meaning as the term "non-deadly" used in the same context at 8 C.F.R. § 287.8 and § 287.9.

3. When an Authorized Officer/Agent uses deadly force, either on or off-duty, which results in death or serious physical injury to a person, the officer/agent shall (after providing incident information in accordance with the requirements of Chapter 5.A.2.d.(1-8)) be placed on Administrative Leave with pay and/or regularly scheduled days off for three (3) consecutive calendar days. During this period, the officer/agent may voluntarily participate in a confidential consultation conducted by an EAP counselor. The RO, on a case-by-case basis, shall grant requests for additional administrative leave for the confidential consultation or other related purposes.
4. The RO shall ensure that an EAP counselor is available for consultation with all officers/agents involved in a deadly force incident. This service is confidential and is not part of the investigative process; its sole purpose is to assist the employee in dealing with the traumatic incident.
5. If an employee avails himself/herself of EAP services under Section 4, the employee shall be granted duty time consistent with operational requirements.
6. While on Administrative Leave following a shooting incident, officers/agents who are compensated with Administratively Uncontrollable Overtime or Law Enforcement Availability Pay shall continue to receive overtime pay and will be credited with excludable days in accordance with existing laws, government-wide regulations, policies and practices.

Chapter 5: Use of Force Reporting Requirements

Important Note: In order to understand and properly comply with the reporting and investigative procedures and responsibilities in this chapter, it must be read, interpreted and applied as a whole. Compliance with the chapter requires an understanding and proper application of all provisions of this chapter and applicable laws and collective bargaining agreements as an overall process.

A. Use of Deadly Force

1. Local law enforcement agencies may investigate use of force incidents, including those resulting in serious bodily injury or death, occurring within their territorial jurisdictions. Their investigative responsibility does not diminish because one of the participants is a federal employee. Accordingly, a CBP employee involved in a critical incident should anticipate an investigation by local authorities.
2. Whenever an Authorized Officer/Agent uses deadly force, whether on or off-duty, the incident **must** be reported by a supervisor to CBP Headquarters. Reports shall be made to the Commissioner's Situation Room in accordance with CBP Directive 3340-025C (or any successor policy), to the Office of Internal Affairs (IA) via the Joint Intake Center (JIC) and to the duty officer at the IA office with responsibility for that area of operations.
 - a. Any use of intermediate force that results in serious physical injury or death shall follow the procedures for reporting the use of deadly force.
 - b. The act of establishing a grip, drawing a weapon or pointing a weapon does not constitute the use of deadly force.
 - c. Any Authorized Officer/Agent who participates in or observes a reportable use of deadly force incident shall orally report the incident to a supervisor in accordance with the requirements of this chapter.
 - d. Unless the employee is physically incapacitated or otherwise unable, the oral report shall be made within one (1) hour of the time the incident occurs or within one (1) hour of the time the employee becomes aware of the incident.

The oral report shall be made either in person, or via radio or telephone, and shall be comprised of the following information, if known:

- (1) The date, time, and location of the incident;
- (2) The identity and current location of any injured or deceased person(s), including an assessment of the extent of the injuries;

- (3) The identity, physical description, and current location of any individual(s) known to be involved in, or to have witnessed the incident, including subjects who are at large;
 - (4) The description and location of conveyances involved in the incident, including any subject conveyance(s);
 - (5) A brief description of the incident, including any unusual circumstance(s) which might cause additional conflicts or confrontations;
 - (6) The operational activity in which the Authorized Officer/Agent or employee(s) involved in the incident was engaged;
 - (7) When firearms are used: the type of firearm(s), the number of shots fired, and the current location of all firearms used in the incident;
 - (8) Any other information that is needed to assure that the operational responsibilities of CBP related to the security of human life and CBP equipment are properly carried out.
3. Following the initial reporting of the incident, an employee who learns of additional information concerning the items listed in Chapter 5.A.2 shall, as soon as practicable, make an oral report of such information to a supervisor.
 4. Any supervisory or management official who is notified of the occurrence of a reportable use of deadly force incident shall make an initial supervisory report, via the established chain of command, to the appropriate RO, to the Commissioner's Situation Room in accordance with CBP Directive 3340-025C (or any successor policy) and to the Joint Intake Center (JIC).
 - a. Incidents involving CBP personnel detailed/assigned to a Field Office (FO), Border Patrol Sector (BPS), Air and Marine Branch (AMB), or any subordinate office, shall be reported via the established chain of command.
 - b. Incidents involving CBP personnel detailed/assigned to a FO, BPS or AMB activity that operate directly under the jurisdiction of CBP Headquarters, BORTAC, or CBP academies, shall be reported via the established chain of command in the geographic jurisdiction where the incident occurred. The RO shall also notify the detailed personnel's permanent command element of a reportable use of deadly force incident involving one or more of their personnel.
 - c. The respective RO, for an incident that occurs in his or her jurisdiction, may retain investigative interest after a declination has been received by the relevant DHS investigative entities. The RO may initiate a parallel investigation into an incident via a Critical Incident Team (CIT), but the

respective CIT investigation will be the secondary investigative entity for investigative purposes. The CIT will coordinate with the primary investigative entity to ensure procedural continuity throughout the investigation.

- d. The RO assumes responsibility for the employee(s) involved as if the personnel were permanently assigned within the RO's jurisdiction.
 - e. The initial supervisory report shall contain a summary of the incident and shall be made within one (1) hour of receipt of the first employee report, and may be made orally, either in person, or via radio or telephone to the Commissioner's Situation Room in accordance with CBP Directive 3340-025C (or any successor policy). Whenever practical, the report shall be made through official channels, but the report shall not be delayed when observance of the chain-of-command is impractical.
 - f. Following the submission of the initial supervisory report, any supervisor or other CBP management official who receives additional information regarding the incident shall, as soon as practicable, report such information to the RO and to the Commissioner's Situation Room in accordance with CBP Directive 3340-025C (or any successor policy).
5. Any RO who is notified of a reportable use of deadly force incident shall report it through the chain of command and to the Commissioner's Situation Room in accordance with CBP Directive 3340-025C (or any successor policy) within one (1) hour of the occurrence of the incident, or as soon as practical. The report should contain all information known about the incident at the time.
- a. In any use of force incident where there is a death or serious injury as a result of actions taken by a CBP Officer, Agent or employee, the RO shall ensure that the incident has been reported to the law enforcement authorities having jurisdiction over the investigation.
 - b. Until the incident is resolved, the RO shall be responsible for responding to requests for information about the incident from the public, the media, and other agencies with a "need to know," after coordinating such information releases with the Office of Public Affairs.
 - c. Following the initial report of the incident and during the ensuing investigation, the RO shall ensure that copies of all investigative reports, any other pertinent documents and copies of all printed and televised media reports are provided to the AC of their operational component and the AC of IA.
 - d. When an injured or diseased animal is euthanized by an Authorized Officer/Agent, the RO may limit the extent of the investigation necessary, with the concurrence of the respective DHS investigative entities. This decision should be based on reasonable facts and belief that the action taken was

prudent, appropriate and justified. If any doubt exists as to the need to have euthanized the animal, a full investigation should be completed.

- e. Upon completion of the local CBP investigation of the incident, the RO shall send a copy of the final report to the UFPD Incident Review Committee (IRC).
- 6. Upon receipt of a report of a use of deadly force incident, the Commissioner's Situation Room shall immediately notify the Joint Intake Center (JIC).
- 7. The JIC shall evaluate the initial report of the incident, contact the RO to confirm receipt of the report and notify appropriate CBP Headquarters and DHS offices.

B. Investigation of Reportable Use of Deadly Force Incidents

1. Responsibility of ROs:

- a. In any incident where a law enforcement agency other than CBP has the primary investigative jurisdiction, the RO shall ensure that the following actions are taken until contact with the responsible law enforcement agency has been made:
 - (1) Collect and report use of deadly force incident information in accordance with Chapter 5.A.2;
 - (2) Ensure that medical attention is provided for any individual injured;
 - (3) Preserve the use of deadly force incident scene and all relevant evidence;
 - (4) Identify witnesses; and
 - (5) Exchange information with other law enforcement investigative agencies and advise them of the desire of CBP to maintain liaison during the investigation.
- b. Following contact with the law enforcement agency with primary investigative jurisdiction (or through DHS/CBP channels if DHS/CBP has primary jurisdiction):
 - (1) The RO is responsible for the completion of the local CBP investigation if a declination is received from the relevant DHS investigative entities. Absent a declination from the relevant DHS investigative entities, the RO may initiate a parallel secondary investigation, but the investigation must be coordinated with the entity with primary investigative jurisdiction to ensure procedural continuity. In incidents involving personnel from more than one CBP component, the responsibility to conduct the investigation shall be agreed upon among all ROs with officers/agents involved in the incident.

- (2) The RO may immediately notify a subordinate official of the incident and direct him/her to initiate a local CBP investigation of the incident.
- (3) The local CBP investigation of the incident is intended to determine the following:
 - (a) Were the actions of each CBP employee involved in the incident appropriate and in accordance with CBP policies?
 - (b) Is there any indication of criminal misconduct by any CBP employee?
 - (c) Are there any factors that should be referred to IA and/or the CBP Office of the Chief Counsel concerning potential litigation?
- c. Upon completion of the local CBP investigation of the incident, the RO shall review all final investigative reports and the recommended disposition of the incident.

C. Incident Investigation

1. Upon receipt of declination from the relevant DHS investigative entities, the RO shall direct designated investigative personnel to initiate an investigation. The investigative personnel shall:
 - a. Obtain a Report of Investigation from the Joint Intake Center and comply with the other instructions contained in the CBP Incident Investigation Manual.
 - b. Assign at least two (2) investigative officers/agents to conduct the local CBP investigation of the incident. No investigating officer/agent who has a conflicting relationship with the involved employee(s) shall be assigned to the investigation. The RO shall determine if a conflict of interest exists between the investigating officer/agent and the involved employee.
 - c. Ensure that when any bargaining unit employee is compelled by or through CBP and/or DHS to provide any information that could reasonably lead to disciplinary action against that employee (other than the initial verbal notification outlined herein), he or she is advised in writing of his or her right to Union representation in accordance with the applicable provisions of the law and governing Collective Bargaining Agreement.
 - d. Ensure that supervisory or investigative officers involved in the investigation of a deadly force incident are aware that any information provided by any employee under threat of disciplinary action by CBP or through any other means of coercion cannot be used against such employee in any type of action other than administrative action(s) taken by CBP, consistent with Garrity v. New Jersey, 385 U.S. 493 (1966).

In appropriate circumstances employees will be provided “Kalkines” warnings consistent with Kalkines v U.S. 473 F.2d 1391 (Ct. CI 1973) informing them of the requirement to cooperate in management’s examination when the employee has been assured that he or she will not be subject to criminal action. After receiving such assurances, an employee’s failure to cooperate in an administrative investigation may result in disciplinary action up to and including removal.

e. The designee shall also direct supervisory personnel present at the scene to:

- (1) Remind involved CBP employees of their rights to Union representation and of their Constitutional rights (including protections against self-incrimination and the right to have an attorney represent them during all phases of the investigation);
- (2) Ensure that all CBP employees who are involved in the incident have been identified and advised that they will be interviewed by the investigating officer(s)/agent(s) and that they are to remain on-duty until the initial interview has been completed or they are released by the investigative team supervisor;
- (3) If an employee requests to consult with an attorney, normally no questioning to the employee will occur until his/her attorney is present. Questioning of an employee without an attorney being present after the employee has requested an attorney be present may result in not being able to take criminal action against the employee;
- (4) If the interview cannot be conducted within a reasonable period of time or the employee is physically or mentally unable to participate in the interview, the investigative team supervisor, or designee, shall direct the necessary rescheduling for this requirement. Employees who are directed to remain on duty will be compensated under the appropriate section of Title 5 of the United States Code for all hours beyond the end of their scheduled shift;
- (5) Ensure that supervisors and/or investigators are aware that employees who are involved in a shooting and/or any deadly force incident are prohibited from making a written statement regarding the incident;

Written statements regarding the incident shall be prepared by the local CBP investigating officer(s)/agent(s) and shall be based upon an interview of these CBP employees. In addition, the supervisor should complete a Reportable Use of Force Incident Data Form, CBP Form 318 (Appendix VI), available as an e-form on CBPnet) for submission to UFPD; and

- (6) Assume on-scene responsibility for media contacts and prevent media disruption of CBP activities at the scene.

- f. Provide to the RO, within one (1) hour, or as soon as practicable, of the arrival of CBP management or the CIT at the scene of the incident, a preliminary report of the status of the situation, including updated information regarding the condition of injured persons and the employee(s) involved in the incident.
- g. Ensure that upon completion of the investigation of the incident that a single, consolidated report of the incident is prepared by the investigative team.
- h. Ensure that any use of force and/or officer safety issues that are identified during the investigation (e.g., equipment, training, tactics or policy) are promptly brought to the attention of UFPD.

D. CBP Personnel Involved in a Use of Deadly Force Incident

1. While CBP's internal investigation of the incident, or a criminal investigation of the incident, is being conducted, the RO may, with the concurrence of the appropriate AC, continue the officer/agent on Administrative Leave with pay until either or both of the investigations are completed. If any such investigation lasts more than 30 days beyond the date of the use of deadly force incident, the RO shall provide the affected employee with a status report of the investigation(s) at 30-day intervals until the employee is returned to full duty status. The report may be oral or in writing, and shall inform the employee of the status of the investigation(s) to the extent known by CBP and an estimated time of completion of the investigation(s).
2. CBP's Drug-Free Federal Workplace Program – Post-incident drug testing shall be required when there is a reasonable suspicion that the actions of the officer/agent were the result of illegal drug use. The decision to require post-incident testing must be based on articulable facts, evidence and circumstances and be undertaken in accordance with the standards and procedures documented in Chapter 5, Part C of the *U.S. Customs Service Drug-Free Federal Workplace Program* (CIS HB 51200-01A), dated April 2002.

E. Discharge of a Firearm

1. All reportable shooting incidents, as defined below, must be reported to the Commissioner's Situation Room by a supervisor in accordance with CBP Directive 3340-025C (or any successor policy) and to the Joint Intake Center (JIC).

All reportable firearms discharges shall be reported to UFPD via CBP Form 318 – Reportable Use of Force Incident Data ([Appendix VI](#), available as an e-form on CBPnet). Firearms discharges pursuant to [Chapter 5.F](#) are exceptions to this reporting requirement.

Reportable incidents are defined as:

- a. Any incident that involves the discharge of a firearm by an Authorized Officer/Agent, either intentional or unintentional, which occurs under the following circumstances:
 - (1) While on duty (except for intentional discharges which occur during firearms training, practice, or qualification, and do not cause any injury to a person or animal, or damage to private, public, or government property); or
 - (2) While off duty, and causes any injury to any person, or any damage to either private, public, or government property in violation of any law or ordinance, or causes an investigation by any law enforcement agency; or
 - (3) At any time, regardless of the Authorized Officer's/Agent's duty status, and regardless of the location or outcome of the incident, when a CBP-issued or approved firearm is, or reasonably appears to be, discharged in an unsafe or reckless manner due to impairment caused by the consumption of alcohol or another drug.
 - b. Any incident which involves the discharge of a CBP-issued firearm by any person other than an Authorized Officer/Agent, and causes any injury to any person, or any damage to any private, public, or government property in violation of any law or ordinance, or causes an investigation by any law enforcement agency;
 - c. Any incident that involves the discharge of a firearm as an act of assault against any Authorized Officer/Agent, or employee, and the assault is, or reasonably appears to be, related to that officer's/agent's CBP employment; or
 - d. Any incident that involves the discharge of a firearm by a law enforcement officer other than an Authorized Officer/Agent, when the discharge occurs during multi-agency operations involving CBP personnel.
2. After any discharge resulting in personal injury or property damage where a firearm malfunction is suspected, the RO must immediately send the firearm and ammunition to the appropriate UFPD facility for examination, unless the firearm is required for an ongoing federal, state or local law enforcement investigation or legal action.

When an officer/agent is required to relinquish his or her CBP-issued firearm, but the authority to carry a firearm has not been revoked, the officer/agent shall promptly be provided with:

- a. A replacement firearm;
 - b. The opportunity to familiarize himself or herself with the replacement firearm under the supervision of a FI;
 - c. An opportunity to qualify with the replacement firearm if required by Chapter 6; and
 - d. Ammunition equivalent to the number of rounds necessary to complete two courses of fire under the applicable components qualification course.
3. To send a firearm to the UFPD facility, ensure that the firearm and magazine are unloaded and that it has **NOT** been cleaned or disassembled prior to shipping.
 4. When an unintentional discharge occurs and the officer/agent has any reason to believe that the firearm has malfunctioned, the firearm must be immediately sent to the UFPD facility for examination.
 5. A shooter-induced unintentional discharge in which there is no personal injury or property damage, and for which the officer/agent acknowledges responsibility, does not require the firearm be sent to the UFPD facility. Post-incident safety and function remedial training shall be provided and documented by the local FI. The documentation shall be included in the incident investigation file.

F. Reporting Use of Intermediate Force

1. Verbal Notification Procedures:

Any incident that results in physical contact with intermediate force devices must be reported orally to a supervisor. Unless the reporting employee is physically incapacitated or otherwise unable, the report shall be made within one (1) hour of the time the incident occurs. The oral report shall be made in person, via radio, or telephone and shall include the following information, if known:

- a. The date, the time and the location of the incident;
- b. The device(s) used by the officer/agent and subject;
- c. The nature and the extent of any injuries claimed or observed; and
- d. The name, date of birth, and physical location of the subject(s).

2. Written Notification Procedures:

- a. The supervisor on-duty shall submit a preliminary written report by the end of the work shift through the chain of command.

- b. CBP supervisors shall send reports through their respective chains of command. Copies of the written reports shall be sent to the appropriate AC and to the Director of UFPD within ten (10) business days or as soon as practical.
- c. Authorized Officers/Agents shall report incidents involving the use of intermediate force (not resulting in serious injury or death) to UFPD by utilizing CBP Form 318 – Reportable Use Of Force Incident Data (Appendix VI, available as an e-form on CBPnet). Uses of force that result in serious injury or death shall be reported to UFPD by CBP supervisors.

3. Special Considerations:

Before fulfilling reporting requirements in this section, Authorized Officers/Agents shall offer medical attention to any person who claims or appears to be injured.

G. Intermediate Force – Serious Physical Injury or Death

Any use of force that results in serious physical injury or death shall follow the report procedures described in Chapter 5 for reporting the use of deadly force.

Chapter 6: Use of Force Proficiency and Training

A. Demonstration of Firearms Proficiency

1. All Authorized Officers/Agents who carry a CBP-authorized firearm(s), on or off-duty, must maintain an acceptable level of proficiency. All officers/agents are required, on a quarterly basis, to demonstrate their proficiency in the use of each of the firearms that they are authorized to carry (unless one of the exceptions noted in Chapter 6.B apply).
2. The RO or his/her designee shall ensure that officers/agents demonstrate proficiency with additional firearms needed to meet operational requirements (e.g., a rifle, shotgun, etc.). Authorized Officers/Agents who cannot demonstrate proficiency with such firearm(s) will not be allowed to carry such types of firearm(s), but this shall not affect their ability to carry their CBP-issued and/or CBP-authorized handgun(s).
3. ROs shall ensure that Authorized Officers/Agents participate in a minimum of four (4) hours of firearms training each qualification period (unless one of the exceptions noted in Chapter 6.B apply).
4. The successful demonstration of proficiency satisfies the requirements that enable the officer/agent to carry that firearm until the last day of the next quarter (unless one of the exceptions noted in Chapter 6.B apply, in which case the time period will be extended as specified in that subsection).
5. An acceptable level of proficiency, pursuant to guidelines established by the Director of UFPD, is based on all of the following:
 - a. Successfully completing the approved CBP qualification courses of fire in no more than two consecutive attempts and achieving at least the minimum numerical score as determined by the Director of UFPD;
 - b. Demonstrating proper handling techniques and manual dexterity required to safely draw, fire, holster, load, unload and operate the firearm;
 - c. Demonstrating safe weapon handling skills with the firearm during all firearms training;
 - d. Successfully completing advanced firearms training exercises, pursuant to guidelines established or approved by the Director of UFPD; and
 - e. Demonstrating appropriate responses to the failure or malfunction of firearms or ammunition, including immediate action drills and weapons clearing procedures.

6. The quarter timeframes referenced in the proficiency requirements are:
 - a. First Quarter - October through December;
 - b. Second Quarter - January through March;
 - c. Third Quarter - April through June; and
 - d. Fourth Quarter - July through September.
7. When an Authorized Officer/Agent fails to demonstrate proficiency with any authorized firearm, the officer/agent loses authorization to carry that firearm.

In instances where an Authorized Officer/Agent is unable to demonstrate the required level of proficiency with a shoulder-fired or specialized weapon, and the authority to carry such weapon is revoked, the officer/agent shall not be assigned to duties that normally require the carrying of such weapon(s). However, if the officer/agent is qualified to carry a handgun and is assignable to duties where the carrying of a shoulder-fired or specialized weapon is not required, the officer/agent shall be assigned to those duties.

The officer/agent must demonstrate proficiency before being reauthorized to carry any firearm for which he or she failed to demonstrate proficiency. This demonstration of proficiency shall enable the officer/agent to carry the firearm for the remainder of the current quarter and shall satisfy the requirements to carry that firearm until the next quarterly qualification (unless one of the exceptions noted in Chapter 6.B apply, in which case the time period will be extended as specified in that subsection).

8. An officer/agent who is unavailable to participate in the quarterly demonstration of firearm(s) proficiency (Did Not Fire) is still qualified until the last day of the current quarter. The officer/agent, however, is neither qualified nor authorized to carry any CBP-authorized firearm after the last day of the current quarter until he or she successfully demonstrates proficiency (unless one of the exceptions noted in Chapter 6.B apply, in which case the time period will be extended as specified in that subsection).
9. Each officer/agent must complete the night fire or low-light familiarization course of fire, approved by the Director of UFPD, on an annual basis (sunglasses or similar devices may not be used to simulate night or reduced light conditions).
10. Managers/supervisors are responsible for planning schedules to ensure that Authorized Officers/Agents are able to participate in required training and proficiency demonstration.

11. Officers/agents are responsible for planning their activities to ensure that they participate in required training and proficiency demonstration.
12. If an officer/agent is detailed to another duty station and will miss firearm(s) qualification at their permanent duty station, the officer/agent shall notify managers/supervisors at the temporary duty station of his or her need to qualify during that quarter.
13. No portion or stage of any firearms qualification or familiarization course may be waived or altered, except as prescribed in Appendix VII or VIII.

B. Unable to Participate

1. Authorized Officers/Agents who are unable to participate in firearms and/or intermediate force device qualifications due to an authorized absence shall be excused from such requirement(s) in accordance with the provisions of this subsection. Except as provided in Chapter 6.B.4, officers/agents shall not be excused from the requirement to qualify with firearms for more than two consecutive quarters.

An authorized absence includes a detail away from an officer's/agent's official duty station, any type of approved leave, or compensatory time off.

Officers/agents who are excused under these circumstances may continue to carry a firearm and/or intermediate force device.

Make-up qualifications should be scheduled in the same quarter as the regular qualification. Officers/agents who are unable to attend a make-up qualification due to an excused absence shall be excused from the requirement to qualify for that quarter.

2. If an officer/agent does not participate in the required quarterly firearms qualification for two consecutive quarters, the RO shall revoke the officer's/agent's authority to carry a firearm.

In the case of handguns, the Authorized Officer/Agent shall be required to relinquish his or her CBP-issued handgun to a supervisor, who will provide the officer/agent with a written record of the transfer of such item(s). The officer/agent shall be re-issued his or her CBP-issued handgun upon qualifying and demonstrating proficiency.

If an officer/agent does not participate in the required annual intermediate force device qualification within 180 days after the expiration of his or her previous certification, the RO shall revoke the officer's/agent's authority to carry such device(s), and the officer/agent shall be required to surrender such device(s).

The officer/agent shall be reissued his or her CBP-issued handgun or intermediate force device(s) upon qualifying and demonstrating proficiency.

In all such instances, the officer/agent must be provided with a written notice at least five working days prior to such revocation, and must be provided with reasonable opportunities to participate in such qualifications prior to the actual revocation.

3. Officer/Agent on Detail

- a. If an Authorized Officer/Agent is detailed to another duty station and will miss one or more firearms qualification(s) and/or an annual intermediate force device qualification at his or her permanent duty station, the officer/agent shall notify supervisory or management officials at the temporary duty station of his or her need to qualify during that quarter.
- b. If the detailed Authorized Officer/Agent is performing duties that normally require he carrying of a firearm, the RO who is responsible for the officer's/agent's temporary duty station shall make reasonable efforts to provide the means and the opportunity for the officer/agent to qualify during that quarter.
- c. If the detailed Authorized Officer/Agent is performing duties that are routinely performed by officers/agents who do not carry a firearm and/or intermediate force device, the officer may be exempted from the requirement to qualify until he or she returns to his or her permanent duty station.

4. Exemptions to Qualification Requirements

- a. An Authorized Officer/Agent may be granted an exemption to the requirement to participate in quarterly firearms qualifications and/or annual intermediate force device qualifications due to a temporary physical condition which affects the officer's/agent's ability to properly utilize a handgun and/or intermediate force device.

Accordingly, an officer/agent granted such an exemption is excused from participating in quarterly firearms qualification and/or annual intermediate force device qualifications for the period for which the exemption is granted. A temporary physical condition may be caused by injury, surgery, illness or pregnancy, and normally will not exceed 180 days. On a case-by-case basis, extensions may be granted. Under no circumstances will an exemption be granted for more than 270 days.

- b. An exemption shall not be granted for non-physical conditions or mental trauma related to mental illness deemed by a mental health professional to adversely affect the officer's/agent's judgment regarding the use of deadly force. Such mental disability shall require immediate revocation of authority to carry a firearm and intermediate force device.

- c. Authorized Officers/Agents granted such an exemption must be able, at any time, to demonstrate an acceptable level of proficiency in accordance with the requirements listed in Chapter 6.A.5(b), (c) and (e).
- d. Authorized Officers/Agents requesting such an exemption must provide their supervisor with a written doctor's recommendation. The recommendation must describe the nature of the disability and the anticipated duration of the disability.
- e. The RO's decision regarding the granting of an exemption and the duration thereof shall be based on all available relevant information. Such information may include the medical documentation submitted by the officer/agent, records of the officer's/agent's prior firearms and/or intermediate force device qualifications and the recommendations of the Firearms Instructor(s) and/or Intermediate Force Instructor(s) and supervisory personnel.
- f. The authority to grant these exemptions is limited to ROs.
- g. Authorized Officers/Agents granted an exemption from qualifying for these reasons shall receive a written authorization to continue carrying handgun(s) and/or intermediate force device(s). The written notice shall include a specific expiration date of the exemption, and a description of the handgun(s) and/or intermediate force device(s) the officer/agent is authorized to carry,
- h. As soon as possible after the expiration of the exemption, but within thirty (30) days, the RO shall ensure that the officer/agent is provided with reasonable opportunities to demonstrate proficiency with each firearm(s) and/or intermediate device(s) he or she is authorized and/or required to carry.

C. Failure to Qualify

1. An Authorized Officer/Agent who fails to demonstrate proficiency with any authorized firearm shall have his or her authority to carry that type of firearm suspended and shall immediately relinquish such firearm to the Firearms Instructor (FI). The officer/agent will be provided with a written record of the transfer of such item(s). The officer/agent shall promptly be scheduled for and attend remedial training with a CBP-certified FI. Remedial training shall be conducted during normal duty hours and begin as soon as practicable after failure to qualify.
2. Each Firearms Instructor should use lesson plans and training aids or materials provided by the Advanced Training Programs necessary for the presentation of remedial training. These items shall be based on CBP-approved Basic Marksmanship Instruction and Practical Pistol course lesson plans, and shall include a combination of classroom instruction and live-fire training.

Remedial training for all officers/agents (except Border Patrol Agents) shall not exceed two (2) hours per day for a total of eight additional hours (Border Patrol Agents should refer to Appendix VIII).

3. An officer/agent who, after completing the remedial training, is still unable to demonstrate the required level of proficiency shall have the removal of his or her CBP-issued firearm recorded in the CBP firearms information tracking system.
4. An officer/agent who, following remedial training, is unable to demonstrate proficiency with the firearm shall not perform duties that require the carriage of a firearm and may be subject to reassignment or removal.

If such inability to demonstrate proficiency is for reasons that are beyond the officer's/agent's control, he or she may be reassigned to a position that does not require the carrying of a firearm. Such reassignment shall not obligate CBP to pay relocation expenses and shall not involve reassignment to a position which has non-competitive promotion potential beyond the position from which the officer/agent is reassigned.

If such inability to demonstrate proficiency is for reasons that reasonably appear to be within the officer's/agent's control, he or she may be removed from employment in accordance with applicable laws, government-wide regulations and CBP policies.

D. Firearms Instructors

1. Each RO shall designate a Primary Firearms Instructor (PFI). The PFI may be a supervisor. The PFI shall:
 - a. Manage the firearms training, practice or qualification programs;
 - b. Schedule and direct the other FIs;
 - c. Ensure all qualification scores are recorded in the CBP firearms information tracking system;
 - d. Maintain sufficient quantities of supplies to conduct the firearms program;
 - e. Coordinate the scheduling of officers/agents to participate in the required firearms qualifications and all applicable training, including use of force, tactical exercises and other required training;
 - f. Make final determinations regarding proficiency, consistent with the provisions and requirements of this policy; and
 - g. Manage the overall firearms and use of force program within his or her area of responsibility.

NOTE: Operational components may also designate PFI personnel at the Sector or Field Office level to assist the RO in administering the firearms program.

2. Each RO shall designate officers/agents to perform full-time or collateral duties as a FI. It is recommended that the designation be for a minimum of five (5) years in duration, if the officer/agent remains assigned to that duty location.
3. The Director of UFPD shall establish the criteria for the selection and certification of an FI. The Director of UFPD shall maintain a record of all certified FIs.
4. All FIs must have successfully completed a CBP/UFPD-approved Firearms Instructor Training Program. FIs must be able to cross-train other CBP operational components.
5. FIs are required to be re-certified at least once every five (5) years through a re-certification program approved by the Director of UFPD. On a case-by-case basis, an extension of one (1) year may be approved by the Director of UFPD.
6. FIs must successfully complete training as specified by the Director of UFPD. For those Authorized Officers/Agents who are involved in full time instructional duties for firearms or participate in an extended detail as an FI to the CBP academies, the five (5) year time frame begins once they leave the full time position or the detail ends.
7. FIs must participate as an instructor in at least one qualification event per year to maintain certification.
8. During firearms training, practice or qualification sessions, FIs are responsible for taking all reasonable steps to ensure the safety and security of all personnel and property. They are authorized to remove any person from the range who refuses to comply with safety instructions or otherwise would pose a safety risk.

E. Range Safety Officers

Range Safety Officers (RSOs) are utilized to augment safety requirements on a range during authorized firearms training. They are trained locally using a prescribed program authorized by the Director of UFPD and administered by a FI. Once they complete the program requirements they can act as safety officers during established qualification and familiarization courses of fire.

RSOs do not carry any firearms instructor certification and therefore cannot take the place of certified FIs. A certified FI is required to conduct any and all training that utilizes RSOs.

F. Intermediate Use of Force Proficiency and Training

1. While performing uniformed law enforcement duties, Authorized Officers/Agents who carry firearms are required to carry either OC spray or a CSB (an officer/agent who is certified in both intermediate force devices may choose to carry either or both). Annual re-certification training is mandatory for all armed officers/agents, regardless of their assigned duties (unless one of the exceptions noted in Chapter 6.B apply).
2. ROs shall ensure that a minimum of four (4) hours of Intermediate Use of Force training is conducted during each qualification period. Each such training block may include the annual re-certification on an intermediate force device.
3. Training guidelines shall be established by the Director of UFPD and shall include training in the following areas:
 - a. Intermediate use of force devices (e.g. OC spray, the CSB);
 - b. Control and arrest techniques;
 - c. Edged weapons defense; and
 - d. Defensive tactics.

G. Intermediate Force Device Basic Certification and Remedial Training

1. No Authorized Officer/Agent shall be allowed to carry an intermediate force device until they have successfully completed the initial course of instruction for such device and have been certified in its use.
2. Successful completion/certification in the use of both OC spray and the CSB is required at the basic training academies.
3. Remedial training shall be provided to Authorized Officers/Agents who are unable to demonstrate the required degree of proficiency. Such training shall be no more than eight (8) hours per device to allow the officer/agent to certify or improve their abilities (Border Patrol Agents should refer to Appendix VIII).

H. Intermediate Force Device Re-Certification and Remedial Training

1. Re-certification in the use of intermediate force devices shall be required on an annual basis. If an officer/agent is detailed to another duty station and will miss qualification at their permanent duty station, the officer/agent shall notify managers/supervisors at the temporary duty station of his or her need to qualify during that quarter.

2. Authorized Officers/Agents who are unable to demonstrate an acceptable level of proficiency shall have their authority to carry that authorized intermediate force device suspended until they have demonstrated required proficiency. An Authorized Officer/Agent who fails to demonstrate proficiency with any required intermediate force device shall promptly be scheduled for and attend remedial training with a CBP-certified intermediate force instructor. Remedial training shall be conducted during normal duty hours and begin as soon as practicable after failure to qualify.
3. Remedial training for all Authorized Officers/Agents, including trainees at the CBP basic academies, shall not exceed eight (8) additional hours (Border Patrol Agents should refer to Appendix VIII).
4. An officer/agent who, after completing the remedial training, is still unable to demonstrate the required level of proficiency shall immediately relinquish that authorized intermediate force device to the IFI conducting the remedial training. This relinquishment shall be documented in accordance with CBP property control policy and practice. The officer/agent will be provided with a written record of the transfer of such item(s).
5. An officer/agent who, following the completion of remedial training, is unable to demonstrate proficiency with the intermediate force device shall not be assigned to perform duties that require the carriage of an intermediate force device and may be subject to reassignment or removal from employment.

If such inability to demonstrate proficiency is for reasons that are beyond the officer's/agent's control, he or she may be reassigned to a position that does not require the carrying of an intermediate force device. Such reassignment shall not obligate CBP to pay relocation expenses and shall not involve reassignment to a position which has non-competitive promotion potential beyond the position from which the officer/agent is reassigned.

If such inability to demonstrate proficiency is for reasons that reasonably appear to be within the officer's/agent's control, he or she may be removed from employment in accordance with applicable laws, government-wide regulations and CBP policies.

I. Exposure to Oleoresin Capsicum (OC)

One exposure to OC spray shall be required as part of the basic certification course for Authorized Officers/Agents to carry OC.

1. As part of the basic training at the CBP academies, officers/agents shall be exposed as part of the course of instruction (bargaining unit employees should refer to Appendix VII or VIII).

2. Officers/agents who have already completed the basic academy prior to the effective date of this policy, but who have not been exposed to OC, are not required to be exposed but are required to attend the OC re-certification course and participate in quarterly intermediate force training.

J. Intermediate Force Instructors (IFIs) & Intermediate Force Instructor Trainers

1. Each RO shall designate officers/agents to perform full-time or collateral duties as an IFI.
2. The Director of UFPD shall establish the criteria for the selection, certification and re-certification of IFIs. Such criteria must be reasonable and fairly applied in all selection, certification and re-certification actions. The Director of UFPD shall maintain a record of all certified IFIs.
3. IFIs are required to be re-certified at least once every five (5) years. To maintain their certification, IFIs must instruct at least one class per year. On a case-by-case basis, a certification extension of up to one year may be granted by the Director of UFPD.
4. IFIs must successfully complete training as specified by the Director of UFPD. For those officers/agents who are involved in full time instructional duties for the use of intermediate force or participate in an extended detail in defensive tactics to the CBP academies, the five (5) year time frame begins once they leave the full time position or the detail ends.
5. During intermediate use of force training, practice or certification sessions, IFIs are responsible for taking all reasonable steps to ensure the safety and security of all personnel and property. IFIs are authorized to remove any person from the training area who refuses to comply with safety instructions or otherwise would pose a safety risk.

Chapter 7: Intermediate Force Devices

A. Authorization to Use Intermediate Force Devices

1. All Authorized Officers/Agents shall participate in UFPD-approved training for the Collapsible Straight Baton (CSB) and Oleoresin Capsicum (OC) spray. All officers/agents are required to be certified in and carry either OC spray or a CSB while performing uniformed duties.
 - a. An officer/agent who is certified in both intermediate force devices may choose to carry either or both.
 - b. An officer/agent who is only certified in one intermediate force device shall carry that device.
2. Re-certification training shall be required annually as outlined in Chapter 6.F of this policy.
3. In addition, Authorized Officers/Agents who are trained and UFPD-certified in their use may use the following intermediate force devices:
 - a. Chemical agents;
 - b. CSBs of non-standard length;
 - c. Riot batons;
 - d. Munition launchers (e.g. Pepper Ball); and/or
 - e. Other intermediate force devices authorized, in writing, by the Director of UFPD with the concurrence of the operational component ACs.

B. Use of Chemical Agents

1. Officers/agents may use only chemical agents authorized by the Director of UFPD, as listed in Appendix IV. Authorized Officers/Agents shall not carry personally-owned OC devices or chemical agents for official use.
2. UFPD-authorized chemical agents may be used as an intermediate force option to temporarily incapacitate an assailant. They may be used in situations where empty-hand techniques are not sufficient to control disorderly or violent subjects, but where deadly force is not justified.
3. The use of chemical agents must be discontinued after a subject has been subdued or incapacitated.

4. Officers/agents shall conduct decontamination of the subject as soon as it can be safely effected.

C. Chemical Munitions

1. UFPD-authorized and CBP-issued CS (O-Chlorobenzylidenemalononitrile) or OC spray may be used.
2. These chemical munitions may be fired from a compressed air kinetic impact delivery system (or similar device) or from a 12 gauge or 40 mm weapon. Such devices shall be procured, inventoried, transferred, and excessed in accordance with Chapter 11 and CBP firearms information tracking system protocols.
3. These chemical munitions shall be used only by officers/agents who have received UFPD-approved training and certification in their use and shall only be used in accordance with such training.

D. Procurement of Chemical Agents/Munitions

ROs shall only purchase chemical agents/munitions through contracts and procedures established by UFPD. Purchase Card acquisitions of chemical agents/munitions must be approved in writing by the Director of UFPD.

E. Storage, Transportation and Issuance of Chemical Agents/Munitions

1. Unissued chemical agents/munitions shall be stored in a secure room with limited access and in a secure safe or container separate from other firearms and ammunition. In addition, chemical agents/munitions should be stored per current industry standards in a cool, dry environment and be rotated periodically.
2. Chemical agent/munition inventory control is the responsibility of the RO, and may be delegated to the PFI/PIFI.
3. The TSA and FAA do not permit any chemical agents in the cabin of a commercial aircraft. As provided by 49 C.F.R. § 175.10, self-defense spray (mace or pepper spray) may be carried in checked baggage, provided the container does not exceed four (4) fluid ounces and has a positive means to prevent accidental discharge. Chemical agents carried onboard CBP aircraft shall be carried in accordance with the CBP Air Operations Handbook (AOH).
4. Upon successful completion of the OC certification course, an Authorized Officer/Agent shall be issued an OC device and a holder. Such items shall be replaced as necessary without cost to the officer/agent.
5. Officers/agents are responsible for advising their supervisors when the chemical agents issued to them are approaching the end of their useable life so that they can be replaced prior to their expiration date.

6. Officers/agents are required to turn in expired, damaged, or empty OC spray canisters to the PFI/PIFI for proper disposal in accordance with local Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (OSHA) requirements.

F. Approved Batons

1. Authorized Officers/Agents may use only CSBs authorized by the Director of UFPD, as listed in Appendix IV. Officers/agents may not carry personally-owned batons for official use.
2. Upon successful completion of the CSB certification course, an Authorized Officer/Agent shall be issued a baton (in the length preferred by the officer/agent) and a holder. Such items shall be replaced as necessary without cost to the officer/agent.

G. Procurement of Batons

ROs shall only purchase CSBs through contracts and procedures established by UFPD. Purchase Card purchases of batons are prohibited without written approval from the Director of UFPD.

H. Use of Approved Batons

1. The use of the CSB must be objectively reasonable and necessary based on the totality of circumstances.
2. The following acts and techniques with the CSB are prohibited when using intermediate force:
 - a. Choke holds, carotid control holds, and other neck restraints;
 - b. Use of a baton to apply "come-along" holds to the neck area; and
 - c. Intentional strikes with the baton to the head, the neck, the face, the groin, the solar plexus, the kidneys or the spinal column.
3. When a subject stops his or her assaultive resistant behavior, the use of the CSB as an impact device must also stop.

I. Training in Intermediate Force Techniques, Tactics and Devices

Authorized Officers/Agents must participate on a quarterly basis in intermediate force techniques, tactics and device training conducted by Intermediate Force Instructors. The Director of UFPD shall prescribe appropriate training to meet operational needs or to update skills or knowledge.

J. Reporting Requirements for Use of Intermediate Force Devices

When Authorized Officers/Agents employ an approved intermediate force device in accordance with the Use of Force Continuum (Appendix V) the officer/agent shall report the incident in accordance with the requirements of Chapter 5.

Chapter 8: Aviation and Marine Enforcement

A. General Guidelines

1. Warning shots are not permitted except as follows:
 - a. Warning shots may be used by Authorized Officers/Agents when conducting maritime law enforcement operations only as a signal to stop a vessel.
 - b. Warning shots may be used by Authorized Officers/Agents when conducting aviation law enforcement operations only as a signal to an aircraft to change course and follow direction to leave airspace.
2. Firearms may not be used solely to disable moving vehicles, vessels, aircraft or other conveyances, except when Authorized Officers/Agents are conducting maritime law enforcement activities against maritime conveyances.

B. Marine Enforcement

1. Training and Certification
 - a. Only those Authorized Officers/Agents who have successfully completed the required training, as mandated by the Director of UFPD, shall be authorized to utilize warning shots and/or disabling fire.
 - b. Only ordnance approved by the Director of UFPD, shall be authorized for use in conducting warning and/or disabling shots.
 - c. Warning shots and disabling fire shall be deployed with strict adherence to UFPD-approved programs policies, procedures and directives.
2. Warning shots are to be used as a signal only. [REDACTED] This conforms to United States and international law, which recognize warning shots across the bow of vessels as legitimate signals.
3. Warning shots pose a potential hazard; therefore, good judgment must be exercised at all times. They may be fired only to signal a vessel to stop. They cannot be fired where there is a reasonable belief that personal injury, death, or property damage will occur. Safety shall always be the first consideration when firing warning shots.
4. Warning and or disabling shots shall be fired only in open waters, when the range is clear and when land or another vessel is not in the line of fire and within range of the projectile(s).

5. Use of Disabling Fire

- a. When a pursued vessel fails to comply with an order to stop, [REDACTED] the CBP Vessel Commander may elect to authorize disabling fire. The deployment of disabling fire must be in strict accordance with UFPD-approved policies, procedures and directives.
- b. The Authorized Officers/Agents must utilize only ordnance authorized by the Director of UFPD, for disabling fire. The authority to commence disabling fire rests with the Vessel Commander. The decision to fire, however, ultimately rests with the shooter. It is the shooter's responsibility to ensure the safe deployment of the disabling rounds and it must be done in strict accordance with UFPD-approved policies, procedures and directives.

6. Defense Against Ramming Attempts

In maritime situations where Authorized Officers/Agents believe that they are in imminent danger of being rammed, and the ramming or attempt to ram is believed to be intentional, CBP personnel can invoke deadly force in self-defense in the circumstances set forth below and in Chapter 4.C. To stop a ramming by using deadly force, the following criteria must be met:

- a. The subject vessel must pose an imminent threat of serious physical injury or death to CBP personnel;
- b. The ramming attempt must appear to the officer/agent to be intentional. If not specifically threatened, the intent to ram may be reasonably inferred based on facts and circumstances, including but not limited to the following:
 - (1) An uncooperative and belligerent attitude toward generalized warnings or orders to "heave to;" or
 - (2) An uncommunicative vessel which refuses to respond to CBP queries, signals, or presence, and does not appear to have difficulties in maneuvering, such as when a sudden change of course is obviously made to collide with the CBP vessel; and
- c. The CBP vessel cannot prevent the ramming by maneuvering clear.

C. Aviation Enforcement

1. Training and Certification

- a. Only those Authorized Officers/Agents who have successfully completed the required training, as mandated by the Director of UFPD, shall be authorized to utilize warning shots.

- b. Only ordnance approved by the Director of UFPD shall be authorized for use in conducting warning shots.
 - c. Warning shots shall be deployed with strict adherence to UFPD-approved programs policies, procedures and directives.
2. Warning shots are to be used as a signal only. [REDACTED] This conforms to United States and international law, which recognize warning shots across the nose of aircraft as legitimate signals.
3. Warning shots pose a potential hazard; therefore, good judgment must be exercised at all times. They may be fired only as a signal to an aircraft to change course and follow direction to leave airspace. They cannot be fired where there is a reasonable belief that personal injury, death, or property damage will occur. Safety shall always be the first consideration when firing warning shots.
4. Warning shots shall be fired only when the range is clear.
5. The Aircraft Commander is responsible for authorizing the use of warning shots.
- D. Reporting the Use of Warning or Disabling Shots
- 1. Air Enforcement – The Aircraft Commander shall report any use of warning shots to the local CBP communications center.
 - 2. Marine Enforcement – The Vessel Commander shall report any use of warning and/or disabling shots to the local CBP communications center.
 - 3. Warning and disabling shots are considered an Intermediate Use of Force. Reporting shall be in accordance with Chapter 5 F.
 - 4. In addition, a supervisor shall complete a Significant Incident Report for any use of warning and/or disabling fire and submit it to the Commissioner's Situation Room in accordance with CBP Directive 3340-025C (or any successor policy) and to the Joint Intake Center (JIC).
 - 5. Authorized Officers/Agents shall report incidents involving the use of warning or disabling shots (not resulting in serious injury or death) to UFPD by utilizing CBP Form 318 – Reportable Use Of Force Incident Data (Appendix VI), available as an e-form on CBPnet). Uses of force that result in serious injury or death shall be reported to UFPD by CBP supervisors.

Chapter 9: Special Programs

A. Border Patrol Tactical Unit (BORTAC)

BORTAC, acting as a national special response unit for CBP, may test, evaluate and utilize any weapons system or weapon-related equipment with the written approval of the AC of an operational component and the concurrence of the Director of UFPD.

B. Special Response Team (SRT)

Any SRT use of force or special weapons training will be consistent with the guidelines and procedures established by BORTAC, authorized by the Director of UFPD and approved by the appropriate AC of an operational component.

C. Special Weapons

1. BORTAC, SRT and specifically designated Authorized Officers/Agents may use specialized firearms, not otherwise listed in Appendix IV, which are specifically approved by the appropriate AC of an operational component with the concurrence of the Director of UFPD.
2. Only BORTAC, SRT and specifically designated Authorized Officers/Agents who have successfully completed the required training, as mandated by the Director of UFPD, shall be authorized to utilize special weapons. Every quarter, these officers/agents must demonstrate proficiency with each special weapon that they are authorized to carry.

D. Training and Testing

As directed by the Director of UFPD, selected Authorized Officers/Agents, FIs or officers/agents assigned to approved SRTs (including detail assignments) may transport and use any firearm in the CBP inventory, any firearm selected by the Director of UFPD for training or operational purposes, or any firearm under consideration by CBP for acquisition for the purpose of conducting:

1. Any training approved by the Director of UFPD; and/or
2. Testing and evaluation of weapons as directed by the Director of UFPD.

E. Honor Guards

Authorized Officers/Agents assigned to an honor guard unit may use firearms specifically approved by the appropriate AC of an operational component with the concurrence of the Director of UFPD. If the firearms are carried loaded, the

officers/agents must successfully complete the required training and certification for each specialized firearm and demonstrate proficiency.

F. CBP-Authorized Competitive Shooting Teams

1. Participation in competitive shooting events is encouraged. CBP may provide support at the local level, to include funds, ammunition and administrative leave as determined by the Field Office or Sector. Officers/agents are required to submit a written request for support and must provide match results from those events. Use of CBP-issued weapons in competitive events is authorized.
2. National competitive shooting teams may be selected on a yearly basis, based on the availability of funds allocated and with the approval of the AC of the respective operational component and/or the Director of UFPD.
3. Use of CBP-issued weapons for competitive team shooting is limited to organized firearms sporting events, competitions, or commercial, public, or government-owned ranges.

G. Explorer Programs

CBP participation in the Law Enforcement Explorer program is encouraged. Local and national support may be made available when funding and manpower permit.

Participants in the Explorer program must adhere to all appropriate safety rules and protocols when utilizing CBP equipment and facilities.

Chapter 10: Foreign Travel and Assignments

A. Foreign Travel

Authorized Officers/Agents who carry firearms and/or intermediate force devices into a foreign country on official business must notify (and receive advance approval from) the AC of the respective operational component, the AC of International Affairs (INA) and the U.S. Embassy, and verify procedures regarding transit country(s) (if required) prior to travel.

B. Foreign Assignments

The following procedures are for officers/agents who are assigned or will be assigned to an overseas post of duty:

1. Import and export of firearms, as well as carriage of a firearm in a foreign country, requires approval from the U.S. Embassy and the AC of INA.

When approval is granted, the Authorized Officer/Agent will be issued a firearm from a permanent inventory of firearms at the post of duty. If available at that location, such weapons will be of the same type that they normally carry. Each duty post may have spare primary firearms for officer/agent use when in country.

- a. These firearms shall be assigned to the CBP Attaché (or other designated representative) who shall act as the RO for the purposes of entering the assignment into the CBP firearms information tracking system and shall ensure compliance with all appropriate national policies and appropriate foreign laws.
- b. Request for weapons, other than handguns, shall be considered on a case-by-case basis with the approval of the appropriate AC of an operational component and the concurrence of the Director of UFPD.
- c. When Authorized Officers/Agents are on an extended foreign assignment that is expected to exceed ninety (90) days, their domestic CBP-issued firearm(s) must be returned to their PFI until they return.

When an officer/agent either departs or returns from an extended foreign assignment they will make arrangements with their supervisor to secure or retrieve their CBP-issued weapon. The purpose of these arrangements is to minimize the time the officer/agent is without a weapon, thereby increasing officer/agent safety.

Chapter 11: Firearms Accountability

A. Control of Firearms, Munition Launchers and Body Armor

1. The Director of UFPD is responsible for providing policy guidance and system oversight of the firearms, munition launchers and body armor accountability process. Firearms, munition launchers and body armor are considered accounted for when they are assigned to a specific person by serial number and are associated with a specific geographical location. Locations are identified by the 16-digit U.S. Department of Agriculture organizational code table. Accountability information is maintained in the CBP firearms information tracking system.
2. Every CBP-issued and authorized firearm, munition launcher, and/or body armor must be recorded and its life cycle maintained in the CBP firearms information tracking system (acquisition, issuance, transfer, maintenance and destruction).
3. Authorized Officers/Agents shall physically verify and certify their inventory (e.g., firearms, body armor), recording such action as required in the CBP inventory system.
4. Supervisors shall physically verify and certify an employee's inventory (e.g., firearms, body armor), recording such actions as required in the CBP inventory system.
5. Upon separation of an officer/agent, the immediate supervisor is responsible for ensuring that all firearms, munition launchers and/or body armor is transferred in the tracking system to the PFI prior to clearance.
6. Managers and supervisors are responsible for the accuracy of inventories for their organizational components.
7. Managers must ensure that each of their officer's/agent's profiles in the tracking system is accurate.
8. PFIs must notify UFPD when a firearm and/or munition launcher undergoes any atypical change of disposition (such as use for competition, firearms being held as evidence, etc.).

B. Annual Inventory

1. The Director of UFPD shall conduct an annual automated inventory for all firearms, munition launchers, and body armor in CBP.
2. ROs shall ensure field compliance with completion of the inventory.

C. Storage of Firearms, Munition Launchers and Body Armor

1. Each Authorized Officer/Agent shall be responsible for the general care and maintenance of assigned firearms, munition launchers, body armor and associated equipment.
 - a. Officers/agents are expected to exercise good judgment in providing sufficient security for all CBP-issued firearms, munition launchers, body armor and other use of force devices to protect against theft or unauthorized use.
 - b. Officers/agents may be subject to disciplinary action if a CBP-issued firearm, munition launcher, body armor or use of force device is stolen or lost and a determination is made that the officer/agent was negligent or used poor judgment in safeguarding that equipment.
2. All unissued CBP firearms shall be stored in locked firearms storage containers and in accordance with the policies and procedures cited in the *Interim Physical Security Guidance for Customs and Border Protection (CBP) Facilities* memorandum dated Oct. 25, 2006 (available on CBPnet).
3. [REDACTED] Immediate control means an officer/agent has control over who can access the weapon. These firearms shall be stored out of plain view and in a location that affords reasonable protection against theft or unauthorized use.
4. Issued Shoulder Fired Weapons (SFWs) and munition launchers shall be stored in a secure area with limited access. With the prior written approval of a supervisor, [REDACTED] The firearm and/or munition launcher shall be stored in a location that affords reasonable protection against theft or unauthorized use.
5. Firearms and munition launchers shall not be stored in vehicles, vessels, or aircraft overnight (or equivalent) unless there is a justified operational purpose and it is approved, in writing (e.g. e-mail) by a supervisor.
 - a. Such approval must be obtained in advance; however the employee is not required to have a copy of the documentation with him/her.
 - b. To receive approval for storage of a weapon under this subsection it must be able to be secured to the vehicle, vessel, or aircraft by locked chain, cable, or CBP-approved safety-locking device and concealed from view. Firearms and munition launchers stored in visible, vehicle-mounted racks do not meet the concealment or security requirement.

6. When Authorized Officers/Agents are on extended leave that is expected to exceed ninety (90) days, their CBP-issued firearm(s) may (at the officer's/agent's discretion) be returned to their PFI until they return to duty.

D. Lost or Stolen Firearms, Munition Launchers and Body Armor

1. CBP firearms, munition launchers and/or body armor that are lost or stolen shall be reported as follows:
 - a. An Authorized Officer/Agent who has a firearm, munition launcher, and/or body armor lost or stolen shall report it to a supervisor as soon as practicable following the discovery of the loss or theft.
 - b. The loss or theft of firearms and/or munition launchers shall be reported immediately through the chain of command to the Commissioner's Situation Room and the Joint Intake Center (JIC) by the RO (or his or her designee).
 - c. Within twenty-four (24) hours of the incident, the firearm, munition launcher and/or body armor must be entered into the National Crime Information Center (NCIC) database by the RO (or his or her designee).
 - d. The Director of UFPD must be notified through the CBP firearms information tracking system. The tracking system form shall be completed by the RO (or his or her designee) within twenty-four (24) hours. Detailed instructions for completing the form are contained in the help screens and training materials on CBPnet.
2. CBP personnel must comply with applicable local law enforcement reporting requirements for lost or stolen firearms and/or munition launchers.
3. When a CBP-issued firearm has been lost or stolen the officer/agent shall (so long as the authority to carry a firearm has not been revoked) promptly be provided with:
 - a. A replacement firearm;
 - b. The opportunity to familiarize himself or herself with the replacement firearm under the supervision of a FI;
 - c. An opportunity to qualify with the replacement firearm if required by Chapter 6; and
 - d. Ammunition equivalent to the number of rounds necessary to complete two courses of fire under the applicable components qualification course.
4. Lost or stolen body armor will be replaced as soon as practicable in order to allow employee to return to duty.

E. Board of Survey

1. The Headquarters Board of Survey (BOS) should meet within thirty (30) days of receipt of a Report of Survey for lost or stolen firearms and/or munition launchers. Body armor loss or theft should be reported to the Local Property Officer.
2. UFPD is responsible for documenting the BOS findings in the CBP firearms information tracking system.

F. Firearms Requests

1. Requests for firearms and/or munition launchers shall be documented in the CBP firearms information tracking system. PFIs shall request firearms and/or munition launchers from UFPD via the tracking system. This request must be approved by the RO or COA.
2. Requests for firearms and/or munition launchers other than handguns require the concurrence of the Director of UFPD, after review by operational component headquarters personnel.

G. Firearms, Munition Launchers and Body Armor Transfers

1. Authorized Officers/Agents shall electronically transfer firearms, munition launchers and body armor assigned to them in the CBP firearms information tracking system through the appropriate tracking system form. The officer/agent receiving the firearm, munition launcher and/or body armor shall electronically accept the property in the tracking system. Accountability does not change until the transfer is accepted in the tracking system.
2. All unissued or pool firearms and munition launchers in any office shall be assigned to the CBP firearms information tracking system PFI for that office.

H. Unissued Firearms

1. The maximum allowable number of each type of handgun is limited to 5% of the number of officers/agents at the duty station. In locations with less than twenty (20) officers/agents, one (1) unissued handgun shall be authorized.
2. The number of handguns authorized to be retained in reserve by the Director of UFPD shall be 10% of the total number of officers/agents.
3. The maximum allowable number of each type of SFW is limited to 105% of the number of officers/agents at the duty station.
4. The number of SFWs authorized to be retained in reserve by the Director of UFPD shall be 5% of the total number of officers/agents.

5. For special weapons in support of specific missions, the type, number, and deployment shall be determined by the appropriate RO with the written concurrence of the AC of the operational component.

I. Non-Standard Firearms

1. Requests for authorization to carry non-standard firearms must be submitted through the CBP firearms information tracking system for approval by the RO and the Director of UFPD. Specific mission needs must be addressed in the form. Non-standard firearms are those that are used by officers/agents in a specific operational activity, in addition to the standard CBP-authorized firearms described in Appendix IV of this policy.
2. UFPD shall be notified when non-standard firearms are issued in order to document the tracking system appropriately.
3. ROs shall ensure that the officers/agents using non-standard firearm(s) have qualified with the firearm(s) in accordance with this policy.
4. Issuance of non-standard firearms shall not exceed one hundred and eighty (180) days. If additional time is needed, an extension may be granted by the RO (UFPD must be notified in writing).

J. Seized or Abandoned Firearms

1. Immediately after final adjudication, abandoned firearms, ammunition, and other firearms related materials and firearms seized for forfeiture shall be forwarded to UFPD.
2. Firearms shall be checked in NCIC prior to shipment to UFPD. Contact UFPD for exceptions.
3. Copies of related documents shall be included and the firearms shall be checked to ensure they are unloaded prior to shipment to UFPD. Seized or abandoned firearms shall be handled in accordance with the current *Seized Asset Management and Enforcement Procedures Handbook* (HB 4400-01A) (available on CBPnet).
4. General Order (GO) firearms, ammunition, and related materials shall be held for ninety (90) days and then forwarded to UFPD. Copies of documents related to GO firearms, ammunition, and related materials must be included.

K. Firearm Acquisitions (Including Munition Launchers)

1. UFPD is the only authorized entry and exit point for all firearms and munition launchers for CBP and is the inventory control point for all firearms and munition launchers.

2. No entity outside of UFPD is approved to receive, destroy or otherwise remove firearms and munition launchers from service without written approval of the Director of UFPD.
3. No entity outside of UFPD is approved to loan or transfer firearms and/or munition launchers to another agency or to individuals within another agency without the written approval of the Director of UFPD.

Chapter 12: Firearm and Munition Launcher Maintenance, Inspection and Repair

A. Firearm and Munition Launcher Inspection Requirements

1. Only UFPD shall receive newly purchased firearms and munition launchers from vendors. All firearms and munition launchers shall be inspected to ensure proper functioning and compliance with CBP specifications and standards.
2. All CBP-authorized firearms shall be inspected during qualification periods by a Field Armorer (FA) or Firearms Instructor (FI) to ensure safe and proper functioning.
3. No accessories may be mounted on any CBP-authorized firearm without written approval from the Director of UFPD.
4. All maintenance and repairs must be documented in the CBP firearms information tracking system.
5. Periodic Inspections - FIs shall provide officers/agents with training regarding proper firearms and munition launchers care, maintenance, and inspection procedures. This training shall be incorporated into the quarterly firearms training curriculum.
6. UFPD has the authority to recall and/or inspect any CBP-issued firearm and/or munition launcher as necessary.

B. Firearm and Munition Launcher Maintenance

1. All Authorized Officers/Agents are responsible for normal cleaning and preventive maintenance of their firearms and/or munition launchers. Officers/agents shall be provided with sufficient materials and sufficient duty time (consistent with operational needs) to clean their authorized weapons. Failure to do so may result in disciplinary action.
2. Maintenance should only be done in accordance with the instructions provided by UFPD or as described in the operator manuals for that particular firearm or munition launcher. Operator manuals shall be provided to all officers/agents for each of their CBP-issued firearms.
3. Firearms and munition launchers shall be cleaned as soon as practicable after being fired. **NOTE: Firearms/Munition launchers should not be cleaned in the case of a reportable shooting incident or an unintentional discharge (refer to Chapter 5.E).**

4. FIs shall ensure that all unissued or pool weapons used in training, practice, or qualification sessions are cleaned and preventive maintenance performed prior to returning the weapon to storage.
5. The officer/agent shall perform any required cleaning of a firearm prior to being turned in and accepted by the FA and the PFI.

C. Firearms Repair

1. Authorized Officers/Agents (except those certified and designated as FAs) are prohibited from making any repairs, adjustments and/or modifications to CBP-authorized firearms unless expressly authorized by the Director of UFPD.
2. FAs, who are certified by UFPD, are authorized to make certain repairs and/or modifications as provided in FA training and subsequent UFPD-directed repairs and/or modifications.
3. Firearms requiring repairs beyond FA authorization must be sent to UFPD.

D. Firearm, Munition Launcher and Body Armor Shipping

1. The PFI is responsible for shipping and receiving all firearms, munition launchers and body armor assigned within their area of responsibility.
2. The shipment of any firearm, munition launcher or body armor shall be done as prescribed by UFPD and sent by a carrier that can control and track secure packages.
3. Regardless of commercial carrier, handguns shall be shipped next day air. Long guns may be shipped by ground. Contents shall not be identified on the outside of the box.

E. Firearm, Munition Launcher and Body Armor Replacement

1. An Authorized Officer/Agent shall immediately notify a PFI or an FI when any CBP-issued firearm, munition launcher or body armor becomes inoperable or appears to be unsafe to use. Based on the inspection, the PFI shall immediately issue the officer/agent a replacement.
2. Serviceable body armor should be replaced no later than the interval recommended by the manufacturer.
3. PFIs shall return any inoperable or unsafe firearm, munition launcher or body armor to UFPD via the CBP firearms information tracking system.

F. Firearm, Munition Launcher and Body Armor Destruction

UFPD is the only CBP component authorized to destroy firearms, munition launchers and/or body armor.

Chapter 13: CBP-Issued Ammunition

A. Ammunition Procurement and Use

1. All CBP-issued ammunition shall be new, commercially manufactured and procured by UFPD through normal procurement channels. UFPD shall conduct research and development, testing, evaluation and procurement of all ammunition or component products. A list of authorized brands and types of ammunition shall be compiled by UFPD. This list shall be updated as necessary and made available to the field by UFPD.
2. Only CBP-issued/approved ammunition shall be used in CBP-issued firearms.
3. Purchase Card acquisition of ammunition must be approved in writing by the Director of UFPD.

B. Special Ammunition Requests

Requests for any specialized ammunition not listed on the approved ammunition list must be submitted in writing through the respective chain of command to the Director of UFPD for approval and procurement.

C. Ammunition Issue

1. Ammunition previously issued for duty carry (handgun, shotgun and rifle) shall be fired during qualifications. Ammunition for practice and/or sighting-in with appropriate SFWs shall be issued at the range prior to firing the qualification course as needed. Replacement ammunition for duty carry shall be issued after each firearms qualification session.
2. Authorized Officers/Agents shall use duty ammunition for qualifications, practice and training.
 - a. Exceptions may occur if firing ranges cannot support duty ammunition or if problems are discovered that require the use of hazard-free ammunition. ROs shall immediately notify UFPD in writing if duty ammunition cannot be used on a particular firing range.
 - b. Exceptions to the requirement to use duty ammunition for qualifications may also be granted by UFPD upon determination that a safety problem exists with firearms or ammunition.
3. In addition to the handgun ammunition necessary for duty carry and official qualification, ROs may issue handgun proficiency ammunition to each Authorized Officer/Agent upon request, if available (guidance specific to Border Patrol Agents is contained in Appendix VIII).

- a. The Authorized Officer/Agent shall initial an Ammunition Use Log – CBP Form 316B (available on CBPnet) upon receipt of their proficiency issue.
- b. CBP issues ammunition to assist officers/agents in maintaining proficiency and improving their shooting skills. Officers/agents should expend this ammunition on a regular basis. The sale of CBP-issued ammunition by individual officers/agents is prohibited.
- c. Authorized Officers/Agents shall expend proficiency ammunition in accordance with all applicable laws, ordinances and policies.

D. Ammunition for Competitive Shooting

1. Authorized Officers/Agents may request ammunition for use in competitive handgun, shotgun and rifle shooting events by submitting a memorandum to the RO.
2. If the ammunition requested is available in the local inventory and issuance will not cause a shortage for duty, training, proficiency or qualification use, it may be issued to the requesting officer/agent once approved by the RO.
3. Ammunition not in the inventory may be requested through the RO with the concurrence of the Director of UFPD.
4. Approval of requests for the purchase of ammunition for competitive shooting is subject to availability of funding and the concurrence of the AC of the respective operational component and/or the Director of UFPD. Purchase Card purchases of firearms ammunition must be approved in writing by the Director of UFPD.
5. Officers/agents who receive ammunition for use in competitive shooting are required to maintain a record of the use of ammunition and submit written evidence of participation in competitive events to the RO.

E. Ammunition Storage

1. Unissued ammunition shall be stored in a secure room with limited access and in accordance with the policies and procedures cited in the *Interim Physical Security Guidance for Customs and Border Protection (CBP) Facilities* memorandum dated Oct. 25, 2006 (available on CBPnet). If required, ROs shall ensure that special storage needs are met for the ammunition.
2. Each Authorized Officer/Agent is personally responsible for all CBP ammunition issued to them and must take reasonable measures to ensure its safe storage and general care in accordance with this policy.

F. Ammunition Inventory

1. As the inventory of ammunition changes, that change shall be continually accounted for and records maintained at the ammunition storage site by the PFI or FI.
2. The RO, or his or her designee, shall conduct an annual audit for each CBP location. Records of these audits shall be maintained locally for a period of no less than five years.

When developed and available, ROs shall utilize the CBP electronic ammunition inventory system and update the ammunition inventory on a quarterly basis.

G. Emergency Situations

In threatening, emergent situations, Authorized Officers/Agents are authorized to use any ammunition available. However, this statement does not authorize the carrying of ammunition that is not specified on the list of Ammunition for Duty Use published by the Director of UFPD.

Chapter 14: Holsters and Related Equipment

A. Uniform Duty Holsters and Related Equipment

All holsters and related equipment which meet the standards established by the Authorized Officer's/Agent's specific program may be approved for duty use by the RO, with the concurrence of the Director of UFPD and the AC of the operational component.

A sufficient selection of holsters and related equipment will be authorized to meet the operational needs of all CBP armed personnel. Suggestions for new or improved holsters and/or related equipment may be submitted for evaluation to the Director of UFPD.

B. CBP-Authorized Plainclothes/Off-Duty Holsters and Related Equipment

1. Holsters and magazine carriers shall be constructed of durable material. They shall be of any design that securely retains the handgun and allows the officer/agent to quickly draw the handgun.

The holsters and magazine carriers must be concealable and may be black, brown, tan, or any other color that is authorized by UFPD and approved by the RO.

2. In conjunction with firearm qualifications, Authorized Officers/Agents who normally carry the handgun in another type of holster shall be required to annually demonstrate their ability to safely draw an unloaded handgun, engage a target and holster the handgun. These exercises should be developed locally by the FI, and shall be sufficient to make a reasonable determination of the officer's/agent's ability to safely use the holster.

C. Inspection of Holsters and Related Equipment

1. The PFI or FI shall conduct an annual inspection of the Authorized Officer's/Agent's authorized holster and related equipment.
2. Officers/agents shall not use any equipment found to be non-operational or in poor condition.

Chapter 15: Range Operations

A. Range Conduct

1. All personnel participating in firearms qualifications shall conduct themselves in a safe and professional manner at all times. Any officer/agent who observes a dangerous or unsafe condition while on the range should immediately call "CEASE FIRE" in a voice that can be heard by all shooters. The Firearms Instructor (FI) shall remove from the range any person who fails to comply with safety practices, procedures or instructions.
2. When conducting firearms training, the FI has the absolute and final authority on matters of range operation and safety.
3. When participating in firearms qualifications, officers/agents may wear their normal duty uniform and/or equipment, or attire and equipment appropriate for their current assignment.
4. During qualification and structured training, armed personnel shall use only CBP-authorized weapons.
5. Armed personnel shall qualify with their assigned weapons. If a weapon malfunctions during qualification and cannot be repaired on-site, the officer/agent may qualify with a different weapon of identical make and model, if available.
6. FIs shall manually inventory weapons used during qualification and ensure that officers/agents qualify with their assigned weapons. The FI shall ensure qualification scores are properly entered in the CBP firearms information tracking system.

B. Range Operation and Safety

1. Prior to commencing range activities, FIs shall ensure that the following minimum safety precautions are adhered to:
 - a. An emergency transport vehicle is designated;
 - b. A telephone, a wireless telephone, and/or radio is available;
 - c. Emergency numbers are available;
 - d. A first aid trauma kit is available, as defined by the Director of UFPD in Appendix IX; and

- e. A Standard Operating Procedure (SOP) is in place for the possibility of injuries. This SOP should be designed for the specific range location and shall include the location of appropriate medical facilities and access to local Emergency Medical Services (EMS).
2. The FI shall ensure that all personnel on or near the firing line use appropriate eye and hearing protection.

Eye protection shall cover the front and sides of the eyes. Hearing protection shall be both inner ear plugs and outer ear protection of a hard shell design.

Such protective devices shall be available to all officers/agents at the firearms range. Unserviceable and/or damaged protective devices will be replaced.

3. The minimum ratios of FIs/RSOs to shooters on the firing line are:
- a. For practice and demonstration of firearms proficiency sessions, one (1) FI/RSO per every six (6) shooters; and
 - b. For tactical firearms training exercises, one (1) FI per every two (2) shooters during static firing and one (1) FI for each shooter during dynamic movement shooting.

C. Force-on-Force Training (FFT)/Integrated Scenario Base Training (ISBT)

- 1. Prior to conducting FFT or ISBT, IFIs and/or FIs must have attended training as approved by the Director of UFPD.
- 2. When conducting FFT or ISBT, IFIs and/or FIs must at all times adhere to the safety precautions delineated in the appropriate lesson plan or SOP.
 - a. For marking cartridges: full face, throat and groin protection, gloves and coveralls or long sleeve shirts are mandatory.
 - b. Marking cartridges shall be used only in firearms authorized by UFPD. UFPD shall compile a list of authorized brands and types of marking cartridges. This list shall be updated as necessary and made available to the field by UFPD.

Appendix I: Acknowledgement of Receipt of CBP Use of Force Policy

As an officer/agent who is authorized to carry a firearm and intermediate force device, you are required to comply with and be thoroughly familiar with all aspects of the CBP Use of Force Policy. You have been provided a complete copy of the CBP Use of Force Policy Handbook and the opportunity to discuss the contents of the Policy with your supervisor or other management officials. Due to the critical nature of certain aspects of the Use of Force Policy, your attention is particularly directed to the following Chapters:

Chapter 2: Authority to Carry Firearms – This section specifically addresses the requirements for an Authorized Officer/Agent to carry a firearm and the circumstances under which a firearm may be carried.

Chapter 4: Use of Force – This section addresses DHS and CBP policy regarding the use of force.

Chapter 5: Use of Force Reporting Requirements – This section addresses the specific actions that shall be taken in the event that a reportable use of force incident occurs.

Chapter 6: Use of Force Proficiency and Training – This section addresses the requirements to maintain firearm and intermediate force device certification.

Chapter 7: Intermediate Force Devices – This section addresses the use of authorized intermediate force devices.

By signing this statement, you acknowledge that you have read, understand, and agree to comply with the CBP Use of Force Policy and your personal obligation to comply with all chapters of the Policy.

Officer's/Agent's Name (Printed)

Officer's/Agent's Signature

Date

Officer's/Agent's Duty Station

Supervisor's Name (Printed)

Supervisor's Signature


Date

This signed acknowledgment shall be included in the officer's/agent's local personnel file in accordance with Chapter 1 of the CBP Use of Force Policy.

Appendix II: DHS Use of Deadly Force Policy*Secretary*U.S. Department of Homeland Security
Washington, DC 20528**Homeland
Security**

July 1, 2004

MEMORANDUM FOR: Deputy Secretary
Under Secretaries
Director, U.S. Secret Service
Commandant, U.S. Coast Guard
Assistant Secretary, ICE
Commissioner, CBP
Acting Administrator, TSA

FROM: Tom Ridge 

SUBJECT: Use of Deadly Force Policy

Attached is the Department of Homeland Security (DHS) Use of Deadly Force Policy which I issued today. The policy, applicable to all DHS law enforcement officers and agents, is intended to provide the standard for all DHS components. Officials and supervisors should take appropriate steps to ensure that pre-existing use of force policies comply with this new standard and incorporate its core principles.

The following Use of Deadly Force Policy was developed by a Task Force comprised of DHS headquarters and component representatives to unify to the extent feasible and practicable existing DHS agency policies. The resulting umbrella policy reflects the components' different law enforcement missions and activities, and permits the agencies to adopt more detailed operational guidance with DHS approval.

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DEPARTMENT OF HOMELAND SECURITY POLICY ON THE
USE OF DEADLY FORCE

June 25, 2004

By virtue of the authority vested in the Secretary of the Department of Homeland Security, including the authority vested by 6 U.S.C. §112(a), I hereby establish a Department of Homeland Security policy on the use of deadly force for law enforcement. The policy set forth herein is intended to set uniform standards and provide broad guidelines for the use of force by law enforcement officers and agents of the Department of Homeland Security performing law enforcement missions. The provisions of this Order apply to all law enforcement officers and agents of the Department of Homeland Security.

I. GENERAL PRINCIPLES

Law enforcement officers and agents of the Department of Homeland Security may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.

A. Fleeing subjects. Deadly force may not be used solely to prevent the escape of a fleeing suspect.

B. Firearms may not be fired solely to disable moving vehicles, vessels, aircraft, and other conveyances, except as follows:

1. United States Secret Service agents and officers, in exercising the United States Secret Service's protective responsibilities, may discharge firearms to disable moving vehicles, vessels, and other conveyances. United States Secret Service agents and officers may discharge firearms to disable aircraft in flight, only if the use of deadly force against the occupants of the aircraft would be authorized under this policy.

2. U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents, when conducting maritime law enforcement, may fire firearms to disable moving vessels or other conveyances.

C. If feasible and if to do so would not increase the danger to the officer or others, a warning to submit to the authority of the officer shall be given prior to the use of deadly force.

D. Warning shots are not permitted, except as follows:

1. Warning shots may be used by United States Secret Service agents and officers in exercising the United States Secret Service's protective responsibilities.

2. Warning shots may be used by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents when conducting maritime law enforcement only as a signal to a vessel to stop.

3. Warning shots may be used by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents when conducting aviation law enforcement operations only as a signal to an aircraft to change course and follow direction to leave airspace.

E. Officers will be trained in alternative methods and tactics for handling resisting subjects which must be used when the use of deadly force is not authorized by this policy.

II. GUIDELINES

A. Homeland Security Directorates and Agencies shall, to the extent necessary, supplement this policy with policy statements or guidance consistent with this policy. Such policy statements shall be subject to review and approval by appropriate departmental offices, including the Office of General Counsel, to ensure consistency with law and departmental standards and policies.

B. The respective Homeland Security Directorate Under Secretaries, the Commandant of the United States Coast Guard, and the Director of the United States Secret Service shall approve guidelines for weaponless control techniques, intermediate weapons, and firearms or lethal weapons with non-lethal munitions, in accordance with this policy and that directorate's or agency's unique law enforcement mission, training, and equipment.

III. MILITARY ACTIVITIES

This policy shall not apply to the United States Coast Guard when engaged in warfighting, the military defense of the United States, or other military activities where Standing Rules of Engagement apply or to other operations at sea addressed by other policies or direction.

IV. SAVINGS

To the extent agency and component policies and procedures in place prior to the creation of the Department of Homeland Security are consistent with this policy, they remain in full force and effect unless otherwise revoked or modified.

V. APPLICATION OF THE POLICY

This Policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

A handwritten signature in black ink that reads "Tom Ridge" with a long horizontal flourish extending to the right.

Tom Ridge

Appendix III: DHS Commitment to Race Neutrality in Law Enforcement Activities

Secretary

U.S. Department of Homeland Security
Washington, DC 20528



Homeland
Security

THE DEPARTMENT OF HOMELAND SECURITY'S COMMITMENT TO RACE NEUTRALITY IN LAW ENFORCEMENT ACTIVITIES

June 1, 2004

One of the greatest strengths of the Department of Homeland Security is the quality and integrity of the people with whom I am honored to serve. I am particularly grateful for the opportunity to work with outstanding law enforcement and military personnel who put their lives on the line daily to make our country safe. Your professionalism, dedication and commitment to excellence are inspiring to us all.

Our mission is to ensure the security of our nation and our people. The size, scope and character of our nation means that we face a substantial challenge, for while we must secure our nation and our people we must also secure our freedoms and ensure that liberty thrives. In all we do to secure America, our strategies and our actions must be consistent with the individual rights and civil liberties protected by the Constitution and the rule of law. I challenge each of you to redouble your efforts to conduct your activities in ways that meet this critical goal.

I particularly direct you to follow a policy of race neutrality in your law enforcement activities. The Department of Homeland Security's policy is to prohibit the consideration of race or ethnicity in our daily law enforcement activities in all but the most exceptional instances. The following is the Department's official policy on this issue:

"Racial profiling" concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement activities. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity. DHS explicitly adopts the Department of Justice's "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," issued in June 2003. It is the policy of the Department of Homeland Security to prohibit the consideration of race or ethnicity in our daily law enforcement activities in all but the most exceptional instances, as defined in the DOJ Guidance. DHS personnel may use race or ethnicity only when a compelling governmental interest is present. Rather than relying on race or ethnicity, it is permissible and indeed advisable to consider an individual's connections to countries that are associated with significant terrorist activity. Of course, race- or ethnicity-based information that is specific to particular suspects or incidents, or ongoing criminal activities, schemes or enterprises, may be considered, as stated in the DOJ Guidance.

This Guidance governs all federal law enforcement activities, and there will be serious consequences for those who disregard it.

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All components are hereby directed to include the DHS policy stated above in law enforcement manuals and policy guidelines covering any activity in which the use of race or ethnicity may arise. Moreover, all components are hereby directed to ensure that all law enforcement personnel, supervisors and managers are trained to the standards set forth in the DOJ Guidance and the DHS policy stated above, and are held accountable for meeting those standards. The Department's Office for Civil Rights and Civil Liberties will supply the components with training materials to ensure that the policy is interpreted and applied in a consistent and uniform manner. In addition, each component should develop agency-specific training materials, in concert with the Department's Office for Civil Rights and Civil Liberties.

Working together, we can protect America while also preserving her great freedoms. I am honored to work with all of you to fulfill this calling.


Tom Ridge

Appendix IV: CBP-Authorized Firearms and Intermediate Force Devices

An Authorized Officer/Agent shall be issued only one primary handgun from the list below. Based upon availability within an operational component, an Authorized Officer/Agent may be issued an [REDACTED] as a secondary handgun with the concurrence of the AC of that operational component. An Authorized Officer/Agent shall not be issued more than two handguns without the concurrence of the AC of the operational component and the Director of UFPD.

A. Handguns authorized for use by Authorized Officers/Agents:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED] (authorized for standard uniform use only with the written concurrence of the AC of the operational component)
4. [REDACTED] (authorization terminates upon component transition to the [REDACTED])
5. [REDACTED] (authorization terminates upon component transition to the [REDACTED])
6. [REDACTED] (authorization terminates upon component transition to the [REDACTED])
7. [REDACTED] DAO (authorization terminates three years from issuance of CBP Use of Force Policy)

B. Shotguns authorized for use by Authorized Officers/Agents:

1. [REDACTED]

C. Rifles authorized for use by Authorized Officers/Agents:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]

D. Submachine guns authorized for use by Authorized Officers/Agents:

1. [REDACTED]

2. [REDACTED]
- E. Special weapons authorized for use by Border Patrol Agents, Air and Marine Officers, and Special Response Teams (SRTs), in addition to all firearms listed above: (Use of these weapons requires specific certification and training prior to issue and use)
1. [REDACTED]
 2. [REDACTED]
 3. [REDACTED]
- F. In addition to the weapons previously listed, Border Patrol Tactical Team (BORTAC) and SRT members may use and transport any weapons system whose utilization has been approved in writing by the AC of their operational component, with the written concurrence of the Director of UFPD.
- G. Authorized Officers/Agents serving as Primary Firearms Instructors (PFIs), Inventory Officers, Firearms Instructors (FIs) or assigned to UFPD or an approved special operations team (including detailed assignments) may use and transport any firearm in the CBP inventory or under consideration by CBP for acquisition for the purpose of conducting:
1. Training approved by the Director of UFPD; or
 2. Testing and evaluation authorized by the Director of UFPD.
- H. Intermediate force devices authorized for use by Authorized Officers/Agents upon completion of certified training.
1. Oleoresin Capsicum (OC) Spray
 2. Collapsible Straight Baton - 21 inches or 26 inches (at the option of the officer/agent).
- I. Other intermediate force devices that are authorized for use by Authorized Officers/Agents upon completion of UFPD-approved training and certification by their respective operational component.
1. Munition launchers (e.g. PepperBall)
 2. 36-inch straight riot baton
 3. Collapsible Straight Batons of non-standard lengths
 4. Intermediate force devices approved by the AC of their operational component, with the concurrence of the Director of UFPD.

Appendix V: CBP Use of Force Continuum

A. Cooperative Controls

This is the first and lowest level of officer/agent response. Although it is the lowest level, the tactics and techniques on this level can be applied to all levels of the continuum to help establish control or compliance. The primary features of this level are officer presence, verbalization and application of appropriate restraints. When considering officer presence, there are several factors to consider:

1. Those elements we can change or effect:
 - a. Society recognizes that a law enforcement officer is provided with certain authorities that the average citizen does not have. Society recognizes that an officer/agent has the right to exercise this authority provided the officer/agent does so in a lawful manner. For officer presence to successfully influence the subject, there must be some type of identification to the subject that the officer/agent is a law enforcement officer. This is demonstrated through the wearing of an official uniform and/or the use of verbal identification and display of proper credentials.
 - b. An officer/agent who appears to be physically fit, mentally alert, and capable of handling a situation is more likely to successfully influence a subject and be perceived as competent.
 - c. Multiple officers/agents can increase the level of control exerted through officer presence as well as the carrying of intermediate force devices, such as CSBs and OC.
2. Those elements we cannot control:
 - a. Individuals will make assumptions about an officer/agent based on certain factors that an officer/agent has no ability to change. These factors may include, but are not limited to: gender, height and age.

B. Contact Controls

Contact controls are physical measures taken when verbal commands and officer presence are not effective in gaining compliance. The subject is offering the lowest level of resistance. In addition to effective communication the officer/agent may use other measures such as strategic positioning, escort holds, joint manipulation or immobilization or touch pressure point stimulation.

C. Compliance Techniques

When the subject is actively resisting the efforts of the officer/agent to establish and maintain control, escalation to the use of compliance techniques may be reasonable and necessary. Examples of compliance techniques include the use of OC spray, strike pressure points, stunning techniques, takedowns and joint manipulations. In situations where subjects are offering active resistance, officers/agents must be mentally and physically prepared to escalate to a higher amount of reasonable and necessary force.

D. Defensive Tactics

When a situation has reached this level on the force spectrum, the subject has either assaulted the officer/agent or is displaying a willingness and intent to do so. An assault at this level is one that results in physical injury to the officer/agent. A sufficient amount of force is needed at this level to neutralize or stop the threat. Concentrated strikes involving the use of empty-hand techniques (i.e. the use of body parts as weapons) as well as the Collapsible Straight Baton are both reasonable and necessary.

E. Deadly Force

At this level an officer/agent has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer/agent or to another person, and the subject has the opportunity, ability and intent to do so. The use of a firearm, impact weapon, and empty-hand techniques or, in an emergency, a field expedient weapon, may be needed to gain control of this situation and prevent serious physical injury or loss of life.

Appendix VI: CBP Form 318 – Reportable Use of Force Incident Data Form (available as an e-form on CBPnet)

DEPARTMENT OF HOMELAND SECURITY
U.S. Customs and Border Protection

Use of Force Policy Division

REPORTABLE USE OF FORCE INCIDENT DATA

SECTION A - INCIDENT IDENTIFICATION INFORMATION

CBP Reportable Incident Number:		Original SIR Number:		Event Number (if applicable):	
Office: <input type="checkbox"/> OFO <input type="checkbox"/> OBP <input type="checkbox"/> OAM <input type="checkbox"/> IA		Owning Org: (Sector/Station; FO/POE; Branch/Unit)		Reporting Official:	
		Telephone No.		FAX No.	
Type of Incident * <input type="checkbox"/> Firearm <input type="checkbox"/> Intermediate Device <input type="checkbox"/> Other		Local Time of Incident: (Military)		Date Of Incident:	
Number of Subjects:	Number of Involved CBP Officers/Agents:	Number of Civilian Witnesses:	Number LE Witnesses:	Other Agency Involved? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> OBP <input type="checkbox"/> OFO <input type="checkbox"/> OAM <input type="checkbox"/> IA <input type="checkbox"/> OTHER _____	

SECTION B - INCIDENT LOCATION INFORMATION

Address:		City:		State:		County:	
Zip Code:		Country:		Latitude:		Longitude:	
Character of Premises (Check one from the first four columns and as applicable from Conveyance)							
<input type="checkbox"/> Urban	<input type="checkbox"/> Suburban	<input type="checkbox"/> Rural	<input type="checkbox"/> Remote / Isolated	<input type="checkbox"/> Highly Populated	<input type="checkbox"/> Moderately Populated	<input type="checkbox"/> Sparsely Populated	<input type="checkbox"/> Uninhabited
				<input type="checkbox"/> Residential	<input type="checkbox"/> Commercial	<input type="checkbox"/> Undeveloped/Open	<input type="checkbox"/> Station/Institution
				<input type="checkbox"/> Indoors	<input type="checkbox"/> Outdoors	<input type="checkbox"/> Conveyance (ID below) <input type="checkbox"/> On Land Vehicle <input type="checkbox"/> On Aircraft <input type="checkbox"/> On Boat	
Illumination (Check one from left column; Check ALL applicable from remaining columns)							
If Natural Illumination:		If Artificial Illumination:		<input type="checkbox"/> Dark	<input type="checkbox"/> Subject Silhouetted		
<input type="checkbox"/> Dawn		<input type="checkbox"/> Interior Room Lights		<input type="checkbox"/> Poor Lighting	<input type="checkbox"/> Officer/Agent Silhouetted		
<input type="checkbox"/> Daylight		<input type="checkbox"/> Street Lights		<input type="checkbox"/> Good Lighting	<input type="checkbox"/> Night Vision Aided		
<input type="checkbox"/> Dusk		<input type="checkbox"/> Vehicle Headlights		<input type="checkbox"/> Weak Moonlight	<input type="checkbox"/> Snow/Marine Glare		
<input type="checkbox"/> Night		<input type="checkbox"/> Flashlight		<input type="checkbox"/> Strong Moonlight	<input type="checkbox"/> Oncoming Light Glare		
Environmental (Check ALL applicable)							
<input type="checkbox"/> Dry		<input type="checkbox"/> Calm		<input type="checkbox"/> Grassland		Estimated Ambient Temperature	
<input type="checkbox"/> Raining		<input type="checkbox"/> Windy		<input type="checkbox"/> Mountainous		('F) _____	
<input type="checkbox"/> Snowing		<input type="checkbox"/> Haze/Blowing Dust		<input type="checkbox"/> Desert			
<input type="checkbox"/> Standing Water		<input type="checkbox"/> Fog		<input type="checkbox"/> Wooded Area			
Additional Comments (relevant to the incident information page):							

SECTION C - INVOLVED OFFICER / AGENT INFORMATION

Involvement: <input type="checkbox"/> Primary <input type="checkbox"/> Assisting					
Name (Last, First, MI):			Title:		Service EOD:
					Duty Location EOD:
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female		Hand Usage: <input type="checkbox"/> Right-handed <input type="checkbox"/> Left-handed		Height:	Weight: Age:
Duty Status: <input type="checkbox"/> On Duty <input type="checkbox"/> Off Duty		Total YEARS Law Enforcement Experience: Federal & Military: State: Local:			
Operational Activity (Check all that apply)					
<input type="checkbox"/> Uniformed	<input type="checkbox"/> Plain Clothes	<input type="checkbox"/> Cargo Operations	<input type="checkbox"/> Joint Task Force	<input type="checkbox"/> Warrant Service	
<input type="checkbox"/> Primary Inspection	<input type="checkbox"/> Linewatch	<input type="checkbox"/> Traffic Checkpoint	<input type="checkbox"/> Air Operations		
<input type="checkbox"/> Secondary Inspection		<input type="checkbox"/> Traffic Observation	<input type="checkbox"/> Marine Operations		
<input type="checkbox"/> Other _____		<input type="checkbox"/> Training/Qualification			

*Employees covered by a collective bargaining agreement are advised that they have the right to Union representation in accordance with their agreement.

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SECTION D - INVOLVED OFFICER / AGENT INCAPACITATION INFORMATION

<input type="checkbox"/> Check This Box if Officer/Agent is Shot			
Degree of Incapacitation: <input type="checkbox"/> No Incapacitation <input type="checkbox"/> Partial Incapacitation <input type="checkbox"/> Full Incapacitation <input type="checkbox"/> Deceased			
Body Armor Usage: <input type="checkbox"/> Used <input type="checkbox"/> Not Used		Number of Impacts:	Number of Penetrations:
Describe Any Involved Officer/Agent Injuries or Other Needed Information:			

SECTION E - ADDITIONAL WEAPONS USED BY OFFICER/ AGENT IN SECTION C

Firearms Information			
Ownership: <input type="checkbox"/> CBP Issued <input type="checkbox"/> Personal		Qualification Field Date:	Qualification Score:
Serial Number:	Manufacturer:	Model Name/Number:	Caliber:
Type: (e.g., pistol, rifle, shotgun)	Bullet Type:	Rounds Fired:	Barrel Length:
Intermediate Device Information			
Device: (e.g., OC Spray, CSB)		Device Type: (e.g., Stream, 26")	Description:
Other Device Information			
Device:		Device Type:	Description:

SECTION F - INVOLVED OFFICER/AGENT SHOOTING INFORMATION (Check all that apply)

Shooting Posture: <input type="checkbox"/> Standing <input type="checkbox"/> Kneeling <input type="checkbox"/> Prone <input type="checkbox"/> Other	Posture Orientation: <input type="checkbox"/> Field Interview Stance <input type="checkbox"/> Facing Squarely <input type="checkbox"/> Side Towards <input type="checkbox"/> Other	Cover Usage: <input type="checkbox"/> No Cover <input type="checkbox"/> Cover Used <input type="checkbox"/> In Vehicle <input type="checkbox"/> Other Conveyance	Shooting <input type="checkbox"/> Two-Handed <input type="checkbox"/> Strong Hand Only <input type="checkbox"/> Weak Hand Only
Target Elevation: <input type="checkbox"/> At/Above Eye Level <input type="checkbox"/> Below Eye Level <input type="checkbox"/> Hip Level	Aiming Method: <input type="checkbox"/> Point Aim <input type="checkbox"/> Sight Aim <input type="checkbox"/> Laser	Firing Mode: <input type="checkbox"/> Semi-Automatic <input type="checkbox"/> Fully Automatic <input type="checkbox"/> Pump Action <input type="checkbox"/> Bolt Action <input type="checkbox"/> Other	Shooting Distance (Expressed in Yards): Minimum: _____ Maximum: _____
Collateral Damage: <input type="checkbox"/> Non-Subjects <input type="checkbox"/> Property Damaged			
Comments Concerning Collateral Damage:			

SECTION G - INVOLVED OFFICER/AGENT TRAINING INFORMATION

What Training (In addition to basic Academy) Assisted the Involved Officer/Agent:			
<input type="checkbox"/> BORSTAR	<input type="checkbox"/> BORTAC	<input type="checkbox"/> PITP	<input type="checkbox"/> EMT
<input type="checkbox"/> FITP	<input type="checkbox"/> IFITP	<input type="checkbox"/> DTI	<input type="checkbox"/> Stat
<input type="checkbox"/> Other	<input type="checkbox"/> DITP	<input type="checkbox"/> SRT	<input type="checkbox"/> Pass
Training Recommendations:			
Additional Comments (on all involved officers/agents):			

CBP Form 318 (10/10)

SECTION H – SUBJECT INFORMATION

<input type="checkbox"/> Person <input type="checkbox"/> Animal Reason (Animal): <input type="checkbox"/> Defense <input type="checkbox"/> Euthanize <input type="checkbox"/> Other: _____		
<input type="checkbox"/> Unidentified Subject		
Name (Last, First, Middle): _____		Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female <input type="checkbox"/> Unknown
Date of Birth (if known) or Age or Age Range: _____		Height or Height Range: _____
Ethnicity: _____	Other Information: _____	Weight or Weight Range: _____
Attire: <input type="checkbox"/> Civilian <input type="checkbox"/> Paramilitary <input type="checkbox"/> Police <input type="checkbox"/> None		
Prior Offenses: <input type="checkbox"/> Felony <input type="checkbox"/> Misdemeanor	FBI No. _____	Subject Body Armor: <input type="checkbox"/> Used <input type="checkbox"/> Not Used <input type="checkbox"/> Unknown
Prior Arrests (Show Date, Offense and Disposition): _____		

SECTION I – SUBJECT FIREARM (AND MISC. WEAPONS) INFORMATION

<input type="checkbox"/> Firearm <input type="checkbox"/> Unknown <input type="checkbox"/> No Firearms			
TYPE:			
<input type="checkbox"/> Pistol	<input type="checkbox"/> Rifle	<input type="checkbox"/> Submachine Gun	<input type="checkbox"/> Unknown
<input type="checkbox"/> Launcher	<input type="checkbox"/> Cannon	<input type="checkbox"/> Missile	<input type="checkbox"/> Shotgun
		<input type="checkbox"/> Machine Gun	<input type="checkbox"/> Other _____
Caliber: _____	Barrel Length: _____	Bullet Type (if shotgun): <input type="checkbox"/> Shot <input type="checkbox"/> Slug <input type="checkbox"/> Other _____	
Serial Number: _____	Manufacturer: _____	Model Name/Number: _____	Rounds Fired: _____
Add Firearms (Use Supplemental Sheet for Additional Subject Firearms): <input type="checkbox"/> None <input type="checkbox"/> See Supplement			
Subject Other Weapon Information (NOT Firearm):			
<input type="checkbox"/> Physical Techniques	<input type="checkbox"/> Rocks	<input type="checkbox"/> Chemical Device	
<input type="checkbox"/> Edged Weapon	<input type="checkbox"/> Vehicle	<input type="checkbox"/> Explosives/Incendiary Device	
<input type="checkbox"/> Other Blunt Instruments	<input type="checkbox"/> Animal	Describe: _____	
<input type="checkbox"/> Other _____	<input type="checkbox"/> Vessel		
Officer/Agent Weapon(s) Used on Subject:			
<input type="checkbox"/> Weapon	<input type="checkbox"/> Effective to Resolve threat		
<input type="checkbox"/> LL Device	<input type="checkbox"/> Not Effective to Resolve Threat		
<input type="checkbox"/> K9	<input type="checkbox"/> Explain: _____		
<input type="checkbox"/> Other _____	<input type="checkbox"/> CTDD Used w/Arrest; if yes, complete CTDD Supplement		
Officer/Agent: _____		Additional Weapons Used on Subject?	
Weapon Used: _____		<input type="checkbox"/> None <input type="checkbox"/> See Supplement	
Result: <input type="checkbox"/> Effective to Resolve threat			
<input type="checkbox"/> Not Effective to Resolve Threat			

SECTION J – SUBJECT INCAPACITATION INFORMATION

<input type="checkbox"/> NO Incapacitation <input type="checkbox"/> PARTIAL Incapacitation <input type="checkbox"/> FULL Incapacitation		
<input type="checkbox"/> Deceased <input type="checkbox"/> Deceased Post Incident		
Number and Location of Subject Hits:		
<input type="checkbox"/> Head (Front): _____	<input type="checkbox"/> Upper Torso (Front): _____	<input type="checkbox"/> Extremities (Arms): _____
<input type="checkbox"/> Head (Rear): _____	<input type="checkbox"/> Upper Torso (Rear): _____	<input type="checkbox"/> Extremities (Legs): _____
<input type="checkbox"/> Lower Torso (Front): _____	<input type="checkbox"/> Neck (Front): _____	
<input type="checkbox"/> Lower Torso (Rear): _____	<input type="checkbox"/> Neck (Back): _____	

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ADDITIONAL COMMENTS
Additional Comments on All Involved Subjects:
Incident Comments (Additional Comments Relevant to the Incident Information Page):
Officer/Agent Comments (Additional Comments on All Involved Officers or Agents):

CBP Form 318 (10/10)

SUPPLEMENTAL

Use this supplement to record Involved Officer/Agent firearms and/or Subject weapons that are additional to those shown on the original form. Firearms or other weapons used by ADDITIONAL Involved Officers/Agents and/or Subjects should be shown on ADDITIONAL FORMS submitted for those parties.

SECTION A - INCIDENT IDENTIFICATION INFORMATION

CBP Reportable Incident Number:	Original SIR Number:	Name of Primary Involved Officer/Agent:
---------------------------------	----------------------	---

SECTION E - ADDITIONAL INVOLVED OFFICER/ AGENT FIREARM INFORMATION

Firearms Information			
Ownership: <input type="checkbox"/> CBP Issued <input type="checkbox"/> Personal		Qualification Field Date:	Qualification Score:
Serial Number:	Manufacturer:	Model Name/Number:	Caliber:
Type:	Bullet Type:	Rounds Fired:	Barrel Length:
Intermediate Device Information			
Device:		Device Type:	Description:
Other Force Information:			
Device:		Device Type:	Description:
Officer/Agent Weapon(s) Used on Subject			
<input type="checkbox"/> Weapon	<input type="checkbox"/> Effective to Resolve threat		
<input type="checkbox"/> LL Device	<input type="checkbox"/> Not Effective to Resolve Threat		
<input type="checkbox"/> K9	<input type="checkbox"/> Explain: _____		
<input type="checkbox"/> Other	<input type="checkbox"/> CTDD Used w/Arrest		

SECTION I - ADDITIONAL FIREARM (AND MISC. WEAPONS) USED BY SUBJECT IN SECTION H

<input type="checkbox"/> Firearm <input type="checkbox"/> Unknown <input type="checkbox"/> No Firearms Were Found			
TYPE:			
<input type="checkbox"/> Pistol	<input type="checkbox"/> Rifle	<input type="checkbox"/> Submachine Gun	<input type="checkbox"/> Unknown
<input type="checkbox"/> Launcher	<input type="checkbox"/> Cannon	<input type="checkbox"/> Missile	<input type="checkbox"/> Shotgun
		<input type="checkbox"/> Machine Gun	<input type="checkbox"/> Other
Caliber:	Barrel Length:	Bullet Type (if shotgun): <input type="checkbox"/> Shot <input type="checkbox"/> Slug <input type="checkbox"/> Other _____	
Manufacturer:	Model:	Serial Number:	Rounds Fired:
Add Firearms (Use Supplemental Sheet for Additional Subject Firearms):			
Subject Other Weapon Information (NOT Firearm)			
<input type="checkbox"/> Physical Techniques	<input type="checkbox"/> Rocks	<input type="checkbox"/> Chemical Device	
<input type="checkbox"/> Edged Weapon	<input type="checkbox"/> Vehicle	<input type="checkbox"/> Explosives/Incendiary Device	
<input type="checkbox"/> Other Blunt Instruments	<input type="checkbox"/> Animal	Describe: _____	
<input type="checkbox"/> Other _____			

ADDITIONAL INFORMATION/TEXT CONTINUATIONS

Add any additional pertinent information or specify the section of the form to which this continuation applies:

CBP Form 318 (10/10)

DEPARTMENT OF HOMELAND SECURITY
U.S. Customs and Border Protection

Controlled Tire Deflation Device Supplement

INCIDENT INFORMATION					
Incident Number:		Title:			
Incident Date:	Time:	Location Latitude:		Longitude:	
Street:	City or County:		State:	Zip Code:	
Deploying Officer(s)/Agent(s):					
Authorized by:			Supervisor:		
Justification:					
VEHICLE INFORMATION					
Make:	Model:	Doors:	Year:	Vin:	
CTDD INFORMATION					
Type:				Tracking Number:	
Identification Number:		Number of Tires Spiked:		No. of Tires Deflated:	
Vehicle Damage:			Injuries/Fatalities:		
No. Apprehended:			Driver Apprehended:		
Estimated Vehicle Speed (MPH):			Distance Traveled:		
Property Damage:			SF-95, Claim for Damage, Injury or Death, Issued? <input type="checkbox"/> No <input type="checkbox"/> Yes http://www.gsa.gov		
OTHER CONDITIONS					
Traffic Condition:		Road Condition:		Weather	
SIGNATURES					
OFFICER/AGENT					
Name			Signature:		
SUPERVISOR					
Name:			Signature:		
Comments:					
REVIEWER					
Name:			Signature:		
Comments:					

CBP Form 318 Supplement (10/10)

Appendix VII: Memorandum of Agreement (MOA) with the National Treasury Employees Union (NTEU)

The CBP Use of Force Policy Handbook (*Handbook*) provides a unified use of force reference, while also allowing operational components to address related issues exclusive to their workplace environments. Inasmuch as an overwhelming majority of the bargaining unit represented by NTEU performs duties that require routine application of use of force policy and procedures, the parties have negotiated procedures and appropriate arrangements applicable to the bargaining unit as a supplement to the *Handbook*.

The parties' agree to the following provisions regarding the implementation of the *Handbook*:

1.A. No later than one hundred and twenty (120) calendar days after the *Handbook* is implemented, the Agency will inform NTEU of changes made to existing firearms and use of force related directives applicable to the NTEU bargaining unit. The Agency's notification will also inform NTEU if Customs Directive No. 4510-019A- Subject Management of Critical Incidents, Customs Directive No. 4510-027-Subject: Firearms Reinstatement Review Process and Customs Directive No. 4510-017A-U.S. Customs Firearms and Use of Force Training Policy are still applicable.

B. To the extent changes are made to these directives that are not responsive to the implementation of the *Handbook*, the parties will bargain prior to implementation of the changes to the extent required by law.

2. For the purpose of the *Handbook* and this Agreement, the term "Authorized Officers/Agents" includes Seized Property Specialists and any other armed bargaining unit authorized employee.

3. In addition to the Virtual Learning Center training regarding the *Handbook*, Firearms instructors will discuss the new Policy with authorized officers at their next scheduled firearms and intermediate force training date. This allotted time will allow the instructor to go over significant changes and field questions. Authorized officers may also forward questions regarding the new *Handbook* directly to the Use of Force Policy Division for a response.

4. Authorized officers, i.e. authorized to carry a firearm, who have successfully qualified may carry their weapons to and from their residences and may make

reasonable stops between their residence and work. In order to assist with their compliance, authorized officers will be provided sufficient training regarding off-duty carry of CBP issued weapons.

5. Consistent with Chapter 2.D of the *Handbook*, as well as law, rule, and regulation, authorized officers may check their firearms into checked luggage when traveling on official orders. Any checked firearm must be placed inside checked luggage and locked in its own protective carry case.

6. The Agency will provide managers and supervisors with additional guidance that will assist them in making swift and appropriate determinations in the weapon removal process, e.g., not every violation under the table of offenses may prompt the removal of a firearm.

7.A. The *Agreement between U.S. Customs and Border Protection (CBP) and the National Treasury Employees Union (NTEU) (Agreement)* dated August of 2006 addressing a due process procedure for CBP Officers (to include Seized Property Specialists) will continue to apply.

B. The authorized officer's nexus letter will be modified to include an area for the Agency to provide the nexus for the firearm removal in situations that were previously identified as "other."

C. The authorized officer's investigation status letter will be expanded to include an estimated time frame for completion.

D. An authorized officer's firearm removal nexus letter and subsequent investigation status letter(s) will also include the statement: "A COPY OF THIS LETTER MAY, AT YOUR OPTION, BE FURNISHED TO YOUR NTEU REPRESENTATIVE."

8. In the event the Agency restricts an authorized officer's off-duty carriage authority for cause, the provisions of the "due process" Agreement will be followed.

9.A. It is important that CBP appropriately determine whether an officer should have the authority to carry a firearm and that where CBP conducts investigations that involve the revocation of that authority, they will be flagged

for priority over other investigations and conducted in an expeditious manner consistent with 9.D.

- B. To increase oversight and attempt to expedite the investigations referenced in 9.A., the Office of Field Operations will inform (on a quarterly basis) the CBP office that is conducting the investigation, e.g., the Office of Internal Affairs, of those authorized officers who have had their weapon removed and are pending an administrative investigation. In return, the Office of Internal Affairs, or applicable office, will provide the Office of Field Operations a status of the individual investigations and an estimated time frame for completion.

The removal of firearm carriage authority pursuant to Section 2.G of the Handbook does not prohibit the return of the firearm pursuant to the procedures set forth in 9.C. below.

- C. At least once a quarter, the Office of Field Operations will use the data assembled in 9.B. to review each revocation and reevaluate if an officer's firearm can be returned. In the event management determines there is no longer a nexus between the alleged conduct and the threat to the safety of the officer or others, the firearm will be returned as soon as practicable.

An impacted employee's investigation status letter will be amended to inform the employee that although the firearm will not be returned at that time, the revocation will be re-evaluated at the next quarterly review.

- D. Investigations involving the revocation of firearm carriage authority will not be confined to any time frame, will not require investigations to be concluded prematurely and will not take priority over all other CBP investigations.
- E. In the event the firearm has not been returned pursuant to Section 9.C. above, once an investigation has been completed and the Agency has not proposed terminating the employee, the firearm will normally be provided back to the employee within ten (10) calendar days of the decision not to terminate the employee's employment unless there is a reasonable belief that returning the firearm may jeopardize the safety of employee(s), CBP operations, or the traveling public. It is understood that CBP has determined that an employee will have their firearm and credentials removed while serving any suspension.
- F. After one (1) year of implementing this Agreement, either party may reopen Section 9. In the event either party requests to reopen this

Agreement, or NTEU requests information in order to make a determination whether or not to reopen this Agreement, the following cumulative report will be provided to NTEU with an appropriate employee identifier, that will include:

- CBP investigating unit;
- The reason supporting the removal of the firearm;
- The date the investigation was opened;
- The status of the investigation e.g. on-going, completed;
- The expected time frame for the completion of the investigation.

Nothing in this provision waives NTEU's right to request additional information pursuant to applicable law.

- G. In the event a decision to revoke firearm carriage authority is found to be improper, in whole or in part, any remedy may include reimbursing the employee for appropriate back pay, in accordance with the provisions of law, e.g. the Back Pay Act.

10. In the event an authorized officer has temporarily had their authority to carry a firearm rescinded, the officer will be assigned duties that do not require the carriage of a firearm until the officer's situation is resolved. During this time, the Agency will make a reasonable effort to assign these officers to duties that may provide for overtime compensation.

11. In the event an officer can no longer demonstrate the proficiency necessary to maintain the authority to carry a firearm, the Agency will consider the employee for other positions for which the employee is qualified prior to taking any other administrative action. This provision is not intended to replace or conflict with established reasonable accommodation procedures.

12. Absent other outstanding misconduct issues, an authorized officer who has had a domestic violence conviction (i.e. Lautenberg Amendment) expunged will be treated as if the conviction had never occurred, e.g. the authorized officer will be permitted to carry a firearm in accordance with the provisions of the *Handbook*.

13. CBP will inform NTEU whether the M-4 and the AR-15 rifles will be made available to authorized officers.

14. CBP will inform NTEU when outerwear vest carriers will be available to authorized officers.

15. If a bargaining unit authorized officer is to be interviewed by any representative of the Agency concerning their involvement in a use of deadly force incident, the authorized officer shall be advised of their right to an NTEU representative, in writing, prior to the interview. The interview will not be held until the authorized officer has had a reasonable opportunity to secure NTEU representation. Pursuant to existing heritage agreements (or the new term agreement when completed), authorized officers will be provided all applicable notices and rights after being afforded reasonable time to regain their composure.

16. Authorized officers involved in a use of deadly force incident will be strongly encouraged to receive immediate medical attention.

17.A. In accordance with Chapter 6 of the *Handbook*, the Agency has determined that while performing official duties, authorized officers who carry firearms are required to be trained in both and carry at least one approved intermediate force device (*i.e.* OC spray or a CSB).

B. Those authorized officers in the field who have previously been certified to carry OC Spray by either CBP, the former United States Customs Services, the former Immigration and Naturalization Service or the former Border Patrol, regardless of whether or not such certification required an OC spray exposure, will be permitted to continue the carry of OC as an intermediate weapon.

C. Those authorized officers in the field who have never been previously certified to carry OC spray, and voluntarily choose to carry OC spray as an intermediate force option, must successfully complete the OC spray exposure exercise.

D. All authorized officers attending basic training must successfully complete the OC spray exposure exercise during their initial certification.

18.A. In accordance with the *Handbook*, the Agency has determined a minimum of eight (8) hours of use of force training will be conducted each qualification period. This will include four (4) hours for firearms training and recertification and four (4) hours for intermediate force training and recertification.

B. Eight (8) hours of remedial training will be provided to those failing to qualify with a firearm.

C. Eight (8) hours of remedial training will be provided to those failing to qualify with an intermediate device.

19. Re-certification in the use of OC spray will not require an OC spray exposure.

20. No pregnant authorized officer will be required to undergo an OC spray exposure.

21.A. In addition to quarterly qualifications, as well as unusual circumstances, authorized officers will be provided with sufficient materials to clean and maintain their Agency-issued or Agency-authorized firearms on duty time in accordance with guidelines provided by the CBP Use of Force Policy Division.

B. CBP will engage in good faith consultations with the local NTEU Chapter to develop procedures to safely implement the cleaning and maintenance of authorized firearms.

22.A. Off-duty storage for Agency-issued firearms at the discretion of armed employees, including overnight storage, shall be permitted only at facilities the CBP determines currently have storage available that is adequately secure.

B. Where CBP determines that a facility has adequately secure storage, but the facility does not have the capacity to fully accommodate employee interest in off-duty storage, employee requests for off-duty storage of their weapons shall be granted in the following order:

1) Authorized officers experiencing significant hardships will be provided off-duty storage.

- 2) Remaining off-duty storage at a duty location will be open to authorized officers for discretionary use with priority granted on the basis of seniority service at the post of duty.
 - 3) This language is not intended to diminish the availability of secured storage provided under current practice at individual facilities.
 - C. To ensure that new or retrofitted facilities will have adequate off-duty firearms storage (i.e., storage to accommodate at least 25 percent of armed employees), CBP will add on-site storage capability to the technical design standards. Once a new facility is scheduled for construction or an existing location is scheduled for retrofitting, CBP will inform NTEU in accordance with existing Agreements and practices.
 - D. Either party may reopen the provisions concerning off-duty storage of firearms after the policy has been in effect for 1 year. In preparation for reopener bargaining, the parties shall jointly determine employee interest in off-duty firearm storage. Thereafter, the provisions, including any modifications thereto, shall remain in effect concurrently with the master collective-bargaining agreement.
23. Firearms instructors will be selected in accordance with the parties' Bid, Rotation and Placement Agreement. In locations that do not consider Firearms Instructors as included in a "work unit", existing selection procedures for the collateral duty will continue to apply.
24. In the event the Agency decides to change the qualification course of fire and required minimal passing numerical score, NTEU will be provided appropriate notice and the opportunity to bargain to the extent required by law.
25. As a general rule, any required proficiency training, demonstration or qualification will be held during the authorized officer's normal tour of duty. If the authorized officer's normal tour of duty does not coincide with the scheduled training, demonstration or qualification, the Agency will modify the work schedule seven (7) days in advance of the administrative workweek, absent an authorized officer's voluntary agreement to do otherwise.

26. The Agency will ensure medical personnel are available (either in person or by phone) when conducting use of force training exercises, including training concerning OC spray.

27. Basic first aid training will be made available to Range Officers to enable them to provide emergency first aid until a more qualified medical technician is available.

28. In accordance with the provisions of Chapter 9 Section E "CBP Authorized Competitive Shooting Teams", upon written approval from the Agency, duty time will be authorized for officers participating in authorized firearms competitions as Agency representatives.

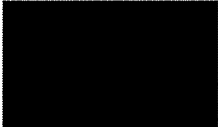




29. To assist authorized officers when applying for concealed weapon permits pursuant to Public Law 108-277, 18 USC 926B, the Agency will issue guidance to authorized officers once finalized. Once the guidance is finalized, NTEU will be provided a copy.

30. In consideration of an employee's right to privacy, any requested medical information will be kept in confidential files separate from an individual's personnel file.

B. Employees will normally provide appropriately requested medical information to the requesting official who will ensure the information is protected in accordance with Subsection A. As an exception, in the event an employee has a reasonable privacy concern related to providing detailed medical information (*e.g.*, information that includes a doctor's prognosis and diagnosis) directly to the requesting official, upon employee request, the Employer will make alternative arrangements for the employee to deliver the required information directly to a medically certified Agency representative. The employee acknowledges the granting of such a request may result in a delay in the benefit sought by the employee.

C. In the event a medically certified Agency representative provides medical information to CBP management officials for the purpose of making an informed management decision, the non-medically certified CBP management officials will only review applicable summary medical information in which they have an appropriate need to know.

31. The *Handbook* will be modified to include this Agreement as an appendix.

 For CBP	 For NTEU
 For CBP	 For NTEU
 For CBP	

7/14/10 7/23/10
Date Date
7/14/2010
Date
7/14/2010
Date

Appendix VIII: Memorandum of Agreement (MOA) with the National Border Patrol Council (NBPC)

This Memorandum of Agreement (MOA) between the National Border Patrol Council of the American Federation of Government Employees, AFL-CIO (hereinafter the Union or NBPC) and U.S. Customs and Border Protection (hereinafter the Agency or CBP) modifies and/or augments the Use of Force Policy Handbook; its provisions must therefore be read and applied in conjunction with the Use of Force Policy Handbook.

The parties have negotiated over the Use of Force Policy Handbook to the fullest extent permissible under law, and as such, it is fully enforceable. In other words, the Union and/or any employee(s) have the right to grieve any alleged violation(s) thereof, including, but not limited to, failure(s) to adhere to the provisions therein and unilateral changes thereto pursuant to the Negotiated Grievance Procedure. Nothing herein shall be construed as an expansion of the scope of the Negotiated Grievance Procedure.

Moreover, in accordance with applicable law, the Agency acknowledges its obligation to notify the Union and provide it with an opportunity to bargain concerning any proposed changes to the policy, procedures, and/or guidelines that would affect the conditions of employment of bargaining unit employees.

1) Within fifteen (15) days of the signing of this MOA, the Union will supply the Agency with names and contact information for twenty-five (25) of its representatives who will assist in the evaluation process of the web-based training for the implementation of the Use of Force Policy Handbook. Within thirty (30) days of their participation in that process, the Union will forward its recommendations to the Agency for modifications to such training. The parties are committed to utilizing a collaborative approach to ensure that the training accurately and effectively conveys the important concepts of the Use of Force Policy Handbook.

2) The Use of Force Policy Handbook will be implemented six (6) months from the date this MOA is signed or six (6) months from the date the Federal Service Impasses Panel (FSIP) renders its final decision in Case No.09 FSIP 47. During this six (6) month period the Agency will do the following in this prescribed order:

- A. Provide each Border Patrol Agent with a copy of the Use of Force Policy Handbook.
- B. Provide each Border Patrol Agent with on-duty time to complete the Virtual Learning Center (VLC) CBP Use of Force Policy course.
- C. During quarterly qualification and/or intermediate force training, provide each agent the opportunity to discuss the new CBP Use of Force Policy with a CBP-certified instructor. If the VLC course is taken off-cycle with the quarterly qualification training, employees will be provided the opportunity to meet with the IFI or FI to discuss the Use of Force Policy.

Until an employee receives a copy of the Use of Force Policy Handbook, completes the VLC course, has the opportunity to discuss the policy with an FI or IFI, and signs the acknowledgement form, he or she will adhere to prior policies and will only be held accountable for such prior policies.

3) *Use of Force Committee*

- A. The parties will establish a Use of Force Committee (UFC) that will meet no less than three (3) times per calendar year to collaborate on matters related to Use of Force that impact the bargaining unit. The UFC will provide an opportunity for both parties to discuss issues of mutual concern relating to Use of Force, as well as the prevention and resolution of misunderstandings.
- B. The UFC will be comprised of three (3) attendees from both the Agency and the Union. Meetings will be co-chaired by a representative of the Union and a representative of the Agency. The operating guidelines and processes of the Committee will be established at the first meeting. Bargaining unit members of the UFC will receive official time for the meeting as well as the time necessary to travel to and from the meeting. Bargaining unit members will also be entitled to reimbursement for travel and per diem expenses in accordance with the Federal Travel Regulation.
- C. The UFC is designed primarily for the purpose of exchanging views and information and shall be deemed a supplement to collective bargaining as defined by the Federal Service Labor Management Relations Statute, not a substitute. The parties recognize that issues unresolved in these meetings can also be addressed in grievances, mid-term bargaining and/or other traditional representational processes.

4) *Chapter 1.A.5. (Implementation)* is modified as follows:

The course of instruction for the Use of Force Policy Handbook for trainee agents at the Border Patrol Academy will be incorporated into the standard curriculum, and will be taught during regular duty hours.

5) *Chapter 1.A.6. (Implementation)* is modified as follows:

The following procedures will be observed for Border Patrol Agents who have graduated from the Border Patrol Academy and are required to take the Use of Force Policy Handbook web-based training course:

- A. Agents will not be required to change their scheduled days off or their assigned shift, or to cancel any type of leave in order to take the training.
- B. The Agency will ensure that all employees are released from their normal duties in order to take the training.

- C. The Agency will ensure that all employees are afforded sufficient duty time to complete the VLC training course, generally two (2) hours. To the maximum extent feasible, such time will be contiguous and uninterrupted.
 - D. To the maximum extent feasible, the training will be accomplished during regular duty time. If employees are required to take the training outside of their regular duty hours, they will be compensated for all such time under the appropriate rate for directed overtime.
 - E. Employees will not be precluded from working AUO at the end of their shift solely because they are required to take the VLC Use of Force training during the final part of their regularly scheduled shift.
 - F. Sector and Station managers will appropriately schedule training to maximize the availability of on-site computers to fulfill the VLC training requirement.
 - G. CBP management has determined that all agents must complete the VLC Use of Force Course, but that no graded examination will be required for successful completion.
- 6) *Chapter 2.G.4.c. (Revocation of Authorization to Carry Firearms)* and *Chapter 5.D.2. (Drug Free Work Place)* are clarified as follows:

All references in the April 2002 U.S. Customs Service Drug Free Federal Workplace program (referred to in Chapter 2.G.4.c. as the "CBP Drug Free Workplace Policy") to NTEU representatives are understood to signify NBPC representatives. Additionally, it is understood that duties assigned to managers with superseded management titles may be assigned to other management officials.

- 7) *Chapter 2.G.7. (Revocation of Authorization to Carry Firearms)* is modified as follows:

Absent unusual circumstances, notice of revocation of authorization to carry firearms will be provided within seventy-two (72) hours.

- 8) *Chapter 6.A.13. (Demonstration of Firearms Proficiency)* is modified as follows:

Authorized agents, including trainees at the Academy, who are unable to assume a required firing position because of a limited range of physical movement shall be allowed to utilize a safe adaptive shooting stance. Firearms Instructors shall work with these agents to develop an appropriate stance.

- 9) *Chapter 6.C.2. (Failure to Qualify)* is modified as follows:

Remedial Firearms Training

General Provisions

Blocks of actual live-fire firearms training shall not exceed two hours in length, with no more than two (2) blocks of live-fire training per day.

Border Patrol Agents Who Have Graduated From the Basic Training Academy

Border Patrol Agents who have graduated from the Border Patrol Academy and who fail to qualify with a firearm shall be provided with sufficient remedial training to enable them to qualify and/or improve their abilities, up to a maximum of forty (40) hours of live-fire remedial training per failure to demonstrate proficiency.

Trainee Border Patrol Agents at the Basic Training Academy

Trainee agents whose firearms proficiency has been identified as inadequate shall be notified of this fact in writing at the earliest practicable time. The aforementioned notice shall advise such employees of the dates and times of on-going pre-remedial training and strongly encourage them to take advantage of those opportunities. To the extent possible, all such pre-remedial training shall be scheduled to minimize adverse impact upon their other areas of study.

Trainees who have failed their firearms proficiency will be given the option of receiving a concentrated block of twelve (12) hours of remedial training from qualified instructors at the Academy or twelve (12) hours of remedial training which fits with their current course workload and academic calendar. After receiving a copy of the MOA with this subsection highlighted, the trainee will submit a memorandum indicating his/her choice. The trainee's decision must be completely voluntary and free of any coercion.

If the trainee requests the concentrated block of training, it will be done on consecutive days. If the trainee requests training on a different schedule, firearms instructors will work with the individual trainee in developing a schedule which meets the trainee's needs. For trainee agents who successfully complete the firearms qualification courses before completing the twelve (12) hours of remedial training, no further firearms remedial training will be required.

At the end of each quarter, the Director of Training shall prepare a report specifying the number of trainee agents who failed to successfully complete the firearms program and the reasons for such failures. The report shall include a comparison of the rate of failure with the overall number of trainee agents who successfully completed the firearms program during the same period. The report shall be forwarded to UFPD, which shall promptly distribute a copy thereof to the Union.

10) Chapter 6.G.3. (*Intermediate Force Device Basic Certification and Remedial Training*) and Chapter 6.H.3. (*Intermediate Force Device Re-Certification and Remedial Training*) are modified as follows:

Remedial Intermediate Force Training

General Provisions

No more than six (6) hours of intermediate use of force remedial training per day shall be provided to any agent.

Remedial training for agents who fail to certify with an authorized intermediate force device shall be divided as follows:

- A. For agents who fail both the written and practical portions of the certification, the training shall be equally divided between the two portions.
- B. For agents who fail only one portion of the certification, at least 75% of the training shall focus on that portion.

Border Patrol Agents Who Have Graduated From the Basic Training Academy

Border Patrol Agents who have graduated from the basic training academy and who fail to certify in the use of at least one authorized intermediate force device shall be provided with sufficient remedial training to enable them to certify and/or improve their abilities, up to a maximum of forty (40) hours of remedial training per failure to demonstrate proficiency.

If an agent is currently certified in the use of one or more authorized intermediate force devices, a minimum of twelve (12) hours of remedial training shall be provided, unless the agent passes the certification sooner.

Trainee Border Patrol Agents at the Basic Training Academy

Trainee agents who fail to certify with any required intermediate use of force device shall be provided with a minimum of eight (8) hours of remedial training per required device, unless they certify with the device sooner. To the extent possible, all such remedial training shall be scheduled to minimize adverse impact upon their other areas of study.

- 11) Chapter 6.I.1 (*Exposure to Oleoresin Capsicum (OC)*) is modified as follows:

OC Exposure Procedures

Exposure to OC will be at a distance of six (6) to eight (8) feet. The agent can choose whether or not to be sprayed from the front or the side. Agents may also choose to wear eye protection (i.e., shooting glasses). The exposure will be administered by a CBP-certified intermediate force instructor as part of a practical exercise. All employees who are exposed to OC shall be properly decontaminated and provided with proper medical care if they suffer unusual reactions requiring attention beyond normal decontamination.

OC Exposure Statistics and Reports

The Agency will maintain statistics regarding the number of agents exposed to OC during training, as well as reports concerning those who suffer unusual reactions requiring attention beyond normal decontamination. This information will be shared with the Union on a quarterly basis. If the Agency becomes aware of any new studies concerning the effects of OC, it will promptly share that information with the Union.

12) Chapter 13.C.3. (*Ammunition Issue*) is modified as follows:

In addition to the handgun ammunition necessary for duty carry and official qualification, Border Patrol Agents will be issued 150 rounds of handgun proficiency ammunition per quarter, upon verbal request and contingent on the availability of funds.

13) This agreement will expire on the date that the Use of Force Policy Handbook policies, procedures and guidelines are superseded or terminated in accordance with the law.

For the Agency:

For the Union:


Date

Director
Use of Force Policy Division


Date

President
National Border Patrol Council


Date

Associate Chief
U.S. Border Patrol


Date

Labor Relations Specialist

Appendix IX: First Aid Trauma Kit Standards

Minimum standards for First Aid Trauma Kits utilized by Firearms and Intermediate Force Instructors are as follows:

The First Aid Trauma Kit shall consist of the following components:

Eye wash	
Sterile water	Cleaning wounds/irrigation purposes
Disposable Emergency Blanket	One time use, foil blanket
Flexible Splint, 36" Rolled	Flexible, moldable foam wrapped metal splint for broken arms, legs etc.
Cold Packs	Squeeze and break, chemicals cause cold within the pack
Rolled Gauze 4 ½" x 4.1 yards	Rolled gauze for keeping wounds clean
Rolled Gauze 2 ¼" x 3 yards	
Elastic Wrap	Stretchy elastic wrap for sprains, to allow some mobility and some stabilization
Trauma Dressing	Thick gauze bandage for heavy bleeding
Elastic Gauze Bandage, 4"	Flexicon is an elastic gauze bandage that holds dressings securely in place without slipping.

Alcohol Prep Pads	
<hr/>	
Chest Seal	Plastic component with valve to allow air to escape but not enter used for sucking chest wounds
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Bio-Hand Cleaner	Waterless hand cleaner
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Hot Compress	Squeeze and break chemicals, cause heat within the compress
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Wound Coagulation Chemical	A sterile hemostatic treatment that rapidly accelerates coagulation in large wounds, including high volume venous and arterial bleeding. It saves lives by arresting hemorrhage before victims go into shock caused by loss of blood
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Burn Kit	Contains ointment and bandages
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Band aids, various sizes	
<hr/>	
Antiseptic Sting Swabs	Antiseptic inside of an ampoule
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Firearms and/or Intermediate Force Instructors shall have a First Aid Trauma Kit available at all times when conducting firearms and/or tactical training.

Instructors who are trained and certified to administer oxygen should carry supplemental oxygen in addition to the First Aid Trauma Kit. Instructors carrying supplemental oxygen are required to adhere to all regulations pertaining to the handling and transportation of medical oxygen.

Appendix X: Glossary

AC	<u>Assistant Commissioner</u> – The director of an operational component of Customs and Border Protection.
BORTAC	<u>Border Patrol Tactical Unit</u> – A nationally recognized tactical unit for CBP. BORTAC has administrative control for all SRT units and is the certifying entity for all tactical teams.
BOS	<u>Board of Survey</u> – A Headquarters board composed of representatives from all operational components to determine disposition of lost or destroyed CBP assets.
CBP	<u>Customs and Border Protection</u> – A component of the Department of Homeland Security.
COA	<u>Co-Authority</u> – An individual designated by the Responsible Official to act in his/her stead in all functions of the CBP firearms information tracking system.
CPA	<u>Chief Patrol Agent</u> – The agent in charge of a Border Patrol Sector.
CS	<u>O-Chlorobenzylidenemalononitrile</u> – The active ingredient in CS gas or spray.
CSB	<u>Collapsible Straight Baton</u> – An intermediate force device.
DFO	<u>Director of Field Operations</u> – The director in charge of a specific number of Ports of Entry under the Office of Field Operations.
DHS	<u>Department of Homeland Security</u> – A cabinet level agency of the United States Government.
EAP	<u>Employee Assistance Program</u> – A CBP program established to provide assistance and guidance to employees.
EMS	<u>Emergency Medical Services</u> – Ambulance or paramedic services.
FA	<u>Field Armorer</u> – A firearms instructor who has been trained and certified through formal instruction to conduct limited maintenance and repair of CBP weapons.
FI	<u>Firearms Instructor</u> – An officer/agent who has been trained and certified through formal instruction as a CBP firearms instructor.
IA	<u>Internal Affairs</u> – A division of CBP that is responsible for internal investigation of all operational components.

IFI	<u>Intermediate Force Instructor</u> – An officer/agent who has been trained and certified through formal instruction to teach CSB, OC spray and other defensive tactics.
ISBT	<u>Integrated Scenario Base Training</u> – Interactive training conducted in simulated real world situations, utilizing simulated ammunition and/or inert OC spray.
OAM	<u>Office of Air and Marine</u> – One of the three operational components of CBP; composed of all CBP air and marine assets.
OBP	<u>Office of Border Patrol</u> – One of the three operational components of CBP.
OC	<u>Oleoresin Capsicum</u> – The active ingredient in OC spray, derived from cayenne pepper.
OFO	<u>Office of Field Operations</u> – One of the three operational components of CBP.
OTD	<u>Office of Training and Development</u> – A division of CBP at headquarters level with the responsibility to create, develop and implement basic and advanced training for all operational components of CBP.
PFI	<u>Primary Firearms Instructor</u> – The lead firearms instructor responsible for receiving, controlling and issuing CBP use of force equipment to CBP personnel within their duty area.
PIFI	<u>Primary Intermediate Force Instructor</u> – The lead intermediate force instructor responsible for receiving, controlling, and issuing CBP intermediate use of force equipment to CBP personnel within their duty area.
RO	<u>Responsible Officials</u> – Chief, Office of Border Patrol (OBP); Assistant Commissioner, Office of Field Operations (OFO); Assistant Commissioner, Office of Internal Affairs (IA); Assistant Commissioner, Office of Air and Marine (OAM); Assistant Commissioner, Office of Training and Development (OTD); Chief Patrol Agent (CPA); Director, Field Operations (DFO); Directors, Air Operations and Marine Operations (DAO, DMO); Division Directors, Internal Affairs (IA); Director of UFPD; and other officials designated in writing by the Commissioner.
RSO	<u>Range Safety Officer</u> – An officer/agent trained in range safety procedures utilized as a line safety officer on the firing line. <u>Serious Physical Injury</u> – A physical injury likely to cause death or serious permanent disfigurement or loss of function of a bodily member or organ.
SFW	<u>Shoulder-Fired Weapon</u> – A CBP-authorized rifle or long arm.

- SRT Special Response Team – A sanctioned, certified and chartered tactical unit performing enhanced field operations and operations requiring specialized weapons, tactics and techniques.
- UFPD Use of Force Policy Division – A division of the Office of Training and Development responsible for development of CBP use of force policy, procurement of CBP firearms and tactical equipment and oversight of use of force training for all CBP operational components.

EXHIBIT D

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
ANASTASIO HERÁNDEZ ROJAS AND FAMILY VS. UNITED STATES
CASE NO. P-524-16
AFFIDAVIT IN SUPPORT OF PETITIONERS

I, James Wong, do state and attest in St. Tammany Parish, Louisiana as follows:

1. I have extensive experience as a law enforcement officer and in investigating corruption and misconduct by law enforcement. Before retiring in 2011, I worked for thirty-five years in state and federal law enforcement agencies. For twenty of those years, I had various supervisory roles within Louisiana State Police and within U.S. Customs Service, U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE), the federal agencies responsible for securing U.S. borders to prevent terrorism, illegal immigration, and the movement of contraband. My experience with federal law enforcement agencies includes significant time at field stations along the U.S.-Mexico border.
2. Over the course of more than three decades, I have conducted and supervised hundreds of criminal investigations. While with the U.S. Customs Service, I investigated money laundering, narcotics, arms trafficking, and child pornography. When I was transferred to the Office of Internal Affairs within U.S. Customs, I began investigating corruption and misconduct by federal law enforcement agents. I supervised corruption and misconduct investigations while at U.S. Immigration and Customs Enforcement's Office of Professional Responsibility and after I joined Internal Affairs at the U.S. Customs and Border Protection (CBP). As CBP's Deputy Assistant Commissioner for Internal Affairs, a Senior Executive Service position, I was responsible for criminal and serious misconduct investigations of CBP employees. During this time, I oversaw the investigation of several use-of-force incidents involving active duty CBP agents, including the incident that resulted in the death of Anastasio Hernández Rojas.

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3. I have prepared this affidavit to support the petition filed by the family members of Anastasio Hernández Rojas (Case Number P-524-16) before the Inter-American Commission on Human Rights.

EDUCATIONAL & PROFESSIONAL BACKGROUND

4. I attended Tulane University from 1971 to 1980, graduating with a degree in Sociology and Social Sciences. During that time, I also worked as a military police investigator for the U.S. Army from 1972 to 1975 at Fort Polk, Louisiana and in Berlin, Germany. I conducted felony-level investigations of crimes that involved military property and personnel.
5. While attending Tulane University, I joined the Louisiana state police. I spent two years as a uniformed patrol officer and nine years as an investigator in intelligence and criminal investigations division and was promoted to Sergeant in 1980.
6. In 1987, I joined the U.S. Customs Service, which was the primary agency tasked with stopping the flow of illegal drugs and other contraband through U.S. ports of entry. Investigations were a key component of U.S. Customs Service's interdiction efforts. At the U.S. Customs Service, I investigated smuggling, financial crimes, fraud, narcotics, and child pornography.
7. Over the next fifteen years, I was promoted from criminal investigator, to special agent, to senior special agent, and lastly to supervisory special agent. In 2003, U.S. Customs Service was subsumed into the newly created U.S. Department of Homeland Security (DHS). Between 2003 and 2006, I worked as a supervisory special agent within U.S. Immigration and Customs Enforcement (ICE). ICE's primary mission was to protect national security, public safety, and the integrity of U.S. borders through the criminal and civil enforcement of federal law governing border control, customs, trade, and immigration. I was the supervisor at the ICE's Office of Professional Responsibility (OPR) located in San Diego, California where I oversaw investigations of misconduct involving ICE employees, independent reviews of ICE programs and offices, ICE background investigations, security clearances for ICE employees and contract staff, and

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ICE detention functions for San Diego and satellite offices in Calexico, Long Beach, San Francisco, and Seattle, Washington.

8. In 2006, I joined Internal Affairs at the U.S. Customs and Border Protection (CBP) where I became Special Agent in Charge of one of the agency's initial internal affairs field offices in Dallas, Texas. I was responsible for supervising investigations of wrongdoing by CBP employees and approving and signing investigative reports for all of the Southwestern United States.
9. In November 2008, I began shadowing CBP's Deputy Assistant Commissioner of Internal Affairs (IA) in Washington, D.C. IA handled security and integrity matters within CBP and was in charge of ensuring compliance with CBP-wide programs relating to corruption misconduct and mismanagement. I was officially promoted to Deputy Assistant Commissioner of Internal Affairs in January 2009 where I worked directly under Assistant Commissioner James Tomsheck, the head of IA. I held that position until I retired in December 2011, in part because of my disagreements with CBP leadership.

U.S. CUSTOMS AND BORDER PROTECTION CULTURE

10. The subsection of CBP charged with protection at the border between the ports of entry is known as Border Patrol (BP), which consists largely of field agents. Since September 11, 2001, CBP, primarily through BP agents, has been tasked with the prevention, detection, and apprehension of potential terrorists, illegal immigrants, and contraband between the ports of entry.
11. During periodic field investigations and official discussions with CBP and BP officials, I have often heard agents describe this civilian law enforcement agency's mission in militaristic terms. CBP agents, in particular BP agents, see themselves as members of a "paramilitary organization" and soldiers "on the front line" of a war against criminal organizations and terrorism. Many agents asserted that CBP's mission was to protect the border at all costs, even at the expense of human life. This militaristic understanding of the agency's role is supported by some high-ranking officials. For example, while Deputy Assistant Commissioner of IA, I heard CBP Deputy Commissioner David Aguilar refer to BP as the "Marine Corps of law enforcement."

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12. While Deputy Assistant Commissioner of Internal Affairs and Special Agent in Charge, I spoke with many BP agents who did not want to acknowledge that undocumented individuals had basic human rights. I heard BP agents characterize undocumented migrants as the enemy and undeserving of any legal rights, much less the same rights as U.S. citizens. On at least one occasion, I have heard a BP agent say that “they don’t have any rights.”
13. I was disturbed to learn from official reports and video evidence collected by nongovernmental groups that BP agents destroyed food and water left in the desert for migrants who were crossing into the United States. Agents justified their actions to me and their supervisors by claiming that migrants were more likely to turn themselves in to U.S. law enforcement if they did not have access to the food and water. This view disregarded the reality that many migrants lost their lives after succumbing to the harsh conditions of the Arizona and Texas desert because they did not have access to food and water.
14. During my time as a CBP agent and investigating CBP misconduct, I was struck by the strength of the BP’s *esprit de corps*. BP continued the training of freshly graduated agents at facilities located on the U.S.-Mexico border and continued teaching them to see themselves as members of a paramilitary organization that provides front-line defense of the United States. I heard BP agents refer to themselves as the “Big Green Machine” (in reference to Border Patrol’s green uniforms). I encountered daily resistance to my efforts to hold agents engaged in misconduct accountable. I was told that those who had “never worn green” could not understand the challenges of being a BP agent.

PREVENTION OF MISCONDUCT & ABUSE

15. CBP’s insular culture was fostered by the agency’s approach to recruitment, training, and supervision. As Deputy Assistant Commissioner of IA, I assessed the agency’s preventative measures and determined that more intensive scrutiny in the hiring process, better training on proper use of force, and closer monitoring by supervisors would likely reduce excessive use of force incidents. Lax hiring standards meant that not all candidates for Border Patrol (BP) were fully vetted to ensure that they would carry out their duties

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responsibly and with integrity. Improper training further exacerbated this problem because BP agents were not taught about migrants' rights. Simply put, CBP's efforts to prevent abuse and misconduct were inadequate.

16. BP agents were woefully ignorant of the law, including basic due process rights. I have encountered several examples of how BP agents who were unaware of the legal and professional guidelines that they are legally bound to obey. For example, while I was in San Diego with the OPR overseeing BP personnel, I made two worrisome discoveries. First, BP agents had the practice of seizing items from undocumented individuals they detained. Agents should have followed chain of custody procedures established by agency policy to ensure that the items were registered and recorded as evidence in accordance with applicable law. Instead, BP agents stored the guns, knives, marijuana, train tickets, currency, and other items they seized in their office drawers and lockers. Second, I discovered that some of the agents used the money they had seized to cover personal expenses.
17. During a field visit, I also discovered that some BP agents ignored the right to privacy and due process by conducting illegal searches. I observed that many BP agents have no concept of what constituted "reasonable suspicion" or "probable cause." By law, BP has the authority to enter onto private land without a warrant within 25 miles of the border. They are, however, prohibited from going into someone's house unless they have a search warrant based on probable cause that evidence of a crime is contained within the house. I spoke to several BP agents who continued to assert their rights to warrantless searches.
18. In another incident, I observed a BP agent using equipment to intercept cell phone conversations. Wire intercepts by law enforcement require a court order and may only be performed while a supervisor is on site. This BP agent was driving around in a van by himself using equipment to intercept phone calls with no authority and no supervision. He told me that the Patriot Act, federal legislation passed after 9-11, authorized this conduct. It did not.
19. During my tenure with CBP from 2006-2011, the main measure used to prevent misconduct and abuse by BP agents was supervision. The reality was that during their careers, most BP agents spent some time in remote areas with little supervision. When

they were not in an urban environment, basically they were by themselves, and they thought they can get away with a lot. They had a mindset of “I am one agent out here by myself, I have miles to patrol. I’m god, and I make all the decisions.” There was supposed to be one supervisor for every eight subordinates. In theory, the supervisor was supposed to monitor agents in the field, but this rarely seemed to happen.

20. Deputy Commissioner Aguilar was against anything that Internal Affairs tried to do to improve supervision. For example, outgoing CBP Commissioner Ralph Basham tried to monitor the conduct of an agent under investigation for misconduct using undercover agents. Deputy Commissioner Aguilar opposed this measure. Commissioner Tomscheck and I suggested that agents wear body cameras and the installation of a GPS system in patrol cars to more closely track agents’ whereabouts and activities. Deputy Commissioner Aguilar opposed these measures, like many others that could improve the supervision of BP agents.

ACCOUNTABILITY

21. In comparison to the other agencies I served during my thirty-five years in state and federal law enforcement, CBP had the worst accountability measures. This was by design; CBP was allowed to operate as a rogue agency within the U.S. government. My official role as Deputy Assistant Commissioner of Internal Affairs (IA) was to ensure compliance with all CBP-wide programs relating to corruption, misconduct, and mismanagement, but I was not allowed to do my job. CBP leadership was reluctant to hold agents and others within the agency accountable for their actions, including if they were involved in criminal activity. CBP leadership’s priority was to protect the reputation of the agency, even if it meant allowing misconduct and corruption to go unpunished.
22. In my experience, CBP and BP agents did not feel like they had to follow the same rules as civilian law enforcement agencies. In my role as Deputy Assistant Commissioner of IA, I became aware of many instances when agents used violence against undocumented individuals without fear of repercussion. In one particularly case that I oversaw, a BP agent physically abused a handcuffed undocumented minor because he thought he could get away with it. While Deputy Assistant Commissioner, I read reports about agents

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- shooting across the border into Mexico without knowing who or what they were shooting at and without concern for innocent bystanders. CBP and BP agents justified their actions under a “fog of war” mentality.
23. High-ranking CBP officials took steps to shield CBP agents from accountability even in the most egregious cases such as the over dozen lethal force incidents involving CBP agents that occurred between 2010 and 2011. It did not matter if the victim was a child or if there was clear video evidence of misconduct, such as in the case of Sergio Adrian Hernández Guereca. Supervising officials would protect implicated agents, and upper-management ignored the problems. In 2011, while I was Deputy Assistant Commissioner of IA, Deputy Commissioner Aguilar asked IA to take over investigations in every CBP incident where deadly force was used. In the United States, state and local police forces have jurisdiction over criminal investigations of use of force at the border that implicate CBP or other federal agencies. At most, CBP had authority to secure a crime scene until the competent investigating authorities arrived. Commissioner Tomsheck and I had to explain to Deputy Commissioner Aguilar that when BP agents use force against individuals, local law enforcement, and not CBP, had jurisdiction to investigate.
 24. Deputy Commissioner Aguilar defaulted to insisting that CBP and BP were not involved whenever IA received information on use of force incidents at the border. If CBP or BP’s involvement was confirmed, Deputy Commissioner Aguilar would assume the agent had used reasonable force. At meetings when we would be brief on the incident, he would insist, “It’s a good shooting! It’s a good shooting,” even before basic facts about the incident were available. The victims of deadly use of force were assumed to be at fault. I heard officials claim that the victims had thrown rocks or were criminals who were “up to no good.” No remorse was ever expressed.
 25. During my tenure as Deputy Assistant Commissioner in IA, Commissioner Tomsheck and I attempted to address problematic policies in CBP that fostered the culture of impunity. This included developing strategies to root out agents engaged in misconduct and abuse and increasing information sharing with other agencies. In furtherance of these goals, we attempted to forge stronger relationships with other federal agencies. While with state police, U.S. Customs, ICE, and CBP—in every position I ever held—I always tried to use force multipliers, i.e., find ways to increase the reach and effectiveness of the

agency. One common strategy, for example, was to create a task force with the participation of multiple agencies. I was always looking for ways to collaborate with anybody who could help me accomplish a job. CBP was the first organization I was ever part of that refused to work with other agencies. They did not play well with others. In 2011, CBP superiors went so far as to sign a memorandum of understanding with the Department of Homeland Security Office of Inspector General (DHS OIG) prohibiting IA from sharing any information with any other agency, including the FBI. This new policy further exacerbated tenuous relationships and made it difficult, and at times impossible, to effectively work in partnership with these agencies to investigate misconduct. This meant that the only consistent way to find out about misconduct was to rely on reports from direct CBP supervisors. But they often covered for those under their command, meaning there was no effective way to detect and prevent abuse.

26. Deputy Commissioner Aguilar and other senior CBP officials would routinely thwart any effort by IA to be a truly independent office. They attempted to strong-arm me into carrying out their orders without question. For example, on one occasion Deputy Commissioner Aguilar instructed Commissioner Tomsheck and me to “cook the books” in order to falsely reduce statistics related to corruption. IA Commissioner Tomsheck and I had compiled alarming statistics related to incidents of corruption committed by CBP agents. During a closed-door meeting on April 15, 2010, Deputy Commissioner Aguilar tried to pressure us to redefine corruption in order to reduce the number of incidents. He insisted that we only include mission-critical compromises, such as taking bribes or other payments in order to aid drug traffickers and human smugglers, and exclude offenses like sexual assault, physical abuse, or even misappropriating money from the definition of corruption. This nonsensical and disingenuous approach would reduce the number of corruption cases by nearly a third. We refused to follow Deputy Commissioner Aguilar’s order.
27. The reporting systems used by CBP to track the investigation of use-of-force incidents failed to prevent abuse. These reporting systems were used to track investigations as they unfolded. Agents conducting the investigation uploaded their reports into a reporting system. Then, their supervisors and superiors reviewed these reports. IA had its own electronic reporting system called the Joint Intake Management System that recorded all

changes made in the system in order to prevent tampering with evidence or disrupting the chain of evidence. BP had a separate reporting system. In contrast to IA's system, BP reports could be altered without leaving an electronic fingerprint, which undermined the integrity of the system and made it easy to change official versions of an incident.

28. I have direct knowledge of multiple instances when reports uploaded onto BP's reporting system were later significantly changed from their original version. Commissioner Tomsheck methodically printed out versions of BP reports to determine if any changes were made. There were multiple times when he would find changes to the BP reports by comparing them to these earlier printed-out versions. For example, after one active-duty shooting incident, a report stating that BP agents had returned fire was changed to say that the shooters were unknown. Another example involved an agent who shot an unarmed Mexican teenager on the U.S. side of the border in 2010. According to the original report, the agent had said, "I am screwed, I am going to jail." These statements were omitted from a subsequent version of the report, which instead asserted that the agent had said that the agent had feared for his life.
29. I am aware of other ways that agents were shielded from accountability. For example, a video of an active-duty shooting incident involving BP agents I watched later disappeared.

ANASTASIO HERNANDEZ ROJAS CASE

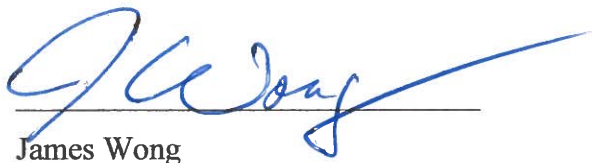
30. When Anastasio Hernández Rojas was beaten and tased on May 28, 2010, I was the Deputy Assistant Commissioner of the U.S. Customs and Border Protection's Office of Internal Affairs. I was alerted to the incident late that night or very early the next morning. The next morning Internal Affairs had a meeting with the Deputy Commissioner David Aguilar. His initial reaction to the reports of the Hernández Rojas's incident was his typical reaction. He denied CBP's involvement even before all the facts regarding the incident were available.
31. It later became clear that there were several deviations from standard protocol in the Hernández Rojas's case. For instance, Border Patrol (BP) used an administrative subpoena to obtain a copy of Mr. Hernández Rojas's autopsy. This is an improper if not a

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criminal use of an administrative subpoena, which is only authorized for immigration matters. I routinely used administrative subpoenas when I was an ICE supervisory special agent but never in this manner. BP did not have jurisdiction to intervene in the investigation of Mr. Hernández Rojas's death. It is incredible that they attempted to get this information through that channel and problematic that the tactic worked. These subpoenas are administrative in nature and not supposed to allow access to something like an autopsy report. Agents received training on how to use these summons, but the protocol was not followed. After discussing this problem with Commissioner Tomsheck, we spoke with either Deputy Commissioner Aguilar or Chief of BP Michael Fisher because we were concerned that it was an abuse of power, and perhaps even criminal. We were told that the matter would be handled internally. And that was the end of that.

32. I also find it troubling that BP agents erased eye-witnesses video footage taken of the beating of Mr. Hernández Rojas from the pedestrian footbridge. It is protocol to secure the scene after an incident like this. It is not protocol to delete evidence taken by onlookers. It may have been proper for these videos to be copied and preserved by Border Patrol. However, by destroying the videos, agents tampered with evidence and should have been prosecuted for that conduct.
33. It is also strange but unsurprising that the San Diego Police Department was not immediately notified of the incident but learned about it the next day although local police has jurisdiction to investigate. CBP often took into their own hands investigations they had no authority to conduct.

I affirm that the statements contained in this affidavit are true to the best of my knowledge and belief.



James Wong

SWORN AND SUBSCRIBED BEFORE ME THIS 18th DAY OF MAY, 2018.

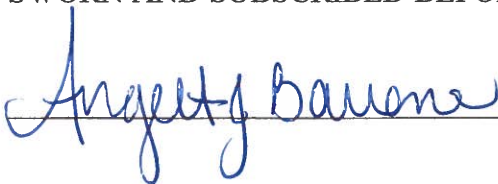




EXHIBIT E

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
ANASTASIO HERÁNDEZ ROJAS AND FAMILY VS. UNITED STATES
CASE NO. P-524-16
AFFIDAVIT IN SUPPORT OF PETITIONERS

I, James F. Tomsheck, do state and attest as follows:

1. During my 40-year and 4-month career in law enforcement, I held a wide range of employment positions at state and federal law enforcement agencies, which allowed me to gain extensive knowledge regarding investigative procedures, policies, and protocols. As a police officer and Secret Service agent, I have personally implemented and enforced best practices in law enforcement, and conducted numerous criminal investigations, including looking into fatal shootings involving law enforcement personnel. Moreover, from my time as a Secret Service agent stationed in Vancouver, Canada, I have experience with border security issues and transnational crime groups.
2. I was Assistant Commissioner of Customs and Border Protection (CBP) Internal Affairs Office (IA) for eight years and also the Chief Security Officer. Notably, when the Anastasio Hernandez Rojas's incident occurred in 2010, I was Assistant Commissioner and I have personal knowledge of the events and investigation that followed the incident.
3. I remain a recognized expert on various law enforcement topics, such as the appropriate use of force by officers because of my extensive career-based knowledge and close interactions with other policing agencies. I have testified before congressional committees about the importance of conserving the polygraph test for CBP agents and about integrity issues, and have spoken about CBP's high corruption rates. In 2016, I submitted an Amicus Brief to the Supreme Court for the case, *Hernandez v. Mesa*, in support of the family members of the 16-year old boy who was fatally shot by a Border Patrol agent two weeks after the Anastasio Hernandez Rojas incident. I have frequently spoken at law enforcement conferences both as a panelist and speaker and have conducted several interviews with media outlets discussing CBP's corruption and discrepancies in reporting its agents' use of force.

4. I have prepared this affidavit to support the petition filed by the family members of Anastasio Hernandez Rojas (Case Number P-524-16) before the Inter-American Commission on Human Rights.
5. The information contained in this affidavit is based upon my personal recollection of the Anastasio Hernandez Rojas incident. In preparation for this affidavit, I reviewed information shared with me about the case and documents from the police investigation of the incident.

I. EDUCATIONAL & PROFESSIONAL BACKGROUND

6. I graduated from the University of Nebraska at Omaha with a bachelor's degree in criminal justice.
7. I began my law enforcement career as a police officer at the Omaha Police Department in Omaha, Nebraska. I served as a police officer for 8 years and 8 months from October 1974 to May 1983. My responsibilities as an Omaha police officer ranged from patrol to complex investigative duties. I was a detective for 6 of those years.
8. My career in law enforcement continued when I joined the U.S. Secret Service and was an agent for 23 years. My duties while a Secret Service agent consisted of a range of investigative, protective, and intelligence assignments that included a four-year assignment to the Presidential Protective Division. The Secret Service was the first federal agency that required pre-employment polygraph tests. I was assigned to the agency's polygraph program for more than six years. I administered the first two special-agent polygraph programs. While in the Secret Service, I was also stationed at the Canadian border for more than nine years, dealing with criminal investigative and protective issues. I opened an office at the US consulate in Vancouver, British Columbia to deal with Secret Service investigative and protective responsibilities that involved transnational crime groups from China, Taiwan, and the Philippines who were engaged in the manufacturing of counterfeit currency, credit cards, and other financial crimes.
9. In 2006, my position in the Secret Service was as a Deputy Assistant Director in the Office of Investigations. As a Deputy Assistant Director, I directed the assistance to the Department of Homeland Security's Office of Inspector General (DHS OIG) with the

hundreds of Katrina fraud cases that were occurring not just in New Orleans, but also in locations across the country. DHS OIG requested support from Secret Service with these fraud cases. From this experience, I came away shocked as to how unprepared DHS OIG was in conducting investigations and writing arrest search warrant affidavits. Overall, DHS OIG agents seemed to have very little experience.

10. While I was still a Deputy Assistant Director in the Secret Service, Ralph Basham, then the Director of the Secret Service, asked me to assume the Assistant Commissioner position for CBP's Office of Internal Affairs (CBP IA). Basham told me he believed that my experience as a Secret Service agent at the Canadian border and my experience administering the Secret Service polygraph program made me the right person for this position. I agreed to assume the position of Assistant Commissioner for CBP IA. During my career in the Secret Service, I had achieved Senior Executive status, which is the civilian equivalent to becoming an admiral or general. I maintained that status at CBP. I retired from the Secret Service on June of 2006.
11. I served as Assistant Commissioner of CBP IA for eight years, from 2006 until 2014. I simultaneously held the titles of Chief Security Officer, responsible for all personnel and physical security concerns for CBP, and Senior Component Accountability Official, responsible for serving as the primary point of contact and CBP liaison for all external audits. During my time at CBP IA, I oversaw a surge in hiring of about 10,000 Border Patrol agents and the creation of 20 Internal Affairs field offices, and I directed a variety of investigative and security programs, including background clearances. When I arrived in IA, there were less than 10 investigators and all of them were stationed in D.C. with the exception of one investigator who was in Dallas, Texas. By late 2008, IA had about 230 investigators, many of whom were re-hired annuitants from agencies like the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), and the Secret Service. In later years, when budget cutbacks occurred, many of these agents were forced to retire. When I left CBP IA there were around 170 investigators.
12. I currently serve as President of Integrated Integrity Strategies LLC, from 2016 to the present.

II. CREATION OF CBP INTERNAL AFFAIRS

13. Founded in 2002, the Department of Homeland Security safeguards the American homeland by enhancing public security, which includes preventing terrorism, ensuring resilience to natural disasters, enforcing and administering immigration laws, and securing and managing the U.S. borders. The DHS Office of Inspector General (DHS OIG) conducts investigations of all DHS programs and operations with the goal to deter, identify, and address fraud, abuse, mismanagement, and waste of taxpayer funds. U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) are two of the 22 agencies within DHS.
14. ICE was created in 2003 and enforces federal immigration laws and gathers intelligence on national and international activities that threaten the security of the homeland. It is the largest investigative agency in DHS..
15. Founded in 2003, CBP is the law enforcement agency in the U.S. government that is responsible for protecting our nation's borders to stop threats from entering the United States, and for facilitating the flow of legitimate travel and trade. CBP is the nation's largest law enforcement organization with more than 60,000 employees. The U.S. Border Patrol (BP) is a unit of CBP and is made up of mobile, on-the-ground agents who prevent undocumented migrants, terrorists, and contraband from entering into the United States between the ports of entry. BP is specifically responsible for patrolling nearly 6,000 miles of Mexican and Canadian international land borders and over 2,000 miles of coastal waters.
16. CBP Office of Internal Affairs came into existence when former CBP Commissioner Robert Bonner, Deputy Secretary of DHS Michael Jackson, and designated CBP Commissioner Ralph Basham held discussions where Bonner expressed concern about the rapid expansion of Border Patrol in particular and how that would create integrity-related threats. Many people were hired in a short amount of time, as BP hired roughly 10,000 people over two years. Nothing like that had ever been done in U.S. law enforcement history. This was the largest and most rapid expansion of a law enforcement agency in U.S. history.

17. When I was still part of the Secret Service, Basham asked if I would consider assuming a new position in CBP IA to start up this office. He believed this office had to exist. I agreed and retired from the Secret Service to accept the position at CBP.
18. At first, DHS Office of Inspector General remained neutral about whether CBP IA should be able to exist as an investigative unit. Later, DHS OIG made it clear that they did not support the creation of the IA and would not give up their investigative authority.
19. In 2006, Border Patrol Chief David Aguilar did not want to staff up an integrity unit like CBP IA. Border Patrol deeply resented the decision to create an IA unit in CBP and did everything they could to undermine the office.
20. It was in this context of opposition that CBP IA was created.
21. While I was Assistant Commissioner, CBP Internal Affairs was charged with maintaining the integrity of the CBP workforce. It conducted investigations of alleged serious non-criminal misconduct of CBP employees and assisted the DHS OIG, U.S. Immigration and Customs Enforcement Office of Professional Responsibility (ICE OPR), the Federal Bureau of Investigations, and numerous other federal, state, and local law enforcement authorities in criminal misconduct investigations.
22. CBP IA oversaw all integrity concerns for CBP personnel and facilities. IA was also responsible for ensuring compliance with all CBP-wide programs and policies relating to corruption, misconduct, or mismanagement and for executing the internal security, integrity, and management inspections program. IA also screened potential CBP employees for suitability; educated employees concerning integrity responsibilities; evaluated physical security threats to CBP employees, facilities, and sensitive information; and inspected CBP operations and processes for managerial effectiveness and improvements.
23. CBP IA had nothing to do with recommending discipline. IA initiated investigations to establish facts and then reports these facts to CBP Human Resources (HR) and the component agency where the incident of alleged misconduct occurred. If HR needed more information in misconduct incidents, HR might have asked IA to go out and re-interview witnesses or new witnesses. IA did not recommend discipline.
24. Discipline is a combination of actions taken by Human Resources and leadership or management within the component agencies.

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25. During my time at IA, I noted that CBP component agencies like the Office of Field Operations appropriately disciplined employees. But repeatedly, Border Patrol would not follow what Human Resources recommended. In egregious circumstances where HR recommended removal, BP would often suspend an agent instead, or use a downward departure to reduce recommended discipline, as directed by BP leadership.

III. BORDER PATROL CULTURE OF INSTITUTIONAL PROTECTION

A. Independence from rest of CBP

26. From my personal experiences in law enforcement agencies, CBP is different than any other agency I have been involved with. Specifically, I have never seen an institution like one of its component agencies, the Border Patrol. Every U.S. Federal Law Enforcement Agency I know of is interested in identifying all the facts of an incident of wrongdoing by one of its officers. The leadership in those agencies makes a genuine effort to find out what happened. In this case, BP often tried to distort and spin many incidents, so that it would not damage its reputation. I have never seen an agency so consumed with its reputation and image. It is afflicted by an institutional narcissism.
27. As I witnessed it, the culture at Border Patrol is one where whatever is necessary is done to preserve the image of BP and promote the notion that BP is the nation's premier law enforcement agency. The institutional narcissism at BP has inevitably been used to justify excessive use of force incidents and to cover up corruption.
28. Beginning when he was the Border Patrol Chief and continuing when he became the Deputy Commissioner for CBP, David Aguilar advanced the notion that BP should become a domestic national police force, and be involved in more than immigration enforcement. Aguilar advanced the idea of BP as the national police force frequently at senior leadership meetings when he was Deputy CBP Commissioner.
29. Aguilar and Border Patrol leadership were always concerned that I was going to interfere with BP's image and culture because my reports, testimony, congressional briefings and statements did not reflect the "corporate message" and the notion that Aguilar was trying to advance of BP as the premier national police force.

B. Falsification of incident reports

30. There were many instances when I suspected that Border Patrol reports were modified to accommodate the wishes of BP leadership. In every use-of-force incident report involving BP, there was always a BP spin, it may not have been wholly deceptive, but it might have been a distortion or omission of information to represent that the incident had occurred in such a way that the use of force was legal and appropriate. This BP spin included making allegations regarding characteristics or elements about the victim. For David Aguilar, every shoot was a "good shoot." I recall meeting with Deborah Spero, then Deputy Commissioner at CBP, after a shooting incident and she was trembling because she was mad and concerned and asked why it was always a "good shoot." I agreed. It was highly suspect that BP very quickly came to the same conclusion that it was a good shoot every time. I never once heard Aguilar say that it was not a good shoot.
31. I cannot recall the specific date, but after 2010, CBP IA came to have a more structured initial reporting in place, which was required of everyone in the field. It took a few months to put this system in place, but essentially the structure was fill-in-the-blank answers and a quick narrative.
32. At the time of the incident involving Mr. Hernandez Rojas, CBP IA's goal was to capture as many facts as possible and report it either through email or the Joint Intake Case Management System (JICMS). Typically, the initial reporting was a series of emails and briefings from the field agent as the events unraveled in front of the agent. CBP IA and ICE reports were put into JICMS, but Border Patrol reports were in a stand-alone system. However, IA reports at times made reference to the BP reports. If something needed to be amended in the IA incident report, a supplementary report would be submitted. Initial reports tend to be less detailed, but as supplementary reports are written and more information is learned, the subsequent reports become increasingly detailed.
33. I was aware of at least one Border Patrol Situation Report (SIT) being altered after being created, which was brought to my attention by James Wong, the Deputy Assistant Commissioner at IA. The report was on the Juan Mendez use-of-force incident, where a BP agent shot and killed Mendez as he was running away. The initial SIT report accurately captured foot pursuit and shots fired, but later another version of the report changed it to make it appear as a justification for use of force. Wong made me aware that

the original reports had been changed. The initial report was very clear in suggesting that agent was almost certainly in the wrong, and included the following statement from the agent, 'I am going to be prosecuted for this,' which was later taken out of the initial report.

34. Another example of incident report being altered is the Sergio Hernandez case. This case is an excellent example. A week after Mr. Hernandez Rojas's death, an incident occurred in El Paso, Texas where Sergio Hernandez was shot and killed in Juarez, Mexico by a border agent. The initial Border Patrol report in the morning after the incident stated that Sergio Hernandez, a 15-year old boy, had illegally entered the United States and had struggled with a BP agent who had apprehended one of his friends. The report further stated that while the BP agent was trying to fend off Sergio, the agent's gun went off accidentally, striking Sergio. BP reported that Sergio stumbled back across the Rio Grande River and collapsed on the Mexico side. However, the information I received from CBP IA staff and the finding from an initial autopsy report indicated that Sergio had sustained a gunshot wound in the middle of the forehead.
35. When Border Patrol briefed its report on the incident, I challenged BP and they objected. I had been in law enforcement for more than 30-years at this point and in my experience, I had never seen someone shot in the forehead and stumble anywhere. When someone is shot in the forehead, typically instantaneous or near instantaneous death occurs. It was evident that Sergio was hit in the head with a 40-caliber bullet and fell where he was shot. BP management was furious that I had challenged them and they did not believe I had the right to do so. The next day, BP conceded that Sergio was on the U.S. side of the border when the gun accidentally went off and that he collapsed on U.S. soil, but they were adamant that Mexican police officers illegally entered and dragged his body back to Mexico soil. Only after Union Pacific Railroad security camera video surfaced did BP's story change. The video showed the BP agent firing three rounds into Mexico.
36. In another incident, Border Patrol was opaque about what happened in the Jose Antonio Elena Rodriguez case. This is a good example of BP injecting false information or manipulating information to give the impression that this was a good shoot. Jose, a 16-year-old boy was shot 10 times and killed in Nogales, Sonora, Mexico. The next morning, BP briefed the incident not only as a rock throwing case, but suggested that Jose was

supervising two marijuana smugglers. However, the marijuana smuggling allegations related to Jose Antonio Elena Rodriguez were not proven. Both CBP IA and the FBI saw video of the incident, but the original video was later "accidentally" erased.

C. Pushback on IA's attempts to strengthen accountability in use-of-force policy

37. A new use-of-force policy for CBP was finalized in the last months I was in CBP IA in late 2013 or early 2014. During the process to develop this policy, portions of the use-of-force policy came to my office for review and comment. Repeatedly, we would comment with most of the suggestions having to do with notification of use-of-force incidents. The comments would go to Border Patrol. Then many months would go by before another version came back to IA. Changes from our office were ignored or removed.

IV. BORDER PATROL CORRUPTION

A. Since inception

38. In March 2008, CBP IA conducted a baseline study to compare arrests and corruption at CBP compared to other agencies like FBI, Secret Service, Federal Air Marshall Service, DEA, ATF, ICE, and U.S. Marshall Service. It was a measure of corruption from October 2003 to 2008. The total number in CBP, I believe, was approximately 40. For statistical comparison, it was less than 10 in all of the other agencies combined. CBP is a larger organization, but in total number of officers it was smaller than the total number of personnel in other agencies at the time. This was a genuine statistical finding and a clear indication there was a significant problem in CBP that needed to be addressed. The rate of corruption in CBP was 7 to 10 times higher than those of other agencies. The legacy components (customs, immigration) always had a corruption problem. It has to be said: the border environment, especially in the southwest, has the highest threat for corruption. There is a concerted ongoing effort to compromise government officials on both sides of the border from transnational organized crime groups.

B. Aguilar's order to redefine corruption

39. In April 2010, I received a phone call from a staff assistant of then CBP Deputy Commission David Aguilar saying he wanted to see James Wong and me. It was just the

three of us in the room in this meeting. Within moments of us sitting down, Aguilar wrote down a number (either 27 or 21) on a piece of paper. He tapped the paper with a pen and told us that would be the number of corruption arrests we would report, even though the actual number was approximately 80 at the time. He said that we wrongly defined corruption. He accused us of including off-duty events. I countered that by saying that was not the case because we clearly differentiated between off-duty misconduct and corruption, which is defined by federal statute, and that definition is used by everyone in federal law enforcement. It was the same definition used by ICE, the Department of Justice, FBI, and Congress. Aguilar, pointing at the number he had written, was trying to get us to reduce the number of corruption cases. Wong and I were clear saying we would not redefine corruption to lower the number.

40. Back in our office, Wong and I looked at each other with the same response. Both of us had 35-plus years in law enforcement and had never seen anything like this. I was a police officer for more than eight years in Omaha and a Secret Service agent for 23 years, and I didn't believe things like that would really happen. The Deputy Commissioner in the nation's largest federal law enforcement agency had just given us an illegal order telling us to manipulate the number of corruption arrests. But I was adamant we would not stop accurately reporting corruption.
41. At another meeting around that time, Aguilar expressed intense rage towards me because I testified at a Senate hearing largely about the polygraph program. I was frequently in congressional staff briefings. I was in those meetings about every five or six weeks where I was transparent and candid about corruption in CBP. At that point, more than 55 percent of applicants for CBP officers or BP agents failed the polygraph, which is shocking.
42. Following my Senate testimony, Aguilar summoned us to his office. Aguilar repeatedly stated that my testimony had not reflected the corporate message on corruption. It was never clear what exactly the corporate message was, but it was something other than what I said. What was clear was that Aguilar wanted us to diminish the reported numbers of corruption by falsifying corruption statistics. Later in a news article, Aguilar stated he was directed by DHS senior leadership to redefine corruption. There was a series of

meetings about the corporate message on corruption and integrity over the course of a month.

V. BORDER PATROL POLYGRAPH AND BACKGROUND CHECKS

43. The Secret Service was the first federal law enforcement agency to require pre-employment polygraph. The first pre-employment polygraphs for Secret Service Special Agent applications were administered in the spring of 1987. I personally administered those polygraphs. I was assigned to the polygraph program in the Secret Service for six years. During that time I administered hundreds of polygraph examinations and, for a time, was the Acting Director of the program. My extensive experience with polygraph contributed to my decision to bring pre-employment polygraphs to the CBP pre-employment screening process. The pre-employment polygraph confirmed that many CBP applicants were engaged in felony crimes. Some were confirmed to be infiltrators with direct connections to cartels. When CBP began using polygraphs in February 2008, Border Patrol made every effort to prevent us from expanding the program. CBP withheld funds and attempted to undermine the program.
44. In January 2011, as the result of my briefings to congressional staff and my testimony to Congress about corruption and the value of the polygraph, President Barack Obama signed anticorruption legislation that mandated that all CBP applicants clear polygraphs before they were hired.
45. In 2012, I tasked CBP IA analysts to conduct a research project to evaluate hiring practices for law enforcement positions and evaluate what happened as thousands of polygraph tests were administered after background checks were conducted. One of the findings was that 65% of the time, applicants who cleared the background check failed the polygraph. Moreover, the reason that these applicants were failing the polygraph included revelations that some were infiltrators, part of cartels, involved in drug smuggling, or had committed felony crimes that the background check did not identify. The research project resulted in a proposal to eliminate the form of background checks conducted because they were both extremely costly and ineffective.

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46. Over \$360 million were spent between August 2006 to 2012 to conduct background checks that the evaluation showed did not screen out cartel members and criminals. The proposal to eliminate background checks was distributed throughout DHS, but only the Chief Security Officer (CSO) approved it. The CSO warned me that many in DHS opposed the proposal. He expressed concern that background investigations contractors would be very angry.

VI. PROBLEMS WITH INVESTIGATION IN CASE OF
ANASTASIO HERNANDEZ ROJAS

47. CBP IA had limited investigative powers in the Anastasio Hernandez Rojas case, which was conducted largely by DHS OIG. OIG was supposed to share investigative findings, but they did not always do so.

A. How investigation protocol is supposed to work

48. Every allegation of corruption, misconduct, or excessive use of force was initially reviewed by DHS OIG. If OIG declined, then ICE Office of Professional Responsibility had the option to take the case. If they declined, then CBP IA could take the case. BP had no authority to investigate, but it nonetheless constantly tried to assert investigate authority, and very frequently interfered with legitimate investigations.
49. When DHS OIG produced a report, CBP IA would have an opportunity to see OIG's report, but could not offer comments. A proper OIG report was supposed to describe the incident in sufficient detail to allow those who can discipline the agents involved to properly decide what action to take. The report should just be a statement of the facts (reporting the investigation and what the investigators did) with no judgment at the end.
50. After DHS OIG completed its investigations, OIG was supposed to give its report of the case to agency leadership and refer for prosecution if appropriate. OIG does not prosecute. Analyzing whether policy was violated is the responsibility of Human Relations and the operational components. They evaluate the facts that were established in OIG's report to determine discipline. CBP IA did not have any role in discipline.

51. Through a series of leadership meetings, a taskforce coordinated efforts to address discipline across CBP, and I participated in some of those meetings to represent IA's findings. I observed that Border Patrol agents were very frequently not properly disciplined, especially when compared to other CBP components. I raised the issue and was told that it was not my area of responsibility and my opinions were "neither solicited nor appreciated." Other CBP components consistently disciplined agents, but BP was remarkably inconsistent in how they disciplined. It appeared to come down to how much they liked you. If they liked you, you could engage in misconduct and not be disciplined. If they didn't like you, you could engage in relatively minor misconduct and they would severely discipline you.

B. How CBP IA learned about Anastasio's incident

52. There is protocol for when CBP officers must notify other agencies about an incident like that of Anastasio Hernandez Rojas. Internally, CBP officers have an obligation to report to leadership and to IA management. Externally, CBP is supposed to report the incident to the state or local agency that has jurisdiction over the incident. Where there is injury or death, the state or local agencies would have the lead in the investigation. In the Anastasio case, CBP officers did not fully follow protocol by not immediately communicating with local police with jurisdiction over the area until the next day.
53. CBP IA was notified the night of the event. I was briefed several hours later, around 7:30 in the morning before attending the Commissioner's morning brief. I was briefed on the incident by CBP IA Deputy Commissioner James Wong and other staff in DC, who received information from staff at the San Diego IA office. The case was also mentioned in the intelligence and operational briefing that went to CBP leadership. This included a briefing from CBP Office of Field Operation.
54. In the morning briefing, and subsequent briefings, Border Patrol repeatedly stated that Anastasio was not restrained, that he was standing, and that he was combative when he was Tased. The initial briefing also mentioned that Anastasio Hernandez Rojas appeared to be under the influence of something or suffering some mental problem that caused him to become noncompliant and combative after having been more than somewhat cooperative during other stages of his detainment

55. This was the info received by the San Diego IA Field Office, presented to headquarters staff for CBP IA, knowing there would be a briefing before the Commissioner. The CBP Field Operation reports stated that Anastasio Hernandez Rojas was restrained on the ground.
56. The CBP Field Operations reports and the Border Patrol reports were the first indication that something was wrong in how the Anastasio Hernandez Rojas incident was being reported. All of the Field Operations reports clearly stated that Mr. Hernandez Rojas was face down on the ground and handcuffed when Tased. Jerry Vales, the CBP officer who Tased Mr. Hernandez Rojas, stated this in his own report. None of the Border Patrol reports reflected this. During the Commissioner's morning briefing when the incident was discussed, David Aguilar stated that all reporting of this incident would reflect that Mr. Hernandez Rojas was standing, unrestrained, and combative when he was Tasered.
57. I challenged Aguilar's assertions by stating that there are reports that reflected otherwise. Aguilar was furious with me for pointing that out. In addition, I informed Aguilar that I had already approved CBP IA reports that noted that Mr. Hernandez Rojas was on the ground and handcuffed when Tasered. Aguilar very clearly did not want any reports from IA or anywhere else that did not reflect anything other than Mr. Hernandez Rojas standing, unrestrained, and combative when he was Tasered. I understood that Aguilar wanted me to falsify reports and did not want this critical portion of events to be accurately documented.
58. During one of the incident meetings, there was agreement among many that Taser use is appropriate when a person is non-complaint, but there was no discussion about whether Taser use is appropriate when a person is handcuffed or not. Aguilar did not want to accept the reality that Mr. Hernandez Rojas was on the ground handcuffed.

C. DHS OIG's refusal to share information

59. CBP IA had a small supportive role with FBI involvement in the Anastasio Hernandez Rojas case. However, IA was walled off from information by DHS OIG. Subsequently, Commissioner Bersin asked IA to conduct a fact-finding investigation. There was significant resistance from DHS OIG because they stated they would establish the facts. This demonstrated how dysfunctional the relationship between DHS OIG and IA was.

OIG would conduct its own investigation with no direct line reporting to the Commissioner.

60. In Anastasio Hernandez Rojas's case, DHS OIG were the initial investigators on the ground. They have an office in San Diego and were on the scene that night. CBP IA was also present with a San Diego field office headed by Kathryn (Kathy) Butterfield and staffed by nearly 20 agents. But CBP IA got there after DHS OIG had already arrived. At this point, DHS OIG could have interviewed witnesses, and I believe they did. They were not going to share information.
61. Within two or three days of the incident involving Anastasio Hernandez Rojas, CBP Commissioner Bersin personally gave me an order that departed from previous incidents. At the time, Bersin had been in place for about eight to nine weeks, and he was frustrated that DHS OIG was on the case and would not share information until they completed the investigation. Bersin directed me to have IA conduct the fact-finding investigation that would monitor DHS OIG's investigation to learn as much as possible. Bersin told me to report directly to him whatever IA was able to confirm.
62. Following this order, IA agents from the San Diego office engaged with DHS OIG investigators and Border Patrol agents. This is when I first discovered that the Border Patrol was conducting its own unauthorized investigation. It was then that DHS-OIG told us that Bersin did not have the authority to direct IA to conduct fact finding. This was an attempt to prevent CBP IA from having any involvement.
63. In San Diego, Special Agent Butterfield was in charge of the CBP IA investigation. I directed her to do fact-finding as requested by the Commissioner. I had conversations with her more than once a day. In all these conversations, she reported that she was receiving extreme resistance from Border Patrol and DHS OIG.
64. Outside of IA, CBP personnel should not be investigating integrity issues. Border Patrol, without authority, aggressively conducted their own investigations that interfered with other investigations.
65. In a conversation with DHS Assistant Inspector General, John Dupuy, who came into that position after the initial investigation was conducted when the FBI reentered the investigation, Dupuy said the initial investigation was riddled with errors and poorly done.

66. In Anastasio Hernandez Rojas's case, CBP IA relied on the DHS OIG report. IA saw it, sometime in 2011, close to a year after the death of Anstasio Hernandez Rojas. I recall it relied on the autopsy report that stated his death was attributed to preexisting medical condition, the physical stress of being in an altercation, being Tasered three times, and methamphetamine intoxication. It is this combination that the report stated contributed to cause of death.
67. When I first saw the initial DHS OIG report, I was in disbelief. I didn't believe it was a well-written report. I didn't believe it was thorough or complete. I believe in most instances OIG reports were lacking in specificity and clearly establishing information that had been obtained through various interviews. I've been reading and writing investigative reports for over 30 years at this point. I found DHS OIG reports to be poorly written and not reflecting a sufficient level of investigation. I found this report to be consistent with previous OIG reports. I had concerns about all DHS OIG investigations.

D. Order from Aguilar to have reports state Anastasio was standing and combative

68. Aguilar ordered me at least twice to reflect that Anastasio Hernandez Rojas was unrestrained when he was combative, even though I informed Aguilar that this was not the case based on the facts reported. I had statements from CBP officers that said Anastasio Hernandez Rojas was facedown on the ground and handcuffed behind his back when Tasered.
69. Periodically during the week following the tragedy, Aguilar ordered me under different circumstances that no reports authored by anyone in IA should mention this. Aguilar wanted all reports to falsely reflect that instead Anastasio Hernandez Rojas was standing and combative. When I was ordered to do this, I told Aguilar that IA already issued reports correctly stating otherwise.
70. There are only two instances where, in my 40 years in law enforcement, was I ordered to falsify reports. In both of these instances David Aguilar gave me that order.
71. It was standard practice for Border Patrol to defend incidents in use of force, to always make it appear that it was justified. This was frequently done by distorting or falsifying information that justified use of force. Border Patrol frequently attempted to spin incidents involving use of force that ended in death.

72. In one meeting, David Aguilar insisted that Anastasio was standing and combative. Aguilar essentially said to repeat, "he was standing and combative," In the room was the Assistant Inspector General (AIG) and deputy AIG at DHS OIG, but no one wanted to correct Aguilar, and everyone went along with him even though I already knew, we all knew, that that was not the case. Bersin let Aguilar demand from the DHS-OIG Special Agent in Charge in San Diego over the phone that he agree with Aguilar that Anastasio was standing and combative. Nobody else spoke up.

VII. FBI AND IA's COLLABORATIVE RELATIONSHIP; TENSION WITH DHS OIG

73. The Federal Bureau of Investigation (FBI) is the main federal law enforcement agency in the United States dealing with corruption, misconduct and executive use of force. It is part of the U.S. Department of Justice (DOJ), which is the federal executive department responsible for the administration of justice. The FBI frequently partners with the Department of Homeland Security (DHS), sharing information about investigations and threats to the United States.
74. During one of the first Commissioner's morning briefings following the incident, I recall a discussion about contacting the FBI for them to consider bringing assault charges against Hernandez Rojas for assaulting border agents. I do not recall who presented this idea, but I believe it could have either been Aguilar or another Border Patrol official. This idea did not cause a reaction in the room because in every use-of-force incident, the FBI was asked to consider bringing assault charges. This was not entirely unusual or atypical, but in cases where the alleged perpetrator is deceased or dying, it becomes more unusual.
75. There were many instances where CBP IA worked in a collaborative way with other agencies, but rarely did that occur with DHS-OIG in the timeframe of 2010, during Anastasio Hernandez Rojas case. In some instances, the FBI would take cases, and in every instance I am aware of, the FBI would work in a fully collaborative way with IA. IA worked well with FBI, which intensified the conflicts between IA and DHS OIG, which deeply resented that IA cooperated with the FBI. This was frequently stated in meetings after meeting after meeting: DHS OIG took the position that the FBI should only be involved when DHS wanted FBI to be involved, and this was an incident that DHS-OIG did not want the FBI to be involved. There was a strong desire on the side of

DHS to not let the integrity problems of DHS end up in the hands of the Department of Justice.

VIII. UNAUTHORIZED INTERFERENCE IN THE INVESTIGATION

A. Obstruction of justice

76. There is a policy for preserving evidence at the scene of an incident in every law enforcement agency. At that time, CBP did not have an agency-wide policy, but I believe the components of CBP did have such a policy. In any event, it was standard practice in law enforcement.
77. Based on my personal knowledge of the events, CBP officers disbursed witnesses the night of Mr. Hernandez Rojas's death and destroyed eyewitness video documenting the incident. In every law enforcement agency, the presumption is that evidence should be preserved in best way possible. Taking away cell phone and video from witnesses to an incident is in violation of standard practice and policy. CBP officers justified the disbursal of witnesses and the destruction of eyewitness video based on a CBP policy that prevents civilians from videotaping operations at the ports of entry. Erasing these devices is an inappropriate application of this policy. When I heard the justification, I knew that it was contrived and absurd. When it was revealed at the Commissioner's morning briefs that Border Patrol agents and CBP officers used this policy as a justification, Alan Bersin, Commissioner of CBP at the time, pointed out that should have never happened. Similarly, Thomas Winkowski, Assistant Commissioner for CBP Field Operations, knew it should not have happened, but also knew why it had happened. In Winkowski's opinion, he stated the officers were choosing the wrong of two policies where evidence should have been preserved.
78. Based on my law enforcement experience, the appropriate thing to do would have been to identify the witnesses, asked them to remain at the scene to facilitate interviews, and documented their interviews. CBP personnel outside of IA should not have been doing any interviews. Seizing the phone, downloading the video, and then deleting the video off the phone was not the appropriate thing to do here. While it would have been an inconvenience to the witnesses, I would not have attempted to download the video. I would have asked a forensic expert to download the video.

79. Knowing what I know now, I believe there was an effort to conceal the video footage of the event from SDPD. Former Acting Commissioner Jayson Ahern was passionate that everything that CBP did should be captured by video to benefit CBP. This would serve to confirm that CBP is doing things properly. Far more often than not, the video supports what CBP officers are doing at the port of entry. CBP IA, through the security management division, was responsible for placing videos throughout the organization and coordinating with operational components. However, because of budget constraints, many of the video cameras within CBP were in a state of disrepair. For example, there was a point when more than 70% of the security cameras at CBP headquarters in the Ronald Reagan building in DC were not working and could not be fixed for budget reasons. It was outrageous that these federal buildings did not have functioning cameras. This situation did not improve until my final months when CBP-IA obtained the required funding to fix the cameras.

B. Failure to abide by policies

80. I assumed that SDPD was notified of the incident immediately because that was protocol. Later, I was informed that there was a delay in notifying SDPD, which struck me as very odd. For me, it is hard to believe that this delay was just an oversight. I suspect that this was used to buy time, enabling Border Patrol to create a false narrative. I was also aware of another incident, in the trial of a Border Patrol agent in Arizona, where there was a BP delay in contacting the local investigative agency. The BP agent was tried for manslaughter for a use-of-force incident that occurred before I came to CBP.
81. Previously, Aguilar and Border Patrol staff had informed me that they wanted CBP IA to be in charge of all use-of-force incidents and not allow state or local authorities to investigate. Aguilar stated that he wanted it to be the same way as in the Secret Service. I informed Aguilar that in the Secret Service use-of-force incidents are investigated by the local authority.

C. Intrusion into SDPD investigation

82. The SDPD's situation report indicating that they were coordinating their investigation with BP and ICE was problematic. Border Patrol in particular had no role in conducting an investigation, but nonetheless they aggressively pursued an investigation.
83. During Mr. Hernandez Rojas's autopsy, Border Patrol was present. I believe that their presence was inappropriate and in violation of policy, but this incident is like countless others, BP improperly trying to assert themselves in events that had potential to embarrass the agency. I was constantly insisting that BP was inserting themselves into scenarios they had no appropriate place.

D. Illegal use of immigration subpoena

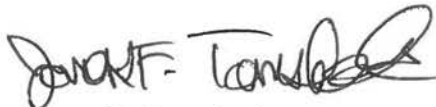
84. During the investigation, Border Patrol used an administrative immigration subpoena to obtain Mr. Hernandez Rojas's autopsy report. BP's use of the immigration subpoena was more than inappropriate: it was illegal. Obtaining the autopsy report using an administrative subpoena is illegal and potentially obstruction of justice.
85. Those BP Agents who accessed the autopsy report should have faced consequences, but there were none. I found out later that then Chief of Border Patrol Michael Fisher ordered San Diego agents to use the subpoena to get the autopsy. I am aware of Border Patrol inappropriately using the subpoena power in another incident as well. I raised concerns about this practice, pointing out that this was highly improper and there should be consequences for the misuse of the subpoena. Disciplinary action should have occurred, but never did. Every time I made recommendation about a disciplinary process, I was told that it was not my area of concern.

IX. CLOSING

86. Following the death of Anastasio Hernandez Rojas, CBP IA, under my direction, made every effort to establish facts, document and communicate those facts, and provide assistance to all agencies legitimately engaged in the investigation of the death. I personally directed that the actions of CBP IA would be conducted in a manner that promoted transparency and accountability. These efforts of CBP IA were significantly frustrated by the leadership of both CBP and the Border Patrol as they instead attempted


to present a false narrative intended to obscure the facts. In an effort to preserve and enhance their authority, DHS OIG also interfered with CBP IA when conducting their investigation in a manner to accommodate CBP and Border Patrol leadership.

I affirm that the statements contained in this affidavit are true to the best of my knowledge and belief.



James F. Tomsheck

SWORN AND SUBSCRIBED BEFORE ME THIS 13th DAY OF AUGUST 2018.



Notary Public - Enrique Luna

Enrique Luna, Notary Public
Montgomery County, Bethesda, Maryland
My Commission Expires Aug. 04, 2019

EXHIBIT F

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
ANASTASIO HERÁNDEZ ROJAS AND FAMILY VS. UNITED STATES
CASE NO. P-524-16
AFFIDAVIT IN SUPPORT OF PETITIONERS

I, John Edward Dupuy, do state and attest as follows:

1. I am a U.S. civil servant and currently the Deputy Director Inspector at the Office of Enterprise Assessments at the U.S. Department of Energy. I have been a civil servant for the past twenty-eight years working in the Office of the Inspector General (“OIG”) at different U.S. Departments. I have extensive experience with the mandates and protocols for investigations carried out by the OIG, including those with allegations of excessive use of force by U.S. federal agents.
2. I have prepared this affidavit to support the petition filed by the family members of Anastasio Hernández Rojas (Case Number P-524-16) before the Inter-American Commission on Human Rights.
3. I provide this affidavit to share my knowledge of the OIG investigation into the use of force and death of Mr. Hernández Rojas. When I reviewed the investigation file two years after the incident I was shocked to see what I believe was a lack of diligence and thoroughness. From my recollection, the OIG relied entirely on the County of San Diego’s Police report to conclude that an OIG investigation was not warranted. The OIG did not do a criminal or misconduct investigation in this case. In my opinion, the OIG should have opened a criminal or, at the very least, a misconduct investigation. An autopsy report is probative but should not be dispositive. The OIG is responsible for investigating the facts and this did not happen in Mr. Hernández Rojas’s case. This case is an example of a pattern of dereliction of duty that I

observed from the DHS OIG Office of Investigation San Diego field office in investigations involving allegations of use of force by federal agents.

EDUCATIONAL AND PROFESSIONAL BACKGROUND

4. I attended the University of California, Los Angeles (UCLA) from 1983 thru 1987, graduating with a Bachelor of Arts degree in Political Science. While studying at UCLA, I enrolled in the Army Reserve Officer Training Corps. In 1998, I also graduated in with a law degree from Golden Gate University.
5. Following my graduation from college, I was commissioned as an Army Officer the U.S. Army where I served as a military intelligence officer. I left active service after four years and continued to serve as a reserve officer for an additional four years.
6. In 1991, I began a career as a civil servant in the U.S. federal government. I have spent the past twenty-seven years investigating government corruption and misconduct from within the Office of Inspector General (OIG) of various U.S. federal government departments.
7. The OIG are independent and impartial units of U.S. federal government departments that conduct and supervise audits and investigations relating to the programs and operations of those departments and their component agencies. One of the mandates of the OIG is to prevent and detect fraud and abuse in the agencies' programs and operations. The OIG carries out its mission, in part, through investigations. Each OIG has an Office of Investigations that investigates allegations of misconduct involving the respective department's employees and contractors. All of my positions at the OIG have been in the respective OIG's Office of Investigations.
8. In 1991, I joined the OIG of the U.S. Department of Housing and Urban Development (HUD) as a Special Agent-in-Charge. I held this position, in different field offices, for

fourteen years. As a Special Agent-in Charge, I investigated allegations of criminal, civil, and administrative misconduct against HUD employees, contractors, and grantees.

9. I carried out criminal investigations from intake through to adjudication or declination from a prosecutor. My investigations aimed to establish the facts and determine if there was support for the allegations. To accomplish this goal, I developed extensive knowledge of the U.S. criminal code (known as Title 18), and relevant civil legislation. My training included courses on constitutional protections, such as use of force standards under the Fourth Amendment, and the tools involved in administrative investigations, such as administrative subpoenas.
10. In 2005, I joined the U.S. Department of the Interior as a Deputy Assistant Inspector General for Investigations, and in 2009, I was promoted to the Assistant Inspector General for Investigation at the OIG of the Department of Interior. I held this position until May 2012. As the Assistant Inspector General for Investigations, I was part of the team at Headquarters Operations and was responsible for the day-to-day operations, strategic planning, and supervising the investigating arms of civil, criminal, and misconduct cases. I was also in charge of the policies and procedures for the Office of Investigations and had to ensure that our practices complied with all investigative and ethical guidelines.
11. In May 2012, I joined the U.S. Department of Homeland Security (DHS) as the Assistant Inspector General for Investigations. This is a position at Headquarters. I was responsible for supervising the performance of all investigative activities and overseeing all DHS Internal Affairs units. I was in charge of case management, case selection, and overseeing investigations, which would include making sure the agents followed the guidelines and standards for investigations and handled the evidence properly.

12. Although I was not working at the OIG DHS on May 28, 2010, when the Anastasio Hernández Rojas incident occurred, senior management brought the case to my attention shortly after I started in 2012. I was responsible for overseeing investigations and there was intense congressional and public interest in the case after news coverage revealed new video evidence. I reviewed the file and shared senior management's concern with how this matter was handled. The file was very thin—there was a lack of diligence and activity in investigating this case. I asked the agent in charge of the initial investigation to re-open the case, but I was unsuccessful.
13. In 2015, I became the Assistant Inspector General for Investigations at the OIG at the U.S. Department of Energy, and in November 2016, I was promoted to Deputy Inspector General for Investigations. I remain an active civil servant.

INTERNAL INVESTIGATIONS AT THE DEPARTMENT OF HOMELAND SECURITY

14. The Department of Homeland Security's OIG Office of Investigations is responsible for investigating allegations of criminal, civil, and administrative misconduct involving DHS employees, contractors, grantees, and programs. DHS consists of twenty-two component agencies (or sub-agencies or programs and operations). U.S. Citizenship and Immigration Services, United States Customs and Border Protection, and United States Immigration and Customs Enforcement are three of those component agencies. Allegations involving their employees or contractors fall within the jurisdiction of the DHS OIG Office of Investigations.
15. Investigations conducted by the OIG Office of Investigations can result in criminal prosecutions, fines, civil monetary penalties, administrative sanctions, and personnel actions. The OIG Office of Investigations oversees the Internal Affairs (Offices of Professional

Responsibility) at all DHS agencies. Internal Affairs (or Office of Professional Responsibility) are offices within a DHS sub-agency, which are responsible for investigating allegations of misconduct involving that agency's employees. Internal Affairs offices are not independent. They are part of their respective agency and report to the head of the agency they are investigating.

16. The OIG Office of Investigations has the first right of refusal for investigating all criminal or misconduct matters arising within DHS. For example, when an incident occurs or an allegation is made about a DHS staff or contactor's involvement in excessive use of force, the DHS component agency must bring this to OIG's attention. The OIG then decides whether to: (1) conduct an investigation; (2) conduct an investigation jointly with the relevant component agency; or (3) allow the component agency to carry out the investigation with OIG maintaining a right of supervision. During my time at DHS OIG, we did not have capacity to run all investigations. Our office would typically investigate particularly egregious violations such as excessive use of force allegations.
17. While I was at DHS, the OIG Office of Investigations protocol for an investigation into a use of force allegation was as follows. First, we would open the matter in the case management system. My office then assigned the matter to a specific regional office.. Cases could also originate in the field and they would manage the case. The supervisor for that office, the Special Agent-in Charge, would open the matter and assign it to a case agent, who would be lead on the investigation, with oversight by a first line supervisor and the Special-Agent in Charge. The case agent would investigate the matter to decide whether it should be opened as a criminal and/or administrative misconduct case, or whether it should be closed without further investigation.

18. Case agents are fact-gatherers and were expected to use a number of techniques to collect and analyze evidence. The case agent would conduct interviews with witnesses, victims, and persons involved in the incident and gather non-testimonial evidence. The case agent would document all their investigative activity and evidence gathered and summarize their factual findings in a memorandum, which would be stored in the file in the case management system.
19. OIG offices have concurrent jurisdiction with the Federal Bureau of Investigation (FBI). The Attorney General Guidelines require OIG offices to promptly notify the FBI upon initiating a criminal investigation of alleged civil rights violations. The FBI has primary exclusive jurisdiction: they determine whether to take exclusive control over the criminal aspect of the investigation or investigate jointly with the OIG. DHS OIG also has a Memorandum of Understanding with the Department of Justice, Civil Rights Division, Criminal Section, which requires DHS OIG offices to notify DOJ within 24 hours, or the next business day, of receiving notice of an incident that suggests the possibility of use of excessive force under color of law. If DOJ chooses to investigate the matter, OIG and FBI investigators may work together. When they work together, OIG agents become part of the prosecution team.

THE TOXIC ENVIRONMENT AT THE DEPARTMENT OF HOMELAND SECURITY

20. I started at the DHS OIG in 2012 and stayed for nearly three years. It was a toxic and dysfunctional environment.
21. I was detailed to DHS from Department of the Interior. I was brought in to address the professionalism of the investigations. There was no senior leadership at DHS OIG when I arrived. All OIG supervisory and managerial personnel were on administrative leave or detailed to another agency. The entire leadership team of the DHS OIG was under criminal or

administrative misconduct investigations following the indictment of the former head of the OIG office in McAllen, Texas for fabricating investigative reports. I was brought in and replaced Thomas M. Frost, the OIG's top criminal investigator, who was on leave following the criminal investigation.

22. When I started, the morale at the office was quite low, and the office environment was one of chaos in terms of work, leadership, and budget. The Office had strained relationships externally with Internal Affairs at Customs and Border Patrol, the FBI, and DOJ. The Office was not well respected by other law enforcement entities. The internal relationships between headquarters and field staff were fractured, especially following the removal of leadership at headquarters. When I joined DHS OIG, the office had better relationships with CBP officers—those who they were mandated to investigate for corruption and misconduct--than with Internal Affairs. It should have been the other way around, but there was a turf war with Internal Affairs (now called Office of Professional Responsibility). Relations were strained with Internal Affairs because they wanted control over many of the investigations but OIG had the first right of refusal. I questioned the neutrality of the OIG because of the close relationship the office maintained with CBP.
23. At the case level, across the board, DHS OIG internal investigations did not comply with investigative and ethical standards. There was a lack of documentation in the case management system for open and closed investigations. Files did not include documentation of investigative activity or case notes. Case agents must memorialize their investigative activity. If it is not documented, it is not done. There were cases that had been opened for six months with little documentation. To me, this suggested that the case agents were not moving forward on these files.

24. DHS OIG made claims about its investigations leading to prosecutions, but there were no underlying documents to support these claims. The state of affairs and investigations showed a complete failure of quality standards. It was the result of a management and leadership failure. In fact, the DHS OIG almost failed the Council of the Inspectors General on Integrity and Efficiency (CIGIE) peer review for 2013/2014. CIGIE is a statutorily created independent body that develops policies and standards applied in the investigations by Offices of Inspectors General. CIGIE organizes and conduct peer reviews of those offices. The peer review found a complete failure to implement and abide by quality standards. One particularly worrisome finding was that the reviewers could not find support for about 40% of the criminal investigations that the OIG claimed resulted in indictments or convictions. The OIG was inaccurate in its statistics, and was taking credit for results achieved by the work of component agencies.
25. Although some field offices took civil rights cases seriously and carried out thorough investigations, I saw a lack of diligence and investigative work in San Diego. Before arriving at DHS, I was at the OIG at the Department of Interior. Like DHS, Department of Interior had oversight over law enforcement operations. If allegations of civil rights or use of force arose involving park police, our protocol in administrative misconduct review was to do a use of force analysis (an after-action review). The purpose of the analysis was to look at the agent's compliance with tactics and procedures. An after-action review would look at the root cause and factors that led or allowed this use of force to occur. This analysis would explore: What training the agent received? Did the training permit the force that the agent used? It would assess the agent's resort to force, looking at whether the force was the least amount necessary. It was not the culture or practice at DHS OIG to do these after-action reviews.

OIG's INVESTIGATION OF THE HERNÁNDEZ ROJAS INCIDENT

26. I joined the OIG at DHS in the spring of 2012. Shortly after arriving, within the first quarter, Steve Laferty, the then Assistant Inspector General of DHS OIG brought the Anastasio Hernández Rojas case to my attention, because there was a high level of public and congressional interest in the case. OIG had closed the case in January 2012, but an eyewitness video came out in the news around the time I arrived, which brought attention and interest to the case. The eyewitness video directly contradicted CBP's version of the event. CBP agents had claimed that Mr. Hernández Rojas was standing and combative, but the video showed him handcuffed in a fetal position on the ground, pleading for his life.
27. When Laferty brought the case to my attention he expressed concern with how the investigation was carried out. He felt like something was wrong with the investigation. He said the file was very cursory for a case with congressional and public interest. He was concerned about the lack of diligence and follow up.
28. After Laferty brought the case to my attention, I reviewed the file, and based on what I saw, I shared Laferty's concerns. I was concerned about the lack of diligence in the OIG's investigation. The case file was thin. The only paperwork I saw was a cover memo by the Special Agent in Charge at the San Diego field office, Dennis McGunagle, closing the case. The memo was de minimus: it was not more than a few pages, fell short of investigative standards, and did not follow investigative procedure. This was a transmittal memo attaching the San Diego autopsy report and deeming that no further investigation was required.

29. Based on my review of the file, the investigation did not meet the standard protocol and fell short of meeting the duties and responsibilities of the OIG. I do not recall seeing any documentation of investigative activity. I don't recall if the investigator even conducted any interviews. There should have been interviews and a separate inquiry, but I didn't see any signs of such investigative activity. I also did not see any recommendations regarding whether the matter should be opened as a misconduct case or referred to DOJ for a criminal investigation. This is all within the domain and responsibility of the OIG investigators.
30. It is standard practice to rely on an autopsy report as evidence. An autopsy report may be probative towards a use of force allegation. But the autopsy is not typically dispositive. It is something to consider along with other evidence. Additional work should be done to uncover the facts for the various elements in the civil rights claim and determine whether a criminal investigation was warranted. It would have been appropriate and typical practice to discuss the matter with DOJ/FBI. The OIG investigator could have shared his belief that a criminal investigation was not warranted and asked for their opinion. As far as I can tell, this was not done. Even if a criminal investigation wasn't necessary, the OIG should have done an administrative misconduct investigation to assess how and why use of force was used against Mr. Rojas and whether it was in line with agency policies and training.
31. I did not see an after-action review in the Anastasio Hernández Rojas file. There was no review of the agency's training, tactics, procedures, or protocols, or an assessment of whether CBP handled the matter in accordance with those procedures and protocols. I did not see a review of the agents in charge or an incident response. Based on my previous experience, the OIG investigator should have assessed: agency procedures, protocols, tactics and training; what decisions were made and by who; whether the officer/agents involved followed the

relevant procedures and protocols; and the specific officers/agents training and their use of equipment. In the case of Anastasio Hernández Rojas, the officer should have assessed whether it was appropriate to use a Taser? Why was an intermediate force option not used? The review should be done with the aim of determining whether the agent acted in accordance with the agency rules, procedures, and training.

32. After reviewing the file, I discussed my concerns with Laferty. He had also previously worked at Department of Interior OIG and understood that investigations of use of force cases should include after-action reviews. These reviews were not required by our standards or policies, but, in my opinion, they were essential in understanding what allowed or led to the agent using force and should be done in use of force cases. He told me that there was no culture at DHS OIG at the time to do these types of reviews. He said the view at DHS OIG was that an after-action review was not necessary if the matter was not criminal, and if it was criminal FBI/DOJ would handle it. They did not consider it their job. From my perspective and based on my experience at other OIG offices, this should have been done regardless of whether the FBI took the case or not. The OIG has a role to understand why this happened.
33. In my review of the file, I watched the recently released eyewitness video of the CBP agents beating Mr. Rojas. The video showed Mr. Rojas detained in handcuffs lying on the ground while a CBP officer Tased him. I reviewed media coverage which reported that Mr. Rojas was handcuffed and on the ground as CBP Tased him. There was a significant discrepancy between the OIG file and the video and media reports regarding Mr. Rojas's physical position while being Tased. The OIG file did not report that Mr. Rojas was detained at the time he was Tased. When someone is Tased while detained that is a fact that should be analyzed in a criminal investigation, it goes towards one of the elements of the crime, that the action

happened under the color of law. Or at minimum, OIG should have a discussion about the matter with DOJ or the FBI and get their opinion. And at the very least, use of force against an individual who is detained requires an administrative misconduct review to assess the agent's use of force against agency policies and procedures. I believed that the OIG investigation needed to be reopened to examine this new evidence and the significant discrepancy in Mr. Rojas's physical position while being Tased. We needed to understand how and why an agent Tased someone who was already detained?

34. I raised the idea of re-opening the investigation with Steve Laferty. He explained that there was not much we could do at headquarters. Headquarters was in a state of disarray. The entire leadership team was on criminal or administrative misconduct and so field offices had a lot of discretion.
35. I raised my concerns with the case with Charles Edwards, the Acting Inspector General and Deputy Inspector General of the DHS at the time. I told him that the investigation, or lack thereof, in this case did not follow best practice. This matter should not have been closed without an investigation. Edwards told me that before I arrived, McGunagle, the Special Agent in Charge from OIG's San Diego office, had flown out to DC to give a briefing to members of Congress and legislative staffers. Edwards seemed satisfied by this action and did not see any reason that further investigation or action should be taken.
36. I also spoke with James Tomsheck, Assistant Commissioner of Customs and Border Protection Internal Affairs Officer, about the matter. Internal Affairs received a copy of the OIG's report and Tomsheck had reviewed it. In general, Tomsheck had concerns over CBP's use of force, and felt that management was not being aggressive enough in stopping these practices. In Mr. Rojas's case he had concerns about how or why the incident happened. Who

was in charge? Who failed to stop the incident? He was also concerned about the lack of reporting and that there were discrepancies amongst CBP officers at the time. Tomsheck felt that more should have been done by the OIG/Internal Affairs to properly investigate what happened in Mr. Rojas's case, but he felt constrained and limited in his abilities to do anything.

37. I also raised my concerns with Dennis McGunagle. I asked him about the case and shared my concerns about the lack of due diligence with the investigation. I recommended that the investigation be re-opened. McGunagle refused. He was adamant that nothing more should be done--the case was closed and should not be reopened. He saw no additional value in OIG reopening the case.
38. In my experience prior to DHS, cases could be reopened if there was new evidence or new witnesses. If a case was reopened, we would re-start the investigation process and make sure the new evidence or information is predicated. We would do new interviews and fact gathering. We would also alert DOJ or the FBI about the new evidence.
39. Typically, the Special Agent in Charge of that file would make the decision whether to reopen the file. While in theory, headquarters maintains the ability to direct a Special Agent in Charge to re-open the investigation, as I explained above, headquarters was limited in capacity at the time. DHS OIG headquarters and its field offices had an atypical dynamic where headquarters gave a lot of discretion to the field offices. I felt boxed in by what I could do on this case. I felt that it should have been re-opened, but McGunagle had primary responsibility for that decision. If I forced the investigation to be re-opened, it would have been assigned to him and his case agents, and it seemed to me he had no interest in ensuring a proper investigation was carried out.

40. During my time at DHS, I had other cases involving allegations of use of force overseen by McGunagle brought to my attention due to similar concerns over improper investigations. For example, I remember another case in San Diego that occurred after I arrived, where a state agent shot a woman, Valeria Tachiquin Alvarado, through the windshield of her car. The investigation file showed a similar lack of diligence and activity.
41. Laferty and I were both concerned with how McGunagle was handling cases involving use of force. There was a pattern of a lack of thoroughness and diligence for files involving use of force that he oversaw. He showed a lack of interest in these cases. We did an internal quality assessment review of case management and we noted problems with his cases. When we raised this matter with him he blamed it on supervisors, but he was the supervisor for that office. To my knowledge, McGunagle has never faced consequences for failing to carry out his duties and properly investigate cases involving the most serious allegations such as excessive use of force resulting in the death of an individual. Instead, he has been rewarded. In 2015, Dennis McGunagle was promoted to Deputy Assistant Inspector General for DHS's OIG.
42. In my opinion, there was a dereliction of duty by the OIG in Mr. Hernández Rojas's case. A man died and the questions that should have been asked about his death, and the events leading to it, were not asked. The OIG had a duty to properly investigate the matter and uncover the facts that led to the death of Mr. Hernández Rojas. This was not done. From what I remember, the OIG didn't even investigate. The OIG decided to rely on the autopsy report to close the matter, without investigating. A proper investigation should have been carried out at first instance, and that investigation should have uncovered the discrepancies regarding Mr. Rojas's physical position and should have determined whether a criminal or misconduct

investigation was warranted. The failure to carry out a proper investigation in this case is a failure at many levels: the case agent, the first line supervisor, and the Special-Agent in Charge, McGunagle. There are checks in place to make sure case agents carry out proper investigations and all those checks failed in this case. There was a lack of leadership at the time at DHS OIG headquarters, but this is no excuse for how this case was handled.

43. It was a second failure not to reopen the matter. In my opinion, the investigation should have been re-opened based on the lack of diligence and based on the new evidence. The video that came to light showed the victim subdued, on the ground in handcuffs when the officers claimed he was standing and combative. The video showed a man being Tased while detained. This conduct warrants a criminal investigation.

I affirm that the statements contained in this affidavit are true to the best of my knowledge and belief.

Respectfully submitted,



John Edward Dupuy

15 Jan 21

Date

EXHIBIT G

50/15

November 15, 2004

P.O. Box 3188
San Clemente, Ca 92674

MEMORANDUM FOR: ALL SAN CLEMENTE AGENTS
SAN CLEMENTE STATION

FROM: Wes Knippler 
Patrol Agent in Charge

SUBJECT: CBP Interim Use of Force and Firearms Policy Directive

Attached for your review are the CBP Interim Use of Force and Firearms Policy Guidance changes memorandum and related documents. Please address any questions regarding this correspondence through the chain of command and forward to FOS Chavez no later than December 2, 2004. Unit Supervisors will be responsible for ensuring that attachment four has been signed by their subordinates and forwarded to FOS Chavez by the same date.



OBP 50/15-P
OBP 50/5.7-P

U.S. Department of Homeland Security
Washington, DC 20229



U.S. Customs and
Border Protection

NOV 04 2004

MEMORANDUM FOR: ALL SECTOR CHIEF PATROL AGENTS

FROM:

David V. Aguilar
Chief
U.S. Border Patrol

A handwritten signature in cursive script, reading "David V. Aguilar".

SUBJECT:

U.S. Customs and Border Protection Interim Use of Force
and Firearms Policy Directive

Attached are the U.S. Customs and Border Protection Interim Use of Force and Firearms Policy Guidance Changes Memorandum and the guidance documents. Ensure that all personnel under your supervision are provided with a copy of the interim guidance. They must also be provided an opportunity to review the guidance and address any questions they might have through their chain of command.

Once they have received, reviewed, and discussed the guidance, they must sign and submit attachment 4 indicating their understanding of, and expected compliance with, the interim policy. This must be completed by December 6th, 2004. Signed acknowledgment sheets (attachment 4) shall be kept on file locally.

This interim policy will remain in effect until the complete new policy is issued under the Commissioner's signature.

Chief Patrol Agents will submit a memorandum certifying that all required personnel have received and acknowledged receipt of the Interim Policy. This memorandum must be submitted by December 13th, 2004.

Questions regarding this policy may be directed to Assistant Chief Harry James Ruffel at 202-344-1502.

Attachments

U.S. Department of Homeland Security
Washington, DC 20229



U.S. Customs and
Border Protection

SEP 15 2004

MEMORANDUM FOR THE COMMISSIONER:

THROUGH: Acting Deputy Commissioner *DJP*
THROUGH: Chief, Office of Border Patrol *David Aguilar*
THROUGH: *FOR* Assistant Commissioner *William S. Hefflinger*
Office of Field Operations
THROUGH: Chief Counsel
Office of Chief Counsel
FROM: Acting Assistant Commissioner *[Signature]*
Office of Training and Development
SUBJECT: CBP Interim Use of Force and Firearms Policy Guidance
Changes

Recently, the Office of Training and Development forwarded interim guidance to address Use of Force and Firearms policy issues that demand immediate action. The interim guidance is pending release after receiving CBP organizational approval. However, the interim guidance requires modification prior to release for the following reasons:

1. The interim guidance reflected that OFO planned to acquire the Glock Model 17 as the duty handgun for CBP Officers. The DHS Weapons and Ammunition Commodity Council has, however, awarded handgun contracts to Sigarms and Heckler & Koch. OFO is now considering the DHS award in its decision on a duty handgun for the future. This is now reflected in the interim guidance.
2. OFO initially decided that the expandable baton would be the only authorized intermediate force device, but is now reconsidering whether to allow Oleoresin Capsicum (OC) spray as an additional intermediate force device. This is now reflected in the interim guidance.

-2-

In your July 6 Memorandum, you asked the Office of Field Operations, the Office of Border Patrol, and the Office of Training and Development to review the newly issued DHS Use of Deadly Force Policy and inform you of the effect that policy would have on the CBP Use of Force Policy. The attached interim guidance complies in full with DHS guidelines and policies relating to the use of deadly force.

In all other respects, this Interim Use of Force and Firearms Policy is identical to the guidance you approved in July 2004. With your approval, it will be incorporated into a multi-policy package set for release to the field on September 19, 2004.

The Office and Training Development, building on the work of the Transition Management Office, is the lead responsible component for the development of this interim policy and the comprehensive CBP Use of Force and Firearms policy that will follow.

Attachments

I Concur

I Do Not Concur

Let's Discuss

RCBannon #

10-11-04

U.S. Customs and Border Protection

Office of Training and Development
Firearms and Tactical Training Division

Interim Use of Force and Firearms Guidelines



Interim CBP Use of Force and Firearms Guidelines

Interim Use of Force and Firearms Guidelines

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Interim CBP Use of Force and Firearms Guidelines

Part 1 Interim Use of Force and Firearms Guidelines

A. Scope

1. These interim guidelines provide direction for U.S. Customs and Border Protection (CBP) personnel pending development and issuance of a comprehensive CBP Use of Force and Firearms Policy Directive.
2. These guidelines address issues that require immediate clarification of or deviation from past policy.
3. For interim Use of Force and Firearms Policy issues not specifically addressed in these guidelines, Office of Field Operations personnel shall operate under the provisions of the Legacy Customs Firearms and Use of Force Handbook - CIS HB 4500-01A dated March 2003. Office of Border Patrol personnel shall operate under the provisions of the INS Firearms Policy dated February 2003.

B. Implementation

1. Responsible Officials shall ensure that supervisors disseminate, review and discuss the contents of these interim Use of Force and Firearms Guidelines with subordinates.
2. Responsible Officials shall ensure that all CBP armed officers they supervise acknowledge receipt of this interim Use of Force and Firearms Guidance by signature no later than thirty days after issuance. Signature pages shall be kept on local file.

Interim CBP Use of Force and Firearms Guidelines

Part 2 Handgun Qualifications Requirements

- A. OFO armed personnel shall qualify with firearms on a trimester basis. For OFO Field Officers, the course of fire consists of a total of 30 rounds. OFO Field Officers shall score 80% to pass this course of fire. (See attachment 1)
- B. CBP Officer trainees at the CBP Academy shall score 80% on a 60 round course of fire to pass. (See attachment 2) (On return from the Academy, CBP Officer trainees shall qualify as described in "A" above)
- C. Border Patrol Agents and Border Patrol Agent trainees at the Border Patrol Academy shall qualify with firearms as provided in current guidelines, using the BP legacy course of fire. (See Attachment 3)

Interim CBP Use of Force and Firearms Guidelines

Part 3 Carriage of Firearms

- A. All OFO armed personnel require certification for 24-hour carry authority in accordance with Legacy Customs guidance. 24-hour carry certificates are issued by, and held on file in the CBP Officer's duty Station.
- B. Until a standard handgun for OFO is designated, Legacy Immigration Inspectors shall carry their currently assigned handgun. Legacy Customs Inspectors shall carry the Glock 17, 9-mm pistol.

Interim CBP Use of Force and Firearms Guidelines

Part 4 Special Conditions Governing Carrying and Training with Firearms

- A. Pregnant OFO armed officers may choose to continue to qualify with a doctor's written authorization. They may choose not to qualify, in which case the authorization to carry a firearm and perform duties requiring the carrying of a firearm is temporarily rescinded (in accordance with Legacy Customs Directive 4510-017A, Section 7).
- B. Legacy Immigration Inspectors shall adhere to Legacy Customs Policy regarding the temporary or permanent removal of firearms. There are no changes to the level of authority that may suspend a CBP employee's carry privileges.
- C. CBP armed personnel who presently carry personally owned, service approved weapons while performing official duties may continue to carry that weapon. After receiving a government issued weapon, they shall cease carrying the personally owned, service approved weapon and begin carrying the government issued weapon. No new authorizations for personally owned weapons shall be issued.
- D. OFO armed officers are required to obtain an approval letter, issued by their Port, to fly armed on a commercial aircraft in accordance with established Legacy Customs procedure.
- E. CBP armed personnel are prohibited from consuming alcoholic beverages while carrying service approved weapons, except when engaged in undercover operations necessitating the consumption of alcoholic beverages. In these cases, the consumption of alcoholic beverages will be limited to an amount that does not impair the officer's judgment.
- F. Use of government approved service weapons is limited to organized firearms sporting events, competitions, or commercial, public, or government owned ranges.

Interim CBP Use of Force and Firearms Guidelines

Part 5 Changes affecting Use of Force Policy

- A. OFO officers shall adhere to the Legacy Customs Use of Force Guidelines (including the "Use of Force Continuum") delineated in Chapter 2, Section III of the Legacy Customs Firearms and Use of Force Handbook.
- B. OFO armed personnel shall not fire solely to disable vehicles. They may fire on the driver or other occupant of a moving motor vehicle or vessel only when there is reasonable belief the subject poses an imminent danger of death or serious injury to the officer or another person and the public safety benefits of using such force outweigh the risks to the safety of the officer or other persons.
- C. The Office of Field Operations issued a memorandum dated March 25, 2003, stating that the Collapsible Straight Baton will serve as the official intermediate weapon for OFO. Training in the use of and issuance of the CSB to OFO Officers has not been completed as previously envisioned. Therefore, each OFO Officer is required to carry: OC Spray, if that Officer has successfully completed OC Spray training; the CSB if that Officer has successfully completed CSB training; or both, if that Officer has successfully completed training for both of these intermediate force weapons.

Attachment 1

CUSTOMS AND BORDER PROTECTION (OFO) SEMI-AUTOMATIC PISTOL 30 ROUND COURSE OF FIRE

DISTANCE	STAGE	POSITION	MAGAZINES	SHOTS	TIME	DESCRIPTION/COMMANDS
3 YDS	1	Standing, strong hand only, and support hand only.	Prepare all magazines with six rounds each.	12 Total	25 Sec	Load, and holster with a 6 round magazine. Target faces, draw and fire 6 rounds with strong hand only grip. Combat load, transition to support hand only grip and fire 6 rounds. Perform a combat reload and holster. Note: This course of fire to be conducted on a "Hot Line". The "Hot Line" concept requires the shooter to reload, without command, when his/her handgun is empty. The shooter will not holster an empty weapon until the exercise is over. Barricades will be used for cover and support.
7 YDS	2	Standing, strong hand supported.	Weapon loaded with a 6 round magazine and 1 additional 6 round magazine available for reload.	6 total	3 Sec.	Target faces, draw and fire 2 rounds strong hand supported. When threat edges away, shooter will go to high ready. When target reappears, the shooter will fire 2 rounds. When target edges away, shooter will go to high ready. When the threat reappears, shooter will fire 2 rounds, combat reload a 6 round magazine and holster weapon.
7 YDS	3	Standing strong hand supported, body armor drill.	Weapon loaded with 6 rounds and 1 additional magazine loaded with 6 rounds for reload.	6 total	6 Sec. 4 Sec.	Target faces, draw and fire 2 rounds center mass and 1 round to the head. When threat edges away, shooter will go to high ready. When target reappears, the shooter will fire 2 rounds center mass and 1 round to the head within 4 sec. Combat reload a 6 round and holster weapon.

CUSTOMS AND BORDER PROTECTION (OFO) SEMI-AUTOMATIC PISTOL 30 ROUND COURSE OF FIRE

DISTANCE	STAGE	POSITION	MAGAZINES	SHOTS	TIME	DESCRIPTION/COMMANDS
15 YDS	4	Standing and kneeling, strong hand supported barricade shooting	Weapon loaded with 6 rounds.	6 total	20 Seconds	Step to cover, draw and fire 2 rounds standing support side barricade, transition to strong side standing barricade and fire 2 rounds. Transition to a strong side kneeling barricade and fire 2 rounds. CLEAR WEAPON AND HOLSTER A SAFE AND EMPTY WEAPON BEFORE STANDING.

NOTE:

(U.S. CUSTOMS) CAT #1 TARGET WILL BE USED.

TOTAL ROUNDS = 30
POSSIBLE SCORE = 150

SCORING:

1. Course requires 2 head shots at 7 yard line.
2. Score body of target and total.
3. Score head shots as 4's and 5's and total. Head shots must be touching or above an imaginary line 10" below the top of the head.
4. Deduct 5 points each from the body total for any body shots beyond 30 hits.

Attachment 2

CUSTOMS AND BORDER PROTECTION (CBP ACADEMY) SEMI-AUTOMATIC PISTOL 60 ROUND COURSE OF FIRE

DISTANCE	STAGE	POSITION	MAGAZINES	SHOTS	TIME	DESCRIPTION/COMMANDS
3 YDS	1	Standing	2 Magazines 17 Rounds (+1)	2	3 Sec	Prepare two (2) seventeen round magazines. Load, charge and holster. Top the weapon off with one (1) round. Eye level, two handed. Secure the second magazine in the pouch.
	2	Standing	1 st Facing 2 nd & 3 rd Facing	2	2 Sec	Target faces, draw and fire 2 shots. When target edges, COVER the target. On the next two (2) facings, fire two (2) shots in two (2) seconds on each facing. SCAN AND HOLSTER
			1 st Facing	6 (12Rds) Total	6 Sec	Target faces, draw and fire six (6) shots in six (6) seconds. SCAN AND HOLSTER
7 YDS	1	Standing	1 st Facing	3	6 Sec	Target faces, draw and fire two (2) shots center mass and one (1) shot to the head. When target edges SCAN AND HOLSTER.
			1 st Facing	6	15 Sec	Target faces draw and fire two (2) shots to the center mass and one (1) shot to the head, COMBAT RELOAD and fire two (2) shots center mass and one (1) shot to the head. SCAN AND HOLSTER. TOP OFF THE MAGAZINE.
			1 st Facing	3	6 Sec	Draw and fire two (2) shot center mass and one (1) shot to the head. SCAN AND HOLSTER.
	2	Standing	1 st Facing	2	4 Sec	Target faces, draw and fire two (2) shots center mass in four (4) seconds. When target edges, COVER THE TARGET.
	3	Standing	On 2 nd & 3 rd Facing	2	3 Sec	On the next two (2) facings, fire two (2) shots center mass in three (3) seconds on each facing. COME TO READY PISTOL, TRANSFER THE WEAPON TO THE WEAK HAND.
	4	Standing	1 st Facing	6 (24 Rds) Total	12 Sec	Bring the pistol to high search. Target faces, fire six (6) shots center mass WEAK HAND ONLY. EXECUTE PROPER CLEARING PROCEDURES AND HOLSTER A SAFE AND EMPTY WEAPON.

CUSTOMS AND BORDER PROTECTION (CBP ACADEMY) SEMI-AUTOMATIC PISTOL 60 ROUND COURSE OF FIRE

DISTANCE	STAGE	POSITION	MAGAZINES	SHOTS	TIME	DESCRIPTION/COMMANDS
15 YDS	1	Standing Weak Side/ Kneeling Strong Side Barricade	2 Magazines 6 Rounds Each	12 (12Rds) Total	35 Sec	Prepare two (2) magazines with six (6) rounds each. Secure one (1) magazine in magazine pouch. Load, charge and holster with a six (6) round magazine. Target faces, fire six (6) shots from the standing weak side barricade position, COMBAT RELOAD with the 2 nd six (6) round magazine, drop down to a kneeling strong side barricade position and fire six (6) more shots in thirty-five (35) seconds. EXECUTE PROPER CLEARING PROCEDURES.
25 YDS	1	Standing Weak Side Standing Strong Side Barricade	2 Magazines 1 - 8 Rounds 1 - 6 Rounds	12 (12 Rds) Total	60 Sec	Prepare two (2) magazines, one (1) with six (6) rounds and one (1) with eight (8) rounds. Secure the six (6) round magazine in magazine pouch. Load, charge and holster with the eight (8) round magazine. Target faces, fire six (6) shots from the weak side standing barricade position, TACTICAL RELOAD with the six (6) round magazine, move to a strong side standing barricade position and fire six (6) more shots in sixty (60) seconds. EXECUTE PROPER CLEARING PROCEDURES AND HOLSTER A SAFE AND EMPTY WEAPON. A LIVE ROUND SHOULD EJECT.

NOTE:

U.S. CUSTOMS CAT #1 TARGET WILL BE USED.

TOTAL ROUNDS = 60

POSSIBLE SCORE = 300

SCORING:

1. Course requires 4 head shots at 7 yard line.
2. Score body of target and total.
3. Score head shots as 4's and 5's and total. Head shots must be touching or above an imaginary line 10" below the top of the head.
4. Deduct 5 points each from the body total for any body shots beyond 30 hits.

Attachment 3

CUSTOMS AND BORDER PROTECTION (OBP) 72 ROUND SEMI-AUTOMATIC PISTOL COURSE OF FIRE

DISTANCE	STAGE	POSITION	MAGAZINES	SHOTS	TIME	DESCRIPTION/COMMANDS
1.5 YDS	1	Standing, one handed, hip level bent elbow	Weapon loaded with 12 rounds.	1,2,3 (6 Total)	2 Sec	<p>Prepare at least four (4) eleven round magazines. Load, charge and holster. Top the off weapon with one (1) round. Scan and perform checkpoints to the holster. Top off magazine pouch.</p> <p>When the threat appears, draw and fire 1 shot. When threat goes away, scan and perform post firing procedures to the holster. On the next facing, fire 2 shots, returning to the holster after the threat goes away. On the third facing fire 3 shots. Scan and holster</p> <p>Note: Prior to holstering throughout this entire 72 round course of fire, the shooter will perform the following checkpoints prior to holstering his/her weapon. After threat goes away, lower the pistol to high search, pause, take finger off of the trigger and scan. Bring weapon to ready pistol, pause and scan. Check condition of the weapon, holster with a shooting grip, pause and scan. Snap weapon into holster</p>
3 YDS	1	Standing, two handed point shoulder	Weapon loaded with 12 rounds with an additional 11 rd magazine available for an emergency reload	1,2,3 (6 Total)	3 Sec	<p>When target appears, draw and fire 1 shot, re-holster. On the second facing draw and fire 2 shots, re-holster. On the third facing draw and fire 3 shots. When slide locks to the rear after the last shot, perform an emergency reload top off the weapon and perform checkpoints back to the holster.</p>
7 YDS	1	Standing, two handed.	Weapon loaded with 12 rounds with an additional 11 rd magazine available for an emergency reload.	1 +1 2+2 3+3 (12 Total on part 1 of 7 yard line)	3 Sec	<p>Target faces, draw and fire 1 shot, when threat edges away, shooter will go to high search, finger on the trigger and the hammer forward. When target reappears, the shooter will fire 1 additional shot. After the threat goes away, the shooter will perform post firing procedures to the holster. On the next series the shooter will repeat this process firing 2 shots from the holster and 2 additional shots from high search. On the third series the shooter will repeat this process firing 3 shots with 3 additional shots from high search. The shooter will perform an emergency reload, checkpoints to the holster and top off the weapon.</p>

CUSTOMS AND BORDER PROTECTION (OBP) 72 ROUND SEMI-AUTOMATIC PISTOL COURSE OF FIRE

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DISTANCE	STAGE	POSITION	MAGAZINES	SHOTS	TIME	DESCRIPTION/COMMANDS
7 YDS	2	Standing two handed, right hand only and left hand only.	Weapon loaded with 12 rounds with an additional 11 rd magazine available for an emergency reload.	2+1	6 seconds	Transition to right handed shooting. When the threat appears, the shooter will draw and fire two shots two handed, transition to right hand only and fire one additional round right hand only for a total of 3 shots in 6 seconds.
				3	5 Seconds	When the threat goes away, the shooter will come to high search right hand only, the finger on the trigger and the hammer forward. When the threat reappears, the shooter will fire an additional 3 shots right hand only in 5 seconds. When the threat goes away, the shooter will reestablish a two handed grip and execute checkpoints to the holster.
				2+1	6 Seconds	Transition to left handed shooting. When the threat appears, the shooter will draw and fire two shots two handed, transition to left hand only and fire one additional round left hand only for a total of 3 shots in 6 seconds.
				3 (12 Total on part 2 of 7 yard line)	5 Seconds	When the threat goes away, the shooter will come to high search left hand only, finger on the trigger with the hammer forward. When the threat reappears, the shooter will fire an additional 3 shots left hand only in 5 seconds. The shooter will perform an emergency reload and execute checkpoints to the holster.
				(A total of 24 round to be fired on the 7 yard line)		At this point the instructor will either have the shooters perform a proper clearing procedure, or allow them to remain loaded and remind them of the condition of their weapon.
						Score the targets. 36 shots for possible 180 points. Reface with a new target, writing front half score and name on new target in preparation for the second half of the qualification course.

CUSTOMS AND BORDER PROTECTION (OBP) 72 ROUND SEMI-AUTOMATIC PISTOL COURSE OF FIRE

DISTANCE	STAGE	POSITION	MAGAZINES	SHOTS	TIME	DESCRIPTION/COMMANDS
15 YDS	1	Standing	Start with loaded weapon with 12 rounds. Have 2 11 round magazines in magazine pouch for reloads.	1	3 Seconds	Draw and fire 1 round, checkpoints to the holster.
				2	4 Seconds	Draw and fire 2 rounds checkpoints to the holster.
				3	5 Seconds	Draw and fire 3 rounds, checkpoints to the holster.
				4	6 Seconds	Draw and fire 4 rounds, checkpoints to the holster.
	2	Standing to Kneeling	Weapon loaded with 12 rounds with an additional 11 rd magazine available for an emergency reload.	2+2	12 Seconds	<p>If the shooter did not fire the correct number of rounds, he/she must adjust the number of rounds in their weapon. The weapon must have 1 round in the magazine and 1 round in the chamber.</p> <p>Shooter will draw and fire 2 shots, perform and emergency reload while dropping to the kneeling position and fire two rounds in the kneeling position. When the threat goes away the shooter goes to the kneeling high search position with their finger on the trigger and the hammer forward.</p>
	3	Kneeling	1 magazine loaded with an 11 rd magazine for a magazine exchange.	1	3 Seconds	When threat appears, shooter will fire one round. When the threat goes away, shooter will return to kneeling high search.
				2	4 Seconds	When threat appears, shooter will fire two rounds. When the threat goes away, shooter will return to kneeling high search.
				3	5 Seconds	When threat appears, shooter will fire three rounds. When the threat goes away, shooter will perform a magazine exchange, holster, snap in and come to their feet.
				(A total of 20 rounds are to be fired from the 15 yard line)		

CUSTOMS AND BORDER PROTECTION (OBP) 72 ROUND SEMI-AUTOMATIC PISTOL COURSE OF FIRE

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022/026

DISTANCE	STAGE	POSITION	MAGAZINES	SHOTS	TIME	DESCRIPTION/COMMANDS
25 YDS	1	Right side barricade, standing and kneeling. Shooter will start one step to the right and one step to the rear of the barricade.	Start with a loaded weapon and have an 11 round magazine available for a magazine exchange.	8	30 Seconds	When the threat appears, the shooter will step into cover, draw and fire 4 rounds in the standing right side barricade position. The shooter will move back into cover with his/her finger off of the trigger, kneel on their right knee and fire 4 rounds in the kneeling right side barricade position. When the threat goes away, the shooter will perform a magazine exchange, holster, snap in and come to their feet.
	2	Left side barricade, standing and kneeling. Shooter will start one step to the left and one step to the rear of the barricade.		8 (A total of 16 rounds will be fired from the 25 yard line)	30 Seconds	When the threat appears, the shooter will step into cover, draw and fire 4 rounds in the standing left side barricade position. The shooter will move back into cover with his/her finger off of the trigger, kneel on their left knee and fire 4 rounds in the kneeling left side barricade position. When the threat goes away, the shooter will perform a proper clearing procedure, holster, snap in before coming to their feet.
						Score second half which consists of 36 shots for a possible 180 points. Add front half totals and the back half totals.

NOTE:

TQ-15 TARGET WILL BE USED.

TOTAL ROUNDS= 72
 POSSIBLE SCORE = 360
 MINIMUM PASSING SCORE= 252 or a 70%

Attachment 4

Interim CBP Use of Force and Firearms Guidelines**Attachment 4****U. S. Customs and Border Protection****Employee Acknowledgement**

As a CBP Employee who is authorized to carry a firearm, you are required to comply with and be thoroughly familiar with all aspects of this interim guidance. You have been provided a complete copy of the interim CBP Use of Force and Firearms Guidelines and have been given the opportunity to discuss the contents of this document with your supervisor or other management official.

By signing this statement, you acknowledge your possession of a copy of the interim CBP Use of Force and Firearms Guidelines and your personal obligation to comply with all sections therein.

Officer's Name (Printed)

Officer's Signature

Date

Duty Station

Supervisor's Name (Printed)

Supervisor's Signature

Attachment 5

Customs and Border Protection

Interim Firearms and Use of Force Policy Guidance

Page Issue

- 1 Warning Shots
- 2 Shooting of Animals
- 3 Frequency of Qualification
- 4 Number of Rounds Fired for Qualification
- 5 Training with Qualification
- 6 Firing Distances for Handgun Qualification Course
- 7 Drinking Alcohol with Weapon
- 8 Lowest Level of Authority to Revoke Weapon Carrying Authority
- 9 Firearms on Commercial Aircraft
- 10 Personally Owned Weapons
- 11 24 Hour Carriage
- 12 Firearms Instructors
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- 14 Use of Deadly Force
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- 20 Temporary Removal of Weapon
- 21 Firing Weapon at Vehicles or Vessels
- 22 Sporting Events - Hunting
- 23 Use of Force Continuum

Warning Shots	
Legacy Customs Inspector	Not authorized.
Legacy INS/Border Patrol	Not authorized.
Proposed CBP Officer	Not authorized.
Proposed Border Patrol	Not authorized.
Effect	None.

Shooting of Animals

Legacy Customs Inspector	Authorized only against dogs or other vicious animals when necessary in self-defense or in defense of others.
Legacy INS/Border Patrol	Authorized when confronted by an animal which presents an immediate threat to the officer or another person or when an animal is encountered that appears to be so seriously injured that it should be destroyed to prevent additional suffering.
Proposed CBP Officer	Authorized only against dogs or other vicious animals when necessary in self-defense or in defense of others.
Proposed Border Patrol	No change.
Effect	Legacy Immigration Inspectors will be required to conform to the Legacy Customs Policy.

Frequency of Qualification

Legacy Customs Inspector	Three times a year.
Legacy INS/Border Patrol	Four times a year.
Proposed CBP Officer	Three times a year.
Proposed Border Patrol	No change.
Effect	Legacy Immigration Inspectors will qualify three times per year vs. 4 times per year.

Number of Rounds Fired for Qualification	
Legacy Customs Inspector	30
Legacy INS/Border Patrol	72
Proposed CBP Officer	30
Proposed Border Patrol	No change.
Effect	Legacy Immigration Inspectors will fire 30 rounds for qualification vs. 72 rounds.

Training with Qualification	
Legacy Customs Inspector	8 hours of training with trimester qualifications.
Legacy INS/Border Patrol	Firearms training quarterly to include qualifications and other firearms tactical courses.
Proposed CBP Officer	8 hours of training with trimester qualifications.
Proposed Border Patrol	No change
Effect	Legacy Immigration Inspectors will receive 8 hours of training on a trimester vs. quarterly basis.

Firing Distances for Handgun Qualification Course

Legacy Customs Inspector	3, 7 and 15 yards.
Legacy INS/Border Patrol	1.5, 3, 7, 15 and 25 yards.
Proposed CBP Officer	3, 7 and 15 yards.
Proposed Border Patrol	No change.
Effect	Legacy INS personnel will fire at the 3, 7 and 15 yardlines. They will no longer fire at the 1.5 and 25 yardlines.

Drinking Alcohol with Weapon	
Legacy Customs Inspector	Not allowed unless working undercover and then must be able to maintain control.
Legacy INS/Border Patrol	Not allowed when under the influence of intoxicating alcoholic beverages. (In practice were permitted to drink with firearms in plain clothes but could not be intoxicated)
Proposed CBP Officer	Not allowed unless working undercover and then must be able to maintain control.
Proposed Border Patrol	Not allowed unless working undercover and then must be able to maintain control.
Effect	Legacy Immigration Inspectors and Border Patrol will be required to conform to the Legacy Customs Policy

Lowest Level of Authority to Revoke Weapon Carrying Authority	
Legacy Customs Inspector	The Responsible Official revokes authority to carry, but the firearms Instructor or first line supervisor has authority to take possession of employee weapon at his/her discretion.
Legacy INS/Border Patrol	The Authorizing Official revokes authority to carry, but the firearms Instructor or first line supervisor has authority to take possession of employee weapon at his/her discretion.
Proposed CBP Officer	The Responsible Official revokes authority to carry, but the firearms Instructor or first line supervisor has authority to take possession of employee weapon at his/her discretion.
Proposed Border Patrol	No change.
Effect	None

Firearms on Commercial Aircraft	
Legacy Customs Inspector	Must have approval letter.
Legacy INS/Border Patrol	No special approval required.
Proposed CBP Officer	Must have approval letter.
Proposed Border Patrol	No change.
Effect	Legacy Immigration Inspectors will require approval letters to bring firearms on commercial aircraft.

Personally Owned Weapons on Duty	
Legacy Customs Inspector	Not allowed.
Legacy INS/Border Patrol	Permitted with approval. Firearm must meet agency standards and requesting officer must meet qualification requirements.
Proposed CBP Officer	Not allowed.
Proposed Border Patrol	No new approvals for personally owned weapons shall be issued. Personally owned weapons shall be removed from circulation at service life expiration or in accordance with future CBP policy.
Effect	Legacy Immigration Inspectors shall no longer be permitted to carry personally owned weapons and shall be issued a government owned weapon when feasible. For Legacy Border Patrol, no new approvals shall be issued and personally owned weapons shall be removed from circulation at service life expiration or in accordance with future CBP policy.

24 Hour Carriage	
Legacy Customs Inspector	All inspectional personnel for service issued firearms only. Certification required.
Legacy INS/Border Patrol	Permitted, no certification required.
Proposed CBP Officer	All inspectional personnel for service issued firearms only. Certification required.
Proposed Border Patrol	No change.
Effect	Legacy Immigration Inspectors will require certification for 24 hour carriage authority.

Firearms Instructors	
Legacy Customs Inspector	Selected from volunteers, collateral duty.
Legacy INS/Border Patrol	Selected from volunteers, collateral duty.
Proposed CBP Officer	Selected from volunteers, collateral duty.
Proposed Border Patrol	No change.
Effect	No effect.

Use of Non-Deadly Force	
Legacy Customs Inspector	Policy permits use of OC Spray and Baton. CBP Officer Candidates trained only on the Baton. Intention to standardize on the Baton and remove OC Spray.
Legacy INS/Border Patrol	Headquarters directed that employees be trained on both OC Spray and Baton and required to carry at least one.
Proposed CBP Officer	The Office of Field Operations issued a memorandum dated March 25, 2003, stating that the Collapsible Straight Baton will serve as the official intermediate weapon for OFO. Training in the use of and issuance of the CSB to OFO Officers has not been completed as previously envisioned. Therefore, each OFO Officer is required to carry: OC Spray, if that Officer has successfully completed OC Spray training; the CSB if that Officer has successfully completed CSB training; or both, if that Officer has successfully completed training for both of these intermediate force weapons.
Proposed Border Patrol	No change
Effect	Each OFO Officer is required to carry: OC Spray, if that Officer has successfully completed OC Spray training; the CSB if that Officer has successfully completed CSB training; or both, if that Officer has successfully completed training for both of these intermediate force weapons.

Use of Deadly Force

Legacy Customs Inspector	Only when necessary, when there is probable cause to believe that the subject poses an imminent danger of death or serious bodily injury to the officer or another person. Verbal warning to submit to authority shall be given prior to use of deadly force if feasible, and if to do so would not increase the danger to the officer or others. Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause that the subject has committed a felony causing serious injury or death and the escape would pose an imminent danger of death to officer or another person.
Legacy INS/Border Patrol	Only with the intent of stopping a person or animal from continuing the threatening behavior which justifies the use of deadly force. When the officer reasonable believes that the person at whom the firearm is to be discharged poses the means, the intent, and the opportunity of causing death or grievous bodily harm upon the officer or another person.
Proposed CBP Officer	Only when necessary, when there is probable cause to believe that the subject poses an imminent danger of death or serious bodily injury to the officer or another person. Verbal warning to submit to authority shall be given prior to use of deadly force if feasible, and if to do so would not increase the danger to the officer or others. Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause that the subject has committed a felony causing serious injury or death and the escape would pose an imminent danger of death to officer or another person.
Proposed Border Patrol	No change
Effect	Legacy Immigration Inspectors will be required to conform to the Legacy Customs Policy.

Pregnant Employees

Legacy Customs Inspector	Pregnant employees may choose to continue to qualify with a doctor's written authorization. They may choose not to continue to qualify, in which case the permission to carry a firearm and perform duties requiring the carrying of a firearm is rescinded temporarily, until the employee's physician provides written authorization.
Legacy INS/Border Patrol	Silent regarding pregnant employees. Pregnant employees may be exempted from requalifying for up to 270 days.
Proposed CBP Officer	Pregnant employees may choose to continue to qualify with a doctor's written authorization. They may choose not to continue to qualify, in which case the permission to carry a firearm and perform duties requiring the carrying of a firearm is rescinded temporarily, until the employee's physician provides written authorization.
Proposed Border Patrol	No change.
Effect	A transition to Legacy Customs policy for Legacy Immigration Inspectors.

At the Academy - Firearms Qualifications	
Legacy Customs Inspector	80% (120 out of 150) Legacy Customs Course of Fire 70% (210 out of 300) FLETC Course of Fire 100% judgement pistol shooting Remedial training and two chances to qualify when remedial is complete.
Legacy INS/Border Patrol	70% (252 out of 360) on Handgun qualification course 100% judgement pistol shooting. Remedial training and one chance to qualify when remedial is complete.
Proposed CBP Officer	80% (240 out of 300) for the 60 round handgun course. Remedial training and two chances to qualify when remedial is complete.
Proposed Border Patrol	No change.
Effect	None. CBP Officer candidates currently fire the 60 round COF at the CBP Academy.

In the Field - Firearms Qualifications

Legacy Customs Inspector	30 round handgun course, 150 points possible, 80% or better to qualify. If fail after remedial training and 3 attempts to qualify weapon and credentials taken away (no waivers). If employee does not participate in trimester qualifications for whatever reason (medical, injury etc) weapon and credentials taken away.
Legacy INS/Border Patrol	72 round handgun course, 360 points possible, 70% or better to qualify. If fail to qualify during 40 hours of remedial training then weapon taken away. Employee is allowed to miss 2 consecutive quarters of qualifications for approved reasons and keep firearm. If employee does not participate in quarterly qualifications for medical or pregnancy reasons, they are allowed to keep their firearm up to 270 days without qualifying.
Proposed CBP Officer	30 round handgun course, 150 points possible, 80% or better to qualify. If fail after remedial training and 3 attempts to qualify weapon and credentials taken away (no waivers). If employee does not participate in trimester qualifications for whatever reason (medical, injury etc) weapon and credentials taken away.
Proposed Border Patrol	No change.
Effect	Legacy Immigration Inspectors will fire only 30 rounds for handgun qualification vs. 72 rounds, but require 80% or better (vs. 70%) to qualify. Legacy Immigration Inspectors will not be allowed to miss 2 consecutive quarters of qualifications for approved reasons and keep firearm. Legacy Immigration Inspectors will not be allowed to fail to qualify for medical or pregnancy reasons for up to 270 days and keep firearm.

Type of Weapon	
Legacy Customs Inspector	Glock-9mm-Model 17 (Shotgun if required)
Legacy INS/Border Patrol	H&K USP-40 caliber and Beretta-96D-40 caliber (INS Shotgun if required) (Border Patrol must qualify with handgun, shotgun and rifle)
Proposed CBP Officer	Pending.
Proposed Border Patrol	No change.
Effect	Until a standard handgun for OFO is designated, Legacy Immigration Inspectors shall carry their currently assigned handgun. Legacy Customs Inspectors shall carry the Glock 17, 9-mm pistol.

Removal of Weapon

Legacy Customs Inspector	<p>EXAMPLES:</p> <p>Any conduct which would be in violation of an applicable Federal law Evidence of the misuse of a firearm; Evidence of the commission of a felony Failure to meet firearms qualifications or other mandatory training requirement Medical conditions that would impede the safe and effective use of a firearm Evidence of substance abuse Evidence of inappropriate violent behavior</p>
Legacy INS/Border Patrol	<p>Authority to carry a firearm during duty and/or non-duty hours may be withdrawn or restricted by the Authorizing Official when the withdrawal or restriction is in the best interests of the Service and/or the officer. Failure to meet firearms qualifications or other mandatory training requirement.</p>
Proposed CBP Officer	<p>EXAMPLES:</p> <p>Any conduct which would be in violation of a applicable Federal law Evidence of the misuse of a firearm; Evidence of the commission of a felony Failure to meet firearms qualifications or other mandatory training requirement Medical conditions that would impede the safe and effective use of a firearm Evidence of substance abuse Evidence of inappropriate violent behavior</p>
Proposed Border Patrol	No change.
Effect	A transition to Legacy Customs' policy for Legacy Immigration Inspectors.

Temporary Removal of Weapon

Legacy Customs Inspector	<p>EXAMPLES:</p> <p>Officers who will be on authorized sick leave or leave without pay status of an entire qualification period and unable to qualify.</p> <p>Suspension due to a disciplinary action regardless of the number of days.</p>
Legacy INS/Border Patrol	<p>Authority to carry a firearm during duty and/or non-duty hours may be withdrawn or restricted by the Authorizing Official when the withdrawal or restriction is in the best interests of the Service and/or the officer.</p>
Proposed CBP Officer	<p>EXAMPLES:</p> <p>Officers who will be on authorized sick leave or leave without pay status of an entire qualification period and unable to qualify.</p> <p>Suspension due to a disciplinary action regardless of the number of days.</p>
Proposed Border Patrol	No change.
Effect	A transition to Legacy Customs' policy for Legacy Immigration Inspectors.

Firing Weapon at Vehicles or Vessels

Legacy Customs Inspector	Cannot be fired solely to disable vehicles or vessels. May be fired at the driver or other occupant of a moving motor vehicle or vessel only when reasonable belief the subject poses an imminent danger of death or serious injury to the officer or another person and the public safety benefits of using such force outweigh the risks to the safety of the officer or other persons.
Legacy INS/Border Patrol	Cannot be fired at a moving vehicle for purposes of stopping vehicle. Firearms may be discharged at the driver or other persons inside a vehicle who the officer reasonably believes presents imminent danger of death or grievous bodily harm to the officer or another person. The hazard of an uncontrolled moving vehicle, as well as the possibility of injury to other persons must be taken into consideration before firing.
Proposed CBP Officer	Cannot be fired solely to disable vehicles or vessels. May be fired at the driver or other occupant of a moving motor vehicle or vessel only when reasonable belief the subject poses an imminent danger of death or serious injury to the officer or another person and the public safety benefits of using such force outweigh the risks to the safety of the officer or other persons.
Proposed Border Patrol	No change
Effect	Legacy Immigration Inspectors will be required to conform to the Legacy Customs Policy.

Sporting Events - Hunting

Legacy Customs Inspector	Not addressed in policy
Legacy INS/Border Patrol	Service firearms may be used at a firearms sporting event or organized competition; hunting for game and/or target practice on privately-owned land with permission of the owner; on public lands where discharging firearms is not a violation of law and reasonable safety procedures can be followed; or at a commercial, public, or government-owned range.
Proposed CBP Officer	Service firearms may be used at a firearms sporting event, organized competition, or at a commercial, public, or government owned range.
Proposed Border Patrol	Service firearms may be used at a firearms sporting event, organized competition, or at a commercial, public, or government owned range.
Effect	Legacy Immigration Inspectors and Legacy Border Patrol will not be permitted to use their Service weapons to hunt and/or target practice on privately owned or public land, even with the permission of the owner.

Use of Force Continuum	
Legacy Customs Inspector	Officer Presence Verbal Commands Soft Techniques (Come along holds, Escort position) Hard Techniques (Strikes to body, take downs) Deadly Force
Legacy INS/Border Patrol	Although not referred to as "Use of force Continuum", the INS Policy includes clear language as to proper use of force (including non-lethal force) in Appendix 6.
Proposed CBP Officer	Officer Presence Verbal Commands Soft Techniques (Come along holds, Escort position) Hard Techniques (Strikes to body, take downs) Deadly Force
Proposed Border Patrol	No change
Effect	Legacy Immigration Inspectors will be required to conform to the Legacy Customs Policy.


Attachment 6

Secretary

U.S. Department of Homeland Security
Washington, DC 20528Homeland
Security

July 1, 2004

MEMORANDUM FOR: Deputy Secretary
Under Secretaries
Director, U.S. Secret Service
Commandant, U.S. Coast Guard
Assistant Secretary, ICE
Commissioner, CBI
Acting Administrator, TSA

FROM: Tom Ridge 

SUBJECT: Use of Deadly Force Policy

Attached is the Department of Homeland Security (DHS) Use of Deadly Force Policy which I issued today. The policy, applicable to all DHS law enforcement officers and agents, is intended to provide the standard for all DHS components. Officials and supervisors should take appropriate steps to ensure that pre-existing use of force policies comply with this new standard and incorporate its core principles.

The following Use of Deadly Force Policy was developed by a Task Force comprised of DHS headquarters and component representatives to unify to the extent feasible and practicable existing DHS agency policies. The resulting umbrella policy reflects the components' different law enforcement missions and activities, and permits the agencies to adopt more detailed operational guidance with DHS approval.

DEPARTMENT OF HOMELAND SECURITY POLICY ON THE
USE OF DEADLY FORCE

June 25, 2004

By virtue of the authority vested in the Secretary of the Department of Homeland Security, including the authority vested by 6 U.S.C. §112(a), I hereby establish a Department of Homeland Security policy on the use of deadly force for law enforcement. The policy set forth herein is intended to set uniform standards and provide broad guidelines for the use of force by law enforcement officers and agents of the Department of Homeland Security performing law enforcement missions. The provisions of this Order apply to all law enforcement officers and agents of the Department of Homeland Security.

I. GENERAL PRINCIPLES

Law enforcement officers and agents of the Department of Homeland Security may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.

A. Fleeing subjects. Deadly force may not be used solely to prevent the escape of a fleeing suspect.

B. Firearms may not be fired solely to disable moving vehicles, vessels, aircraft, and other conveyances, except as follows:

1. United States Secret Service agents and officers, in exercising the United States Secret Service's protective responsibilities, may discharge firearms to disable moving vehicles, vessels, and other conveyances. United States Secret Service agents and officers may discharge firearms to disable aircraft in flight, only if the use of deadly force against the occupants of the aircraft would be authorized under this policy.

2. U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents, when conducting maritime law enforcement, may fire firearms to disable moving vessels or other conveyances.

C. If feasible and if to do so would not increase the danger to the officer or others, a warning to submit to the authority of the officer shall be given prior to the use of deadly force.

D. Warning shots are not permitted, except as follows:

1. Warning shots may be used by United States Secret Service agents and officers in exercising the United States Secret Service's protective responsibilities.

2. Warning shots may be used by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents when conducting maritime law enforcement only as a signal to a vessel to stop.

3. Warning shots may be used by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents when conducting aviation law enforcement operations only as a signal to an aircraft to change course and follow direction to leave airspace.

E. Officers will be trained in alternative methods and tactics for handling resisting subjects which must be used when the use of deadly force is not authorized by this policy.

II. GUIDELINES

A. Homeland Security Directorates and Agencies shall, to the extent necessary, supplement this policy with policy statements or guidance consistent with this policy. Such policy statements shall be subject to review and approval by appropriate departmental offices, including the Office of General Counsel, to ensure consistency with law and departmental standards and policies.

B. The respective Homeland Security Directorate Under Secretaries, the Commandant of the United States Coast Guard, and the Director of the United States Secret Service shall approve guidelines for weaponless control techniques, intermediate weapons, and firearms or lethal weapons with non-lethal munitions, in accordance with this policy and that directorate's or agency's unique law enforcement mission, training, and equipment.

III. MILITARY ACTIVITIES

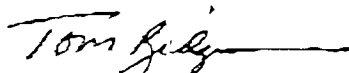
This policy shall not apply to the United States Coast Guard when engaged in warfighting, the military defense of the United States, or other military activities where Standing Rules of Engagement apply or to other operations at sea addressed by other policies or direction.

IV. SAVINGS

To the extent agency and component policies and procedures in place prior to the creation of the Department of Homeland Security are consistent with this policy, they remain in full force and effect unless otherwise revoked or modified.

V. APPLICATION OF THE POLICY

This Policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

A handwritten signature in black ink, appearing to read "Tom Ridge", followed by a horizontal line.

Tom Ridge

OBP:CKoenig:HRuffel:mad:10/26/04:04-03696

bcc: OBP 50/15-P
OBP 50/5.7-P
Master Log

EXHIBIT H

Secretary

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

July 1, 2004

MEMORANDUM FOR: Deputy Secretary
Under Secretaries
Director, U.S. Secret Service
Commandant, U.S. Coast Guard
Assistant Secretary, ICE
Commissioner, CBP
Acting Administrator, TSA

FROM: Tom Ridge 

SUBJECT: Use of Deadly Force Policy

Attached is the Department of Homeland Security (DHS) Use of Deadly Force Policy which I issued today. The policy, applicable to all DHS law enforcement officers and agents, is intended to provide the standard for all DHS components. Officials and supervisors should take appropriate steps to ensure that pre-existing use of force policies comply with this new standard and incorporate its core principles.

The following Use of Deadly Force Policy was developed by a Task Force comprised of DHS headquarters and component representatives to unify to the extent feasible and practicable existing DHS agency policies. The resulting umbrella policy reflects the components' different law enforcement missions and activities, and permits the agencies to adopt more detailed operational guidance with DHS approval.

www.dhs.gov

DEPARTMENT OF HOMELAND SECURITY POLICY ON THE
USE OF DEADLY FORCE

June 25, 2004

By virtue of the authority vested in the Secretary of the Department of Homeland Security, including the authority vested by 6 U.S.C. §112(a), I hereby establish a Department of Homeland Security policy on the use of deadly force for law enforcement. The policy set forth herein is intended to set uniform standards and provide broad guidelines for the use of force by law enforcement officers and agents of the Department of Homeland Security performing law enforcement missions. The provisions of this Order apply to all law enforcement officers and agents of the Department of Homeland Security.

I. GENERAL PRINCIPLES

Law enforcement officers and agents of the Department of Homeland Security may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.

A. Fleeing subjects. Deadly force may not be used solely to prevent the escape of a fleeing suspect.

B. Firearms may not be fired solely to disable moving vehicles, vessels, aircraft, and other conveyances, except as follows:

1. United States Secret Service agents and officers, in exercising the United States Secret Service's protective responsibilities, may discharge firearms to disable moving vehicles, vessels, and other conveyances. United States Secret Service agents and officers may discharge firearms to disable aircraft in flight, only if the use of deadly force against the occupants of the aircraft would be authorized under this policy.

2. U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents, when conducting maritime law enforcement, may fire firearms to disable moving vessels or other conveyances.

C. If feasible and if to do so would not increase the danger to the officer or others, a warning to submit to the authority of the officer shall be given prior to the use of deadly force.

D. Warning shots are not permitted, except as follows:

1. Warning shots may be used by United States Secret Service agents and officers in exercising the United States Secret Service's protective responsibilities.

2. Warning shots may be used by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents when conducting maritime law enforcement only as a signal to a vessel to stop.

3. Warning shots may be used by U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection and U.S. Coast Guard law enforcement officers and agents when conducting aviation law enforcement operations only as a signal to an aircraft to change course and follow direction to leave airspace.

E. Officers will be trained in alternative methods and tactics for handling resisting subjects which must be used when the use of deadly force is not authorized by this policy.

II. GUIDELINES

A. Homeland Security Directorates and Agencies shall, to the extent necessary, supplement this policy with policy statements or guidance consistent with this policy. Such policy statements shall be subject to review and approval by appropriate departmental offices, including the Office of General Counsel, to ensure consistency with law and departmental standards and policies.

B. The respective Homeland Security Directorate Under Secretaries, the Commandant of the United States Coast Guard, and the Director of the United States Secret Service shall approve guidelines for weaponless control techniques, intermediate weapons, and firearms or lethal weapons with non-lethal munitions, in accordance with this policy and that directorate's or agency's unique law enforcement mission, training, and equipment.

III. MILITARY ACTIVITIES

This policy shall not apply to the United States Coast Guard when engaged in warfighting, the military defense of the United States, or other military activities where Standing Rules of Engagement apply or to other operations at sea addressed by other policies or direction.

IV. SAVINGS

To the extent agency and component policies and procedures in place prior to the creation of the Department of Homeland Security are consistent with this policy, they remain in full force and effect unless otherwise revoked or modified.

V. APPLICATION OF THE POLICY

This Policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

A handwritten signature in black ink, appearing to read "Tom Ridge", followed by a long horizontal stroke.

Tom Ridge

EXHIBIT I

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DEPARTMENT OF HOMELAND SECURITY U.S. Customs and Border Protection

CBP DIRECTIVE NO. 4510-029

DATE: July 13, 2009

ORIGINATING OFFICE: OTD:UFPD

SUPERSEDES:

REVIEW DATE: July 2012

POLICY ON THE USE OF ELECTRONIC CONTROL DEVICES

1. **PURPOSE.** The purpose of this directive is to establish uniform standards for the proper training, deployment and use of Electronic Control Devices (ECDs) by U.S. Customs and Border Protection (CBP) law enforcement personnel.
2. **AUTHORITIES.** 19 U.S.C. § 1589 (a); 8 U.S.C. § 1357; and applicable Department of Homeland Security (DHS) and CBP regulations and policies.
3. **SUPERSEDES/CANCELLED POLICY/SUMMARY OF CHANGES.** This policy supersedes any prior CBP policy to the extent that the prior policy is inconsistent with the content of this policy directive.
4. **BACKGROUND.** The Use of Force Policy Division (UFPD), the steward of use of force and threat management policy within CBP, has identified a need for a comprehensive CBP ECD policy. This policy establishes guidelines and parameters for the deployment of an ECD in those situations where it would be reasonable to use intermediate force.
5. **DEFINITIONS.**
 - 5.1 **Passive Resistance.** A subject that offers no physical or mechanical resistance to a law enforcement officer's control efforts, but is not cooperative.
 - 5.2 **Active Resistance.** A subject that is exhibiting physical or mechanical defiance to a law enforcement officer's control efforts. Although the subject is not deliberately attempting to cause injury to the officer/agent or to others, injury could nevertheless occur as a result.
 - 5.3 **Assaultive Resistance.** Active resistance that has the potential of causing physical injury to the officer/agent or to others. The subject attempts (or appears to have the intent to attempt) to make physical contact in an attempt to control or assault the officer/agent.
 - 5.4 **Serious Physical Injury.** A physical injury likely to cause death or serious permanent disfigurement or loss of function of a bodily member or organ.
 - 5.5 **Electronic Control Device (ECD).** A device that uses short-duration electronic pulses to overload a targeted muscle system, causing neuro-muscular incapacitation, with minimal risk of serious physical injury or death.

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5.6 ECD Deployment. The use or activation of an ECD.

5.7 ECD Cartridge. The device that houses the probes for an ECD.

5.8 Probe Deployment. The launching of probes from an ECD device/cartridge towards an intended target.

5.9 Neuro-Muscular Incapacitation (NMI). The involuntary stimulation of both motor and sensory nerves that impedes a person's ability to act. NMI is not reliant on pain for compliance.

6. POLICY.

6.1 POLICY – TRAINING GUIDELINES

6.1.1 Only CBP certified ECD instructors shall instruct CBP personnel and certify them as end users/operators or instructors.

6.1.2 Only ECD systems and cartridges authorized by the UFPD shall be used in training or operations.

6.1.3 Participation in the training and certification for the ECD shall be voluntary.

6.1.4 Only CBP personnel who have previously been certified in either the collapsible straight baton or OC spray are eligible to be trained and certified to use ECD devices.

6.1.5 ECD systems, cartridges and related equipment shall not be altered in any way.

6.1.6 Successful completion of a UFPD approved ECD training course (consisting of at least eight hours of instruction) is required for initial end user/operator certification. Thereafter, ECD certified personnel must receive an annual four-hour UFPD approved refresher course in order to maintain certification.

6.1.7 Exposure to an ECD is not required for end user/operator certification. End users may opt to participate in exposure training, so long as the training is conducted under the close supervision of CBP certified ECD instructors and in a controlled manner with appropriate safety gear. Exposures should be documented in the training log after-action report and may be videotaped and kept for training reference.

6.1.8 Appropriate safety equipment (including eye protection) shall be worn during all ECD training.

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6.2 POLICY – OPERATIONAL GUIDELINES

6.2.1 An ECD shall be deployed only in accordance with DHS policy, CBP use of force policy, the CBP Use of Force Continuum, and in a manner consistent with its designed use as specified by the manufacturer.

6.2.2 An ECD shall not be used to taunt, harass, or abuse a subject, or in a manner inconsistent with training or policy protocols.

6.2.3 An ECD is not a substitute for the use of deadly force. This however, does not preclude the use of an ECD (or any other weapon) for this purpose if the use of deadly force would otherwise be reasonable.

6.2.4 An ECD shall only be utilized by CBP trained and certified law enforcement personnel as an intermediate force device on subjects who, at a minimum, demonstrate active resistance.

6.2.5 ECDs shall be carried on the non-gun side in a UFPD authorized holster issued by or CBP or purchased through an official uniform purchase program.

6.2.6 ECD operators shall not intentionally target the head, neck, groin or female breast.

6.2.7 CBP personnel should not deploy ECDs near flammable materials.

6.2.8 CBP personnel shall deliver only the number of ECD cycles reasonably necessary to control and secure a resistant subject. If the use of the ECD is unsuccessful in controlling a subject, the officer/agent should transition to another use of force option.

6.2.9 When possible, CBP personnel should verbalize "TASER, TASER, TASER" prior to deployment to warn fellow officers/agents of the imminent use of an ECD. This will alert fellow officers/agents to prepare to control a subject under the power of an ECD.

6.2.10 When possible, CBP personnel should avoid using an ECD on children, the elderly, pregnant subjects, subjects who are on elevated surfaces, subjects operating a conveyance, subjects in water sufficient to drown or subjects who are running (unless exigent circumstances exist).

6.2.11 CBP personnel shall ensure that any person(s) exposed to an ECD and in CBP custody will be promptly seen by an Emergency Medical Technician. Additionally, CBP personnel shall seek medical attention, as appropriate, for anyone who appears, or claims to be, injured.

6.2.12 CBP personnel trained and certified in the use of an ECD may remove probes embedded in a person's skin, provided the projectiles are not embedded in the head, neck, genitals, or female breast tissue. Probe removals in those instances shall be performed by a certified medical professional.

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6.2.13 If practical, CBP personnel shall photograph or videotape any marks or injuries resulting from the use of an ECD. If the marks or alleged injuries to be documented are on a private portion of the subject's body, CBP personnel shall make reasonable efforts to ensure privacy before the documentation is recorded. To the extent possible the recording must be made by an officer/agent of the same gender as the subject.

6.2.14 ECD projectiles are considered a biohazard and shall be disposed of according to established biohazard disposal protocol.

6.2.15 Only UFPD authorized ECD systems and cartridges shall be carried and utilized by CBP personnel. Requests to utilize special-purpose systems or cartridges not previously authorized must be submitted through the chain of command to the Director of the UFPD.

6.2.16 Any incident that results in the discharge of an ECD must be reported in accordance with Section 8 of this Policy.

6.2.17 Only personnel who have been trained and CBP certified as ECD Armorers are authorized to perform maintenance on, or make repairs to, ECD systems. This does not preclude ECD end users from performing routine cleaning that does not require disassembly of the device beyond removal of the cartridges.

6.2.18 An ECD shall not be used for the purposes of voluntary exposure unless it is part of an authorized training course in accordance with Section 6.1.7 of this policy.

7. RESPONSIBILITIES.

7.1 Assistant Commissioners (or their designees) shall ensure appropriate distribution and dissemination of this policy.

7.2 The UFPD shall be responsible for the development and approval of ECD training materials, certification standards and operational procedures.

7.3 The UFPD shall be responsible for the periodic review of field usage of ECDs in order to evaluate policy compliance as well as to assess the overall safety and effectiveness of ECD devices/systems.

7.4 Responsible CBP supervisory personnel shall ensure that ECDs (when not in use) are stored with cartridges removed, in a limited access location and in a manner consistent with the manufacturer's suggestions for storage.

7.5 Local Stations, Branches and Ports of Entry shall be responsible for the issue, storage, proper care and maintenance of ECD devices and related equipment.

7.6 Each ECD device shall have all stored deployment and utilization data downloaded quarterly. Additionally, after each field deployment, data related to that deployment shall be downloaded and saved.

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7.7 Responsible officials shall ensure that all downloaded ECD data is securely stored and maintained for a minimum of three years.

7.8 Failure to comply with this policy may result in disciplinary action and/or loss of ECD certification.

8. PROCEDURES.

8.1 ECD REPORTING GUIDELINES

8.1.1 Verbal Reports – Personnel shall verbally report any use of an ECD to their immediate supervisor within one hour of the event, unless the reporting employee is physically incapacitated or otherwise unable. Such oral report shall be made in person, via radio, or telephone and include the following information (if known):

- a. The date, the time, and the location of the incident;
- b. The device(s) used;
- c. The nature and extent of any injuries claimed or observed; and
- d. The name, date of birth, and physical location(s) of the subject(s).

8.1.2 If CBP bargaining unit employees are required to provide any additional information, pursuant to, but not limited to, written or oral statements and/or reports, all applicable provisions of the appropriate collective bargaining agreement must be observed.

8.1.3 Written Reports. CBP supervisors shall send reports through their respective chains of command. Copies of the written reports shall be sent to the appropriate Assistant Commissioner and to the Director of UFPD within 10 business days, or as soon as practical. Reports to the UFPD shall be made by utilizing CBP Form 318 – Reportable Use of Force Incident Data (also available as an e-form on CBPNet).

8.1.4 Supervisors should follow the guidelines established in CBP Directive 3340–025C (or any successor policy) when determining whether a Significant Incident Report (SIR) should be completed. A deployment of an ECD device, in and of itself, does not warrant the filing of a SIR. The supervisor on duty shall submit a preliminary written report by the end of the work shift to the Commissioner's Situation Room in accordance with CBP Directive 3340–025C.

8.1.5 Any use of an ECD that results in serious physical injury or death shall follow CBP policy and procedures for reporting the use of deadly force.

8.1.6 If medical treatment offered pursuant to Section 6.2.11, above, is refused, that refusal shall be documented by the CBP personnel involved.

8.1.7 Mere display of an ECD device does not constitute a reportable use of the system.

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9. **NO PRIVATE RIGHT STATEMENT.** This document is for internal CBP use only and does not create or confer any rights, privileges, or benefits for any person or entity. United States v Caceres, 440 U.S. 741 (1979).

Acting Commissioner
U.S. Customs and Border Protection