



October 27, 2021

Chairman Dick Durbin
Ranking Member Chuck Grassley
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Chairman Bennie Thompson
Ranking Member John Katko
Committee on Homeland Security
H2-176 Ford House Office Building
Washington, D.C. 20515

Chairman Jerrold Nadler
Ranking Member Jim Jordan
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

Chairwoman Carolyn B. Maloney
Ranking Member James Comer
House Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Chairman Gary Peters
Ranking Member Rob Portman
U.S. Senate Committee on Homeland
Security & Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC, 20510

Re: Request for congressional investigations and oversight hearings on the unlawful operation of the U.S. Border Patrol's Critical Incident Teams (BPCITs).

Dear Congressional Committee Leaders,

On behalf of the Southern Border Communities Coalition (SBCC), a network of organizations in California, Arizona, New Mexico, and Texas, we write to sound the alarm on the dangerous overreach and illegal operation of the U.S. Border Patrol's unlawful Critical Incident Teams (BPCIT).¹ The BPCITs, in all of their permutations, may be the largest and longest standing shadow police unit that is operating today in the federal government. Without any federal authority, BPCITs investigate incidents of agent-involved use of force, and they work to mitigate and conceal their culpability. The actions of these Border Patrol units to withhold, destroy, and corrupt evidence and to tamper with witnesses have gone unchecked for decades. It's time for Congress to investigate them fully.

¹ Also known as Critical Incident Investigative Team (CIIT), Cross Border Investigations Unit (CBIU), Crash Unit (CU), Evidence Collection Team (ECT), Investigative Intelligence Unit (IIU), Sector Evidence Team (SET), Sector Investigative Group (SIG), and Special Investigation Team (SIT), among other possible variations.

In their own words, BPCITs conduct investigations on behalf of Border Patrol chiefs for “mitigation of civil liability.”² There is no known equivalent in other law enforcement agencies — it would run counter to their duty to protect the public. Nevertheless, the BPCIT “preserves and protects the integrity of the Border Patrol and its [on and off duty] personnel” by investigating any “occurrence arising from the conduct of Border Patrol activities which result in death, serious bodily injury, significant property damage, or other exposure to significant civil liability.”³

One senior Border Patrol agent who helped create BPCITs in multiple sectors at the request of various Border Patrol chiefs and trained supervisors on how to use them, described the work of BPCITs as completing reports related to fatality vehicle collisions, conducting interviews, documenting and preserving evidence, and completing “comprehensive reports for Border Patrol that were utilized in Tort Claims against agents.”⁴ The work of BPCITs is not unlike that of the National Border Patrol Council whose mission includes protecting Border Patrol “against frivolous lawsuits, overzealous prosecutors, and unwarranted or disparate administrative actions.”⁵

Known by many names, BPCITs have existed since at least 1987, and appear to be operating in many, if not all, Border Patrol sectors in the country.⁶ As discussed below, BPCITs operate as shadow police units outside of federal law and without congressional authority. Their existence poses a threat to public safety by concealing agent misconduct, enabling abuse, and exacerbating impunity within the nation’s largest law enforcement agency, U.S. Customs and Border Protection (CBP). Immediate investigations into BPCITs are imperative.

I. BPCITs have no authority to conduct criminal or administrative investigations of agents and are engaged in obstruction of justice.

Congress grants authority to conduct criminal investigations of misconduct, including excessive use of force by border agents, to specific government agencies — the Federal Bureau of Investigations (FBI),⁷ the Department of Homeland Security Office of Inspector General (OIG),⁸ and in limited circumstances the CBP Office of Professional Responsibility (OPR).⁹ But nowhere in federal law does Congress grant that authority to Border Patrol or any component thereof, including BPCITs.¹⁰ The only other entities that have the authority to investigate border agents are state and local law enforcement agencies with territorial jurisdiction. Nevertheless, BPCITs are conducting investigations for Border Patrol chiefs without federal authority, without external oversight, and often without public knowledge.

² Letter Exhibit A, San Diego Critical Incident Investigative Team (CIIT) presentation, at 49. The presentation was acquired by journalist John Carlos Frey, southernborder.org/letter_exhibits.

³ *Id.* at 52-54.

⁴ Letter Exhibit F, Public profile of John Buscaglia on Linked In, at 5, southernborder.org/letter_exhibits.

⁵ See NBPC mission statement at <https://bpunion.org/about-nbpc/the-nbpc-mission/>.

⁶ See e.g., Letter Exhibit A, San Diego CIIT presentation at 49, stating that CIIT started in the San Diego sector in 1987; Letter Exhibit F, at 4, discussing the formation of a team in the Tucson sector in the years 1996-2003 and in the Rio Grande Valley sector in the years 2003-2006; Letter Exhibit G, challenge coins from the BPCITs in the various sectors under various names, southernborder.org/letter_exhibits.

⁷ See 28 U.S.C. § 535(a).

⁸ See 5a U.S.C. §§ 4(a), 6(f), 8l(c).

⁹ See 6 U.S.C. § 211(j). See also 2004 DHS Management Directive 0810.1, stating that OIG has the right of first refusal and that OPR should not investigate until OIG declines / passes.

<https://www.oig.dhs.gov/sites/default/files/0810.1%20The%20Office%20of%20Inspector%20General.pdf>.

¹⁰ Border Patrol authority is granted in 6 U.S.C. § 211(e)(3), and is limited to the interdiction of people and goods entering illegally between the ports of entry.

Border Patrol has attempted to keep the existence of BPCITs secret by intentionally excluding details about the unit from government documents.¹¹ The existence of BPCITs within Border Patrol has only been revealed through public record requests, occasional media reports, agent disclosures, and litigation. Challenge coins like the one pictured here are created by BPCIT members and also reveal how they see themselves — as criminal investigators — even though they have no authority to conduct criminal investigations.¹²



In addition to not having criminal investigative authority, BPCITs do not have the authority to conduct administrative investigations. To be clear, BPCITs are not internal affairs units. They themselves recognize that.¹³ Internal affairs is the role of OPR (formerly called Internal Affairs). So the question arises, what authority, if any, do the BPCITs have and what is their purpose? Notably, the BPCITs do not scrutinize the actions of agents. Rather, they protect them. They look for exculpatory evidence to exonerate them and shift the burden to victims. According to a BPCIT powerpoint presentation, the unit “[i]nvestigates and prepares criminal cases against suspects for assaults on Border Patrol Agents.”¹⁴ The alleged suspects are often the victims of agent abuse who suffer not only from the abuse, but also the indignity of false allegations.¹⁵

In operating as cover-up units, BPCITs threaten the integrity of any legitimate law enforcement investigation. Reflecting on his tenure as the head of CBP Internal Affairs between 2006 and 2014, Assistant Commissioner James Tomscheck stated:

BP had no authority to investigate, but it nonetheless constantly tried to assert investigative authority, and very frequently interfered with legitimate investigations. . . .

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.¹⁶

Both former CBP Assistant Commissioner Tomscheck and Deputy Assistant Commissioner for Internal Affairs, James Wong, identified an alarming pattern of cover ups at Border Patrol.¹⁷ These

¹¹ For example, when a 2013 Police Executive Research Forum (PERF) audit of the *CBP Use of Force Policy Handbook (October 2010)*, available at <https://info.publicintelligence.net/CBP-ForcePolicyHandbook.pdf>, recommended that Critical Incident Teams, referenced in the 2010 Handbook at pages 20-21, be defined and described, CBP responded by removing the reference altogether. It has never reappeared in subsequent handbooks even though BPCITs have continued to operate. See PERF audit recommendations, at 14, <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

¹² Challenge coins are available online at sites like worthpoint.com and ebay.com. The coin pictured here is from the El Centro sector.

¹³ Letter Exhibit A, San Diego CIIT presentation, at 52.

¹⁴ *Ibid.*

¹⁵ See discussion below of the Anastasio Hernandez Rojas case in San Diego where the BPCIT there asked the FBI to bring assault charges against Hernandez Rojas while he lay brain dead and ultimately died after being beaten and shot with a taser five times. Anastasio was identified as the assailant in his own homicide investigation. See Letter Exhibit, at 7.

¹⁶ Additional Observations on Merits submitted to the Inter-American Commission on Human Rights in the case of Anastasio Hernandez Rojas, Case No. 14.0-42, January 27, 2021, Exhibit E, Declaration of James F. Tomscheck, paragraphs 48, 71. Exhibits available at https://d3n8a8pro7vhmx.cloudfront.net/alliancesandiego/pages/3138/attachments/original/1612382773/Additional_Observations_on_Merits_Case_14042_Exhibits.pdf?1612382773.

¹⁷ Additional Observations, IACHR Case No. 14.0-42, Exhibits D and E, Declarations of James F. Tomscheck and James Wong.

include activities to tamper with, corrupt, and destroy evidence.¹⁸ Tomsheck and Wong also described activities in specific cases¹⁹ that could constitute grounds for criminal prosecution of obstruction of justice under 18 U.S.C. § 1512(c), which reads:

Whoever corruptly (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

The mere fact that BPCITs exist to protect agents rather than the public puts them at cross purposes with legitimate law enforcement and jeopardizes the pursuit of truth and justice. Their involvement in investigations without any federal authority is a dangerous overreach and is, at a minimum, unlawful. It could amount to criminal activity subject to prosecution. The involvement of BPCITs should prompt a reopening of use-of-force investigations that led to impunity not only for agents that used force, but also for BPCIT members that covered it up and Border Patrol chiefs who directed them to do so.

All use-of-force incidents investigated by BPCITs should be re-examined.²⁰ As a priority, the investigation of Anastasio Hernández Rojas's death should be reopened. It is a landmark case as the first ever to go before an international tribunal where it is currently pending.

II. The case of Anastasio Hernández Rojas reveals the role that BPCITs play to corrupt investigations and obstruct justice.

On May 28, 2010, Anastasio, a longtime resident of San Diego and father of five U.S. citizen children, was brutalized by border agents after asking for medical attention for his ankle that agents had injured.²¹ Agents "hogtied him, dragged him, beat him with batons, punches and kicks, stood and kneeled on his body against the ground, and tasered him repeatedly for extended lapses of time, even after he had become unresponsive, thus causing his death."²² The San Diego Police Department (SDPD) investigated the incident as a homicide.²³

Anastasio's death sparked public outcry and congressional action when an eyewitness video was revealed on national television exposing the lies that agents told. Border agents had initially described Anastasio as aggressive, standing and kicking an agent, but the video revealed he was actually handcuffed and lying face down on the ground surrounded by a dozen agents who ended his life.²⁴ When no criminal charges were brought, the family petitioned the Inter-American Commission on Human Rights, which accepted review of the case in the first-ever probe of an extrajudicial killing by law enforcement in the United States. The Inter-American Commission is currently awaiting a response from the United States in the case.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ See for example the cases identified by SBCC: <https://www.southernborder.org/border-patrol-abuses>.

²¹ See IACHR, Report No. 198/20. Petition P-524-16. Admissibility. Anastasio Hernández Rojas and family. United States of America. July 23, 2020. <https://www.oas.org/en/iachr/decisions/2020/usad524-16en.pdf>.

²² *Id.* at paragraph 2.

²³ Letter Exhibit B, San Diego Police Department Investigation, [southernborder.org/letter_exhibits](https://www.southernborder.org/letter_exhibits).

²⁴ See for example, <https://www.typeinvestigations.org/blog/2012/10/19/story-sparks-oig-investigation/>.

The Anastasio case is emblematic of the impunity perpetuated by BPCITs. The record reveals the obstructive role that the BPCIT there played to compromise the integrity of the investigation and protect the agents involved:

- (1) The San Diego BPCIT (known there as CIIT) was the first to be notified by border agents.²⁵ The BPCIT *never* notified SDPD, the agency with jurisdiction to conduct the criminal investigation. Instead, the BPCIT contacted the FBI and asked them to charge Anastasio with assault while he lay brain dead in the hospital.²⁶ The FBI declined.²⁷ SDPD only became aware of the incident through a media inquiry and located the scene of the incident on their own a day later, without help from the BPCIT or other border agents.²⁸
- (2) Despite having no authority to investigate, the BPCIT was identified in a situation report prepared by Border Patrol as “coordinating the investigation” with SDPD and other components of DHS.²⁹ The BPCIT participated in incident briefings, controlled the witness lists of border agents for police investigators, and were present at police interviews of witnesses, including agents.³⁰ The BPCIT members even asked questions of witnesses like Anastasio’s brother.³¹ Members of the BPCIT were also present at the hospital where Anastasio was brought and at the autopsy, where BPCIT members took pictures for their own purposes.³²
- (3) The BPCIT tampered with evidence, specifically they altered the I-213 Border Patrol apprehension report, removing the narrative of the border agent who first came into contact with Anastasio, before giving the report to SDPD.³³ The narrative indicated that Anastasio was compliant, and it did not indicate any agent concerns; had the narrative been included in the I-213 given to police, it would have contradicted subsequent statements that the agent made to police investigators painting a picture of an erratic and problematic Anastasio.³⁴ The latter fed into a narrative that he was aggressive, non compliant, and on drugs even though other testimony contradicted that view and Anastasio’s brother emphatically stated he was not on drugs.³⁵
- (4) Soon after Anastasio arrived at the hospital and before SDPD became aware of the case, the BPCIT talked to the attending doctor and asked him to take a blood sample

²⁵ *Id.* at 489.

²⁶ *Id.* at 10.

²⁷ *Ibid.*

²⁸ *Id.* at 335.

²⁹ *Id.* at 10.

³⁰ *Id.* at 169-176, 191-204, 217-222, 227-229, 232-234, 248-250, 261-267, 269-273, 309-311, 315-316, 476.

³¹ *Id.* at 249.

³² *Id.* at 315; Letter Exhibit C, County of San Diego Autopsy Report, southernborder.org/letter_exhibits.

³³ The original version of the I-213 contains a narrative from Border Patrol agent Nicholas Austin that recounts his encounter with Anastasio Hernández Rojas, and states that he responded to his questions. The narrative does not express any concerns or problems. The I-213 with the narrative appears in the CIIT report for Case# 100528F1 CHU, which was acquired by journalist John Carlos Frey. It is under a protective order. It cannot be shared as an exhibit, but it could be subpoenaed by Congress. The version of the I-213 without the narrative is included in the SDPD investigation report in Letter Exhibit B, SDPD Report, at 487.

³⁴ See SDPD interview with BP agent Nicholas Austin in Letter Exhibit B, SDPD Report at 169. Note that CIIT member Victor Garcia was also present at the interview.

³⁵ Letter Exhibit B, SDPD Report, at 248-250.

to test for drugs.³⁶ Hospital records show that the hospital did so, but the records do not show any results.³⁷ The one blood test for which the hospital records do show results state that there were “no drugs detected.”³⁸ The Medical Examiner relied on a different blood sample, one that does not correspond to any blood drawn in the hospital records and has no chain of custody, to determine that Anastasio had meth in his body.³⁹ It was this determination that led the Justice Department to decline to prosecute for murder.⁴⁰ This raises serious questions about BPCIT interference.

- (5) In a blatant effort to obstruct justice, the BPCIT also “served an administrative subpoena” on the hospital for Anastasio’s medical records and then “refused to provide SDPD investigators with a copy of the records.”⁴¹ Use of an administrative immigration subpoena for a criminal homicide investigation is inappropriate at best, and doing so to delay an authorized investigative agency from obtaining it may constitute grounds for prosecution.⁴² The subpoena was prepared at the direction of the U.S. Border Patrol Chief Michael Fisher⁴³ and would have been overseen, if not signed, by the acting chief of the San Diego sector at the time, Rodney Scott.⁴⁴
- (6) Additionally, the BPCIT failed to preserve video evidence. Over several weeks, in an act of deliberate omission that led to the destruction of evidence, BPCIT members repeatedly withheld video surveillance footage requested from SDPD and instead gave SDPD footage that did not pertain to the incident, while allowing the requested footage to be erased and taped over.⁴⁵ According to the record, the footage was sent to Sector Command soon after the incident and then given to the BPCIT.⁴⁶ When SDPD requested it, the BPCIT gave them the wrong hour of footage, then denied having any additional footage, ultimately indicating it had been recycled.⁴⁷ SDPD investigators sought the video because it “could potentially identify additional witnesses.”⁴⁸

³⁶ Statement of Joe Vaiasuso included in the CIIT report for Case# 100528F1.CHU, acquired by journalist John Carlos Frey, which is not included as an exhibit because it is under a protective order, but it could be subpoenaed by Congress. See also Letter Exhibit B, SDPD Report at 26, discussing Vaiasuso’s presence at the hospital and his collection of evidence, including the taser probes removed from Anastasio’s body. The probes were given to SDPD in an unsealed bag the next day without an established chain of custody. *Id.* at 116.

³⁷ The hospital ordered blood drawn for a drug screen on May 28, 2010, at 23:46. *Id.* at 647. The blood was drawn at 23:50. *Id.* at 584.

³⁸ *Id.* at 589.

³⁹ The toxicology test that the Medical Examiner used to determine that Anastasio had meth in his system is based on two blood draws at 22:19 and 23:19 on May 28, 2010. See Letter Exhibit C, Autopsy Report at 18, southernborder.org/letter_exhibits. The hospital does not show a draw at 22:19, but it shows a draw at 22:20, which it determined to be an unacceptable specimen. See Letter Exhibit B, SDPD Report at 588. The hospital shows no record of a draw at 23:19; the next draw was at 23:50. *Id.* at 574.

⁴⁰ See <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-anastasio-hernandez-rojas>.

⁴¹ “Citing HIPAA regulations and their department policy, Border Patrol refused to provide investigators with a copy of the records.” Letter Exhibit B, SDPD report, at 19.

⁴² This could constitute obstruction of justice under 18 U.S.C. § 1512. See Additional Observations, IACHR Case No. 14.0-42, Exhibits D, at paragraph 32, and E, at paragraph 84. It could also constitute a violation of the 4th Amendment. Under the Fourth Amendment’s reasonable requirement standard for administrative subpoenas; an immigration subpoena may not be overbroad in scope, irrelevant and improper in purpose. See *v. City of Seattle*, 387 U.S. 541, 544 (1967).

⁴³ See Additional Observations, IACHR Case No. 14.0-42, Exhibit E, at 20.

⁴⁴ Although reference to the subpoena is made in the SDPD investigators report, the subpoena itself on form I-138 is not in the record. It could be subpoenaed by Congress to confirm who authorized it.

⁴⁵ See Letter Exhibit B, SDPD report, at 459-462, 466-470.

⁴⁶ *Id.* at 468.

⁴⁷ *Id.* at 466-468.

⁴⁸ *Id.* at 467.

- (7) Finally, the BPCIT gave information to the defense attorneys for border agents that was not given to SDPD for its investigative record. Specifically, the BPCIT in San Diego prepared a 160-page incident report, which was shared with the attorneys who defended border agents, but it was never made part of the SDPD report for prosecutors to review.⁴⁹

These are the revelations evident in the available documents. There may be additional revelations of problematic BPCIT activity in their internal records and/or in their communication with the Border Patrol chiefs who directed their activity. It is not evident that SDPD, FBI, or OIG scrutinized any obstruction of justice. But the harm was done — a family was left without justice, a community was left without answers, and the public continues to be at risk of abuse covered up by the BPCITs.

Instead of the BPCIT being scrutinized for their unauthorized, problematic, and potentially criminal involvement in the homicide investigation, members of the San Diego BPCIT and the acting chief who oversaw them were rewarded and promoted into positions of power. The most notable among them is Rodney Scott who went on to become the U.S. Border Patrol Chief with oversight of the BPCITs throughout the country.

The role that the BPCIT played in the Anastasio case was not isolated. Rather, it was part of a system of impunity that has rarely, if ever, been questioned. The case examining Anastasio's death that is pending before the Inter-American Commission on Human Rights is expected to go to a hearing in 2022. BPCITs have drawn the attention of the international community and their actions compel examination inside the United States. Congress must not disregard BPCIT's dangerous record of overreach and obstruction.

III. BPCITs exacerbate the impunity of border agents while abuse continues unabated.

SBCC has documented over 150 deaths resulting from encounters with border agents since 2010.⁵⁰ The actual number might be significantly higher. According to a 2020 Government Accountability Office (GAO) report, CBP does not have reliable information on deaths and “has not consistently reported deaths of individuals in custody to Congress.”⁵¹ Apart from deaths, abuse is rampant. As documented in a 2011 report, border agents physically abuse one in ten people in their custody.⁵² Just last week, Human Rights Watch revealed internal DHS complaints filed by USCIS asylum officers of egregious abuses committed by border agents that have gone unchecked, including physical abuse and sexual assault of children.⁵³ According to CBP data, agents have been involved in an average of over 500 use-of-force incidents a year for the past five years with a record number of incidents in 2021.⁵⁴

⁴⁹ See Letter Exhibit D, Declaration of Richard Tolles in Support of Motion for Stay at 2. The missing report is Case# 100528F1.CHU, southernborder.org/letter_exhibits.

⁵⁰ See data compiled by SBCC: https://www.southernborder.org/deaths_by_border_patrol.

⁵¹ See GAO report, *CBP Needs to Increase Oversight of Funds, Medical Care, and Reporting of Deaths* (July 2020), at 3, <https://www.gao.gov/assets/gao-20-536.pdf>.

⁵² See No More Deaths, *Culture of Cruelty* (2011), <https://nomoredeaths.org/wp-content/uploads/2014/10/CultureOfCruelty-full.compressed.pdf>.

⁵³ See <https://www.hrw.org/report/2021/10/21/they-treat-you-you-are-worthless/internal-dhs-reports-abuses-us-border-officials>.

⁵⁴ See CBP data on Use of Force for 2017-2021, <https://www.cbp.gov/newsroom/stats/assaults-use-force>.

Despite the magnitude of harm, few border agents are held accountable. In fact, not a single agent has been successfully prosecuted for use of force on duty that ended in death. Not a single one in the nearly 100 years that Border Patrol has existed. *Zero*.

Moreover, administrative discipline is rare. In 2014, in an effort to earn the public trust and as a direct response to the outcry over the killing of Anastasio, CBP established the National Use of Force Review Board (NUFRB) “to review use of force incidents resulting in serious physical injury or death, or any incident involving the discharge of a firearm.”⁵⁵ The earliest incident they reviewed was Anastasio’s case, concluding that the use of force “was in compliance” with policy.⁵⁶ To date, the NUFRB has only reviewed 28 cases, and has not reviewed any in the last five years, since January 2017.⁵⁷ In all but two cases (which did not result in death), NFURB found that agents were in compliance with policy.⁵⁸

The fact that no agent has been held accountable for a killing and few have been held accountable for abuse, even in the face of damning evidence, is not accidental. It is by design. The BPCITs play a pivotal role in protecting agents at the expense of the public. Moreover, other agencies rely on these unauthorized investigations. For example, the FBI cited a BPCIT report in recommending that no further investigation be done in a deadly shooting of a migrant for allegedly throwing a rock, even though the statement of another border agent contradicted the shooter.⁵⁹

In an extensive review of use-of-force cases over several years ending in 2013, the *Arizona Republic* found repeated instances in which eyewitness testimony and evidence directly contradicted agents’ statements made to justify their use of force.⁶⁰ When asked by reporters at the time, the Department of Justice was not able to point to a single one of those cases in which it had recommended civil or criminal charges against a border agent who killed in the line of duty.⁶¹

Since then, the DOJ has brought charges against the agent who killed Jose Antonio Elena Rodriguez, a teenager shot 10 times in Mexico by an agent from the U.S. side of the border for allegedly throwing rocks in 2012. The jury acquitted the agent, in part because the evidence was faulty.⁶² At trial, it was revealed that the BPCIT collected all the evidence for the FBI, including the gun used, the shell casings, the photos of the scene, and the rocks allegedly thrown.⁶³ This is alarming, given their lack of authority. The BPCIT investigator at trial described the role of his team as follows:

The Critical Incident Team, basically we went out and did a third-party investigation for the Border Patrol. We investigated and collected forensic data in regards to shootings, uses of

⁵⁵ See <https://www.cbp.gov/newsroom/stats/cbp-use-force/case-summaries>.

⁵⁶ See <https://www.cbp.gov/newsroom/stats/cbp-use-force/case-summaries/may-28-2010-use-force-incident-san-ysidro-port-entry-san>.

⁵⁷ See <https://www.cbp.gov/newsroom/stats/cbp-use-force/case-summaries>.

⁵⁸ *Ibid.*

⁵⁹ See <https://www.azcentral.com/story/news/arizona/2014/03/28/arizona-border-force-deadly-incidents/7013023/>.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² See

https://tucson.com/news/local/jurors-on-opposite-sides-was-agent-stopping-threat-or-lethally-over-reacting/article_95e3c6bd-101f-5487-9c3f-752640ce5a9b.html.

⁶³ See Letter Exhibit H, Court Transcript in Trial of Lonnie Swartz, at 47, southernborder.org/letter_exhibits.

force incidents, collisions, things like that. Anything that the Border Patrol deemed to be critical and there might be some media attention or somebody was hurt, injured, or killed.⁶⁴

At trial, it was further revealed that the evidence had been corrupted thoroughly. For example, agents drove through the scene of the incident before it was secured, they walked through the shell casings before they were collected, and they never collected DNA on the rocks that were allegedly thrown and which the agent used to justify the shooting.⁶⁵ Former CBP Assistant Commissioner for Internal Affairs Tomscheck later stated that this case was “a good example of BP injecting false information or manipulating information to give the impression that this was a good shoot.” Border Patrol spun a story and they erased original video surveillance that would tell otherwise.⁶⁶

Interference by BPCITs is evident in a number of cases, the most recent of which is the case of Marisol Garcia Alcantara who was nearly killed this year and survived to tell about it. On June 16, 2021, Marisol was sitting in the backseat of a car, when she was shot in the head by a Border Patrol agent in Nogales, Arizona. Miraculously, she survived, and she recalls that the driver of her car had stopped moments before a border agent fired a gun.⁶⁷ Marisol was taken to a hospital where doctors operated, but they were not able to remove all of the bullet fragments.⁶⁸ Because she did not have documents to remain in the country, she was detained and then deported to Mexico, where she suffers from the effects of the shooting, stating to the media,

I don't know what type of surgery they did, I wasn't given any medical records, not even my deportation paperwork ... [but in Mexico] they told me I have fragments of metal from the bullet still in my head and that there's a 70 to 100% chance I will suffer epileptic seizures throughout my life.⁶⁹

According to the Nogales Police Department (NPD) incident report, a Border Patrol supervisor told the NPD officer who responded to the scene that “they had a fail to yield with the Kia, and one shot was fired.”⁷⁰ When the police officer asked for more information, the Border Patrol supervisor stated that was all he could say and did not provide NPD with any more information.⁷¹ The incident report then goes on to say that NPD assisted with traffic control and “stayed on the scene until the arrival of the Border Patrol CIT team and Federal Bureau of Investigations.”⁷²

Under any standard, shooting to kill is an inappropriate response to a car failing to yield, if in fact the car failed to yield. For example, the 2021 CBP policy prohibits firing a gun at a moving vehicle, even if it is fleeing, unless doing so is necessary to prevent imminent bodily harm to the agent or another person.⁷³ No such danger was evident in the NPD report. The fact that a gun was fired and Marisol was shot should have triggered an immediate investigation by NPD that included preservation of evidence and interviews with the agent who fired the shot, the witnesses, and Marisol herself.

⁶⁴ *Id.* at 8-9.

⁶⁵ *Id.* at 61-83.

⁶⁶ Additional Observations, IACHR Case No. 14.0-42, Exhibits D, at paragraph 36. See also news report on Border Patrol's admission that they erased original video, <https://www.azcentral.com/story/news/arizona/2014/03/28/arizona-border-force-deadly-incidents/7013023/>.

⁶⁷ See <https://www.abc15.com/news/state/why-me-woman-allegedly-shot-in-the-head-by-a-border-patrol-agent-speaks-out>.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ See Letter Exhibit E, Nogal Police Department report, at 4, southernborder.org/letter_exhibits.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ See 2021 CBP Use of Force Policy, at 9, https://www.cbp.gov/sites/default/files/assets/documents/2021-Jul/cbp-use-of-force-policy_4500-002A.pdf.

But the NPD did not conduct an independent investigation into the shooting. Ten NPD officers responded to the incident, but not a single one investigated, according to their own report.⁷⁴ They left that to the BPCIT, although the unit lacks criminal investigative authority, and to the FBI, which allowed BPCIT to collect the evidence in the prior Jose Antonio Elena Rodriguez case, and may have done so here as well. When asked for a statement by the media, the FBI responded that, “The FBI and U.S. Customs and Border Protection are conducting a joint investigation into the matter.”⁷⁵

When CBP was asked for a statement, they responded that the “use of force investigation falls under CBP’S Office of Professional Responsibility (OPR),” which principally handles matters of administrative misconduct rather than criminal misconduct.⁷⁶ They did not name BPCIT or identify what role they played.⁷⁷ It should be noted, once again, that BPCITs do not have any formal authority to engage in investigations or even to augment them; their stated purpose of protecting agents from civil liability is not neutral. Moreover, best practices call for independent and external investigations,⁷⁸ which is not possible when BPCITs are involved in investigations of their own agents.

According to CBP, “the investigation will include a comprehensive review of the incident leading to the facts and circumstances being presented before CBP’s National Use of Force Review Board (NUFRB).”⁷⁹ But as noted above, NUFRB has not been an effective or timely tool for reviewing cases and does not appear to have reviewed use of force incidents in the last five years.

In the meantime, Marisol was never interviewed by a police investigator.⁸⁰ Instead, she was interviewed by Border Patrol agents at the hospital and then in a detention center, before being deported.⁸¹ To her knowledge, none of the other passengers in the car who were witness to the shooting were interviewed by police officers or questioned about the shooting; they were only questioned by Border Patrol agents about their legal status and their arrival.⁸² It is not evident that any agent was ever questioned or scrutinized by an authorized criminal investigator for possible criminal misconduct.

From Anastasio’s killing in 2010 to Marisol’s shooting in 2021, the BPCITs have operated in the shadows to conduct investigations without legal authority. They have overreached and obstructed justice to protect agents at the expense of the public. They have operated largely out of view, including from Congress, and have enabled Border Patrol agents to act with impunity and get away with murder of migrants and U.S. citizens alike, and of men, women and children. It is imperative that Congress bring BPCITs into the light to examine the harm they are causing to public safety and to the credibility and integrity of the federal government.

⁷⁴ See Letter Exhibit E, Nogal Police Department report.

⁷⁵ See <https://www.abc15.com/news/state/why-me-woman-allegedly-shot-in-the-head-by-a-border-patrol-agent-speaks-out>.

⁷⁶ Pursuant to 2004 DHS Management Directive 0810.1, OIG has the right of first refusal. OPR should not investigate until OIG declines / passes. <https://www.oig.dhs.gov/sites/default/files/0810.1%20The%20Office%20of%20Inspector%20General.pdf>.

⁷⁷ CBP further stated that “the investigation will include a comprehensive review of the incident leading to the facts and circumstances being presented before CBP’s National Use of Force Review Board (NUFRB).” It should be noted that the last time NUFRB completed a review was nearly five years ago. <https://www.cbp.gov/newsroom/stats/cbp-use-force/case-summaries>.

⁷⁸ President’s Task Force on 21st Century Policing, Final Report of the President’s Task Force on 21st Century Policing, at 21 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

⁷⁹ <https://www.abc15.com/news/state/why-me-woman-allegedly-shot-in-the-head-by-a-border-patrol-agent-speaks-out>.

⁸⁰ Interview with Marisol Garcia Alcantara (Oct. 6, 2021).

⁸¹ *Ibid.*

⁸² *Ibid.*

IV. BPCITs operate in the shadows, undermining public safety and trust. That must end.

Trust in the federal government is built on transparency and accountability. BPCITs represent neither. BPCITs are not visible in government documents available to the public. They are not recognized by federal statutes or regulations. They are not in the organizational charts of DHS or CBP.⁸³ They are not included in the expansive list of *DHS Acronyms, Abbreviations, and Terms (DAAT)*, even though other Border Patrol components are listed like BORSTAR and BORTAC.⁸⁴ They are not mentioned in any public CBP documents. There is no visibility, no transparency.

Congressional action has drawn the BPCITs into the light once before, if only briefly. Following the killing of Anastasio Hernández Rojas and other border residents, members of Congress called for an investigation into CBP use of force.⁸⁵ This prompted an audit by the Police Executive Research Forum (PERF), in which the auditors noted that the 2010 CBP Use of Force Policy Handbook, which was not publicly available, made reference to a “Critical Incident Team (CIT) that may initiate a *parallel* investigation into an incident.”⁸⁶ The PERF report stated, “There is no other definition or description of a CIT,” and recommended, “[s]uch information should be added to the Handbook.”⁸⁷ Although the Handbook was updated as a result of the audit and subsequently made public, the reference to BPCITs disappeared.⁸⁸

No reference is made to BPCITs in the most recent 2021 *CBP Use of Force - Administrative Guidelines and Procedures Handbook*.⁸⁹ Instead, the *Handbook* states, “Any use of force incident involving CBP employees may be reviewed and/or investigated by the appropriate federal, state, or local law enforcement agencies.”⁹⁰ The BPCITs are not mentioned. But the PERF audit made plain that BPCITs do exist and they are conducting shadow investigations.

As discussed above, the BPCITs do not act on their own. They answer to Border Patrol chiefs. They are often the first to appear at a use-of-force incident implicating a border agent. They involve themselves in investigations from start to finish and mishandle evidence. They interrogate witnesses. They even extract confessions from the victims of use of force that are used against them.⁹¹ And they make judgements about culpability, all without the legal authority to conduct criminal investigations.⁹²

⁸³ See DHS org chart, https://www.dhs.gov/sites/default/files/publications/19_1205_dhs-organizational-chart.pdf, and CBP org chart, <https://www.cbp.gov/document/publications/cbp-organization-chart>.

⁸⁴ See <https://www.dhs.gov/terms>.

⁸⁵ See media report on the outcry that followed the airing of eyewitness video in the Anastasio Hernández Rojas case, <https://www.typeinvestigations.org/blog/2012/10/19/story-sparks-oig-investigation/>. See also the letter signed by sixteen members of Congress on May 10, 2012, calling for an investigation of CBP, <https://www.typeinvestigations.org/wp-content/uploads/2016/09/DoJLetter-holder.pdf>.

⁸⁶ See PERF audit recommendations at page 14, <https://www.cbp.gov/sites/default/files/documents/PERFReport.pdf>.

⁸⁷ *Ibid.*

⁸⁸ See, e.g., *CBP Use of Force - Administrative Guidelines and Procedures Handbook (January 2021)*, https://www.cbp.gov/sites/default/files/assets/documents/2021-Jul/cbp-use-of-force-admin-guide-procedure-handbook_4500-002B.pdf.

⁸⁹ See *CBP Use of Force - Administrative Guidelines and Procedures Handbook (January 2021)*, https://www.cbp.gov/sites/default/files/assets/documents/2021-Jul/cbp-use-of-force-admin-guide-procedure-handbook_4500-002B.pdf.

⁹⁰ *Id.* at 26.

⁹¹ In 2009 in Arizona, Jaime Martinez-Garcia was shot by a Border Patrol agent for allegedly throwing a rock. Shortly thereafter, he was interrogated jointly by a BPCIT agent and an FBI agent who could only communicate through the BPCIT agent who spoke Spanish with Martinez-Garcia. The agents extracted a signed confession from Mr. Martinez-Garcia that he threw a rock before he was shot, which was counter to what he told the first border agent he spoke with when he emerged from his surgery. The confession was used to prosecute him in federal court. See 2010 WL 11474435, https://drive.google.com/file/d/1Wi778QPKkF3o7HzfTcFA_3s40Pca7GJS/view.

⁹² See <https://www.azcentral.com/story/news/arizona/2014/03/28/arizona-border-force-deadly-incidents/7013023/>.

Their actions to corrupt evidence, tamper with witnesses, and interfere with investigations undermine the pursuit of truth and justice. The very purpose of BPCITs — to protect Border Patrol and its personnel from civil litigation — works at cross purposes with legitimate law enforcement investigations into criminal misconduct of border agents. Nevertheless, the BPCITs encroach on authority that the FBI, OIG, and local law enforcement agencies have to conduct investigations.

BPCITs are not recognized as an occupation in the federal government.⁹³ In fact, Border Patrol agents are classified as “1896” personnel whose positions are limited to the “detection, interdiction, and apprehension of those who attempt to illegally enter or smuggle any person or contraband across the nation’s borders.”⁹⁴ Agents do not have general law enforcement authority like police do, but rather specific authority limited by federal authority.⁹⁵ Border Patrol agents are not classified as “1811” personnel whose positions involve “planning, conducting, or managing investigations related to alleged or suspected criminal violations of federal laws.”⁹⁶ That classification is reserved for authorized investigative personnel such as FBI and OIG investigators.⁹⁷

Despite not being recognized within the OPM classification system, participation in the BPCITs is considered internally, within Border Patrol, for promotion, which speaks to the value of BPCITs to leadership in protecting the agency from scrutiny. The current promotion assessment tool used by the agency asks a candidate, “Have you performed Sector Evidence Team/Critical Incident Team/Evidence Collection Team collateral duties or special assignments?”⁹⁸ Promotion is based in part on these kinds of “specialized experiences” even while there is no education requirement, at all, for a promotion to supervisor or other top positions with pay that begins at close to \$90,000.⁹⁹

The ongoing informal use of BPCITs as an illegitimate investigative arm of Border Patrol chiefs is disturbing. There is no legitimate role that BPCITs play in an investigation. As discussed above, they do not have general law enforcement authority. And they are not internal affairs units. That is the role of OPR, which has its own investigators. In the words of former CBP Assistant Commissioner Tomscheck, “There is no circumstance in which it is appropriate for OPR to rely on the Border Patrol CITs for an investigation, administrative or otherwise. They have their own investigators.”¹⁰⁰

The only purpose BPCITs play is to protect agents from legitimate investigations into their potential abuse of power and/or excessive use of force. That does not exist in other law enforcement agencies and should not exist at Border Patrol. Former CBP Deputy Assistant Commission Wong states it squarely:

⁹³ For a complete listing of OPM codes, see <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/#url=O>.

⁹⁴ See *OPM Handbook of Occupational Groups and Families* (December 2018), at 113.

⁹⁵ Border Patrol authority is granted in 6 U.S.C. § 211(e)(3), and is limited to the interdiction of people and goods entering illegally between the ports of entry.

⁹⁶ *Id.* at 109.

⁹⁷ See 1811 criminal investigator positions available: <https://www.usajobs.gov/Search/ExploreOpportunities/?series=1811&sort=enddate&page=1>.

⁹⁸ See Border Patrol Promotional Promotional Assessment questionnaire, question 126. <https://apply.usastaffing.gov/ViewQuestionnaire/10536691>.

⁹⁹ See job posting for Border Patrol promotions to GS 13-15 (top level positions like supervisors), <https://www.usajobs.gov/GetJob/ViewDetails/538295600>.

¹⁰⁰ Interview with James F. Tomscheck, October 21, 2021.

The purpose of an investigation is to collect the facts, regardless of whether they are exculpatory or not. Investigators should never set out to mitigate liability. That is inappropriate. Given that Border Patrol CITs have worked to mitigate instead of collect facts leading to the truth shows that they are a questionable management tool, not a legitimate investigative tool. As such they should be abolished.¹⁰¹

The overreach of the BPCITs is profound. The scale of their unlawful behavior jeopardizes public safety and public trust. And the fact that they have been able to operate for decades without scrutiny is alarming. As Border Patrol's primary tool to shield agents from accountability, the BPCITs must be called into question by Congress.

V. Congressional investigations and oversight hearings would serve to check the overreach of Border Patrol and expose the unlawful activities of BPCITs.

Congress has a constitutional role in performing oversight of the Executive Branch, which includes accessing documents and testimony for accountability. Congressional investigations and oversight are critical to a functioning democracy and are warranted here with respect to BPCITs.

There is no place for rogue law enforcement in a democracy. Yet the BPCITs have operated as just that, perpetuating impunity at Border Patrol, part of the largest law enforcement agency in the country. They have done so since at least 1987, for nearly 35 years. BPCITs may be the longest standing shadow police units operating in the federal government today.

Congressional committees can play a pivotal role in shutting down these units. The Senate Committee on Commerce, Science & Transportation is an excellent example. In February 2021, the Committee launched an investigation into the alleged misconduct of the Investigations and Threat Management Service (ITMS) at the Department of Commerce for improper activities dating back to the mid-2000s.¹⁰² The misconduct included unauthorized investigations targeting Asian Americans.¹⁰³ In July 2021, the Senate Committee reported its findings, that for sixteen years, the ITMS had operated without proper authority or meaningful oversight.¹⁰⁴ "The unit regularly disregarded the rule of law, committing gross abuses of power and misusing taxpayer funds to perform missions the unit lacked authorization to undertake."¹⁰⁵

The Senate Committee recommendations following the investigation may be pertinent here. The Committee recommended to the Department of Commerce that, among other things, it evaluate the future of ITMS, conduct a review of all adverse actions resulting from the activities of ITMS, and conduct a review of closed cases, including potential referral of criminal misconduct to the appropriate prosecutorial authorities.¹⁰⁶

¹⁰¹ Interview with James Wong, October 22, 2021.

¹⁰² See Committee Investigation Report, *Abuse and Misconduct at the Commerce Department* (July 2021), at 2. <https://www.commerce.senate.gov/services/files/3893917C-A6CE-4D6C-AA9D-781401322BF3>.

¹⁰³ *Ibid.*

¹⁰⁴ *Id.* at 36.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Id.* at 37-38.

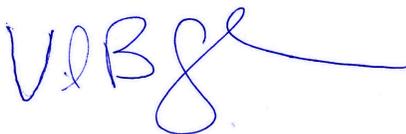
Because the ITMS had claimed it was delegated authority by the U.S. Marshals, the Senate Committee also called on the Department of Justice to conduct a thorough review of policies and procedures governing the Special Deputation program to improve oversight and prevent future abuse.¹⁰⁷ That serves as a good example for your committees to address any claims made by the BPCITs that they have been delegated authority to augment investigations, but have yet to provide evidence of a formal delegation consistent with federal law and policing best practices that call for independent and external investigations.

In September 2021, the Department of Commerce reported that it had accepted the Senate Committee's recommendations and eliminated ITMS.¹⁰⁸ The activities of BPCITs are more egregious and far reaching. The BPCITs have operated for longer and have allowed border agents to get away with nearly everything, including murder. The danger of abusive and unaccountable federal agents who operate outside of the law cannot be understated. We respectfully request that your committees conduct investigations and oversight hearings as soon as possible.

Congressional investigations and oversight hearings by your committees should seek to answer the following questions:

1. Under what authority do BPCITs operate and become involved in investigations of use of force; what policies and procedures regulate their activities; and what is their relationship with other law enforcement agencies, including local police, FBI, OIG, and OPR?
2. What oversight and accountability mechanisms are in place to assess misconduct by the BPCITs including administrative and criminal misconduct; and what steps has the Department of Justice taken previously to assess possible charges for obstruction of justice?
3. What cases have been adversely affected by the involvement of BPCITs; what is the extent of harm caused by BPCITs; and which cases should be reexamined, investigations reopened, and prosecutions of BPCIT agents and their supervisors and chiefs considered?

Respectfully,



Vicki B. Gaubeca
Director, Southern Border Communities Coalition



Andrea Guerrero
Executive Director, Alliance San Diego

Letter exhibits: southernborder.org/letter_exhibits

Cc: Nancy Pelosi, House Speaker
Steny Hoyer, House Majority Leader
Kevin McCarthy, House Minority Leader

Charles Schumer, Senate Majority Leader
Mitch McConnell, Senate Minority Leader

¹⁰⁷ *Id.* at 38.

¹⁰⁸ See U.S. Department of Commerce, *Report of the Programmatic Review of the Investigations and Threat Management Service* (Sep 3, 2021), <https://www.commerce.gov/sites/default/files/2021-09/20210903-ITMS-Report.pdf>.