

LAW ENFORCEMENT AT THE BORDER: Staffing, Corruption, and Oversight

Jeremy L. Neufeld

Immigration Policy Fellow

Niskanen Center

May 16, 2018

INTRODUCTION

Illegal immigration may be down and illegal border crossings down even more, but border security remains at the forefront of the political discussions surrounding immigration. At the center of the border-security strategy of the United States are the law enforcement personnel of U.S. Customs and Border Protection (CBP). Policymakers must consider both the target level of law enforcement agents at the border as well as the feasibility of reaching that target. As the number of agents has massively expanded, so too has the difficulty of maintaining that staff. In addition, policymakers must consider what integrity measures and oversight are necessary to combat corruption and abuse at the border. This brief examines those questions. Section I looks at staffing the border. It examines the history of the growth of the Border Patrol (the CBP's "boots on the ground"), the diminishing returns to new agents, and attempts to augment law enforcement at the border with the National Guard. Section II looks at corruption and abuse at the border, as well as attempts to combat that corruption. Section III makes recommendations about both staffing and anti-corruption policy.

I. STAFFING

A. United States Border Patrol

CBP is the largest law enforcement agency in the United States. The nearly 20,000 agents of the Border Patrol make up one third of CBP's staff. The Border Patrol is tasked with securing the borders of the United States from illegal crossings between ports of entry.

The Border Patrol was not always as big as it is today. Originally part of the Immigration and Naturalization Service until the INS was supplanted by CBP when the Department of Homeland Security was founded in 2002, the Border Patrol has historically been quite small compared to today. Until 1978, the Border Patrol had fewer than 2,000 agents to patrol thousands of miles of the U.S. borders. The lengths of the borders have not grown, but the agency has grown more than tenfold since then.

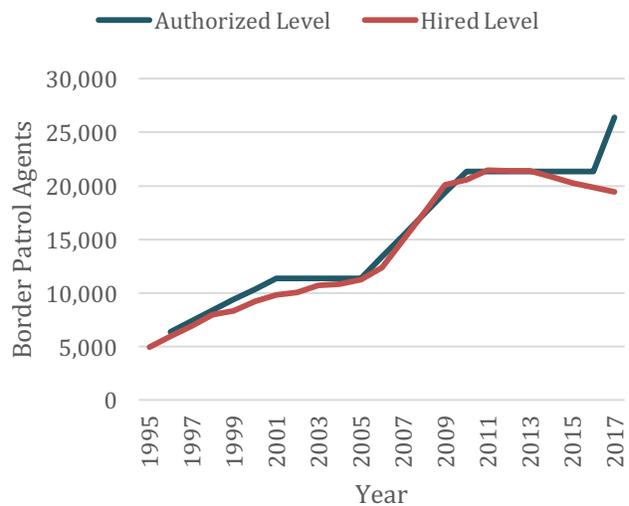
Congress doubled the Border Patrol's staff with the passage of the Immigration Reform and Control Act in 1986, the first modern surge at the agency. But the Border Patrol still remained less than 5,000-strong. Then, in 1996, Congress authorized another surge to take place from 1997-2000, swelling the ranks by up to 1,000 agents a year for five years, and to deploy the entire force at the border rather than having some agents in the interior of the country.¹ After 9/11 and the reorganization of U.S. border security, another surge followed from 2006-2010, increasing the authorized levels of Border Patrol agents by 10,000 over five years. In 2017, President Trump announced that staff would surge again, increasing the authorized level of agents by 5,000.

With the latest call for more Border Patrol agents, for perhaps the first time, the feasibility of a proposed surge is being questioned. In recent years, CBP has had trouble even maintaining the Border Patrol at its present size, let alone expanding it. For

six consecutive years, the agency has shrunk, the largest absolute staffing decline in its history and the longest decline since at least 1975, where our records begin. In fact, 2012, when the downturn began, was the first year the Border Patrol had not increased in size since the early 1990s. This contraction isn't for lack of trying. Not only is employee attrition high, new hiring cannot keep up. There are too few applicants given the approval rate and existing employees do not stay long enough. The result is difficulty in staffing even the presently authorized level of Border Patrol agents, let alone a higher level.

See the figure below for the difference between authorized and actual staffing.

Border Patrol Staffing



Source: U.S. Customs and Border Protection

Proponents of the surge are critical of the slow hiring of recent years. They point to anti-corruption measures as the major obstacles to the surge and argue they could be relaxed (more on this in Sections II and IIIa). But before considering the potential costs of various proposals to spur hiring,

¹ Chad C. Haddal, [Border Security: The Role of the U.S. Border Patrol](#), CRS Report for Congress, RL32562

(Washington, D.C.: Congressional Research Service, 2010).

let's look at the potential benefits of the surge in the first place. What is to be gained by having 5,000 more Border Patrol agents?

Sheer manpower is doubtless one factor in reducing illegal border crossings. All else being equal, the more Border Patrol agents there are, the fewer illegal crossings will be successful. A reduction in illegal crossings is driven both by a greater number of attempts being thwarted and by a deterrent effect that reduces the number of attempts made. This deserves some caveats, however. First, illegal crossings are not a perfect proxy for illegal immigration. Most of new illegal immigration today is the result of aliens entering legally but overstaying their visas. Second, higher security at the border may mean greater apprehensions, but it also means undocumented migrants who intend to return across the border when, for example, the growing season ends, may choose to stay in the United States permanently. Increased border enforcement has reduced the return rate of Mexican migrants.² But with those caveats, it is still true that more Border Patrol agents will likely lead to more illegal border-crossing attempts being foiled.

However, while we can confidently say that the effect of the number of agents on apprehensions is positive, the size of that effect is very small and faces steep diminishing returns. In other words, the benefit of adding yet another agent gets smaller as the size of the existing force grows. Looking at data from 1975-1995—before two major surges which quadrupled the size of the Border Patrol—one study found that it took three to four additional person-hours of policing the border to make one additional apprehension.³ But that return on manpower has dropped precipitously. Over the 1975-1995 period, the Border Patrol made 354 apprehensions per agent on average. Today, with a much larger baseline force, not to mention

² Douglas S. Massey, Jorge Durand, and Karen A. Pren, "Border Enforcement and Return Migration by Documented and Undocumented Mexicans," *Journal of Ethnic and Migration Studies* 41, no. 7 (Dec. 2014): 1015-1040.

new technology, the Border Patrol makes fewer than 20 apprehensions per agent—less than 5 percent of its old efficiency rate. To be clear, this drop is not entirely attributable to the increase in the size of the Border Patrol, it is also driven by a secular decline in illegal immigration, governed more by push/pull factors like economics and violence than by border security efforts. However, whatever the relative roles of the various causes, it suffices to say that greater investment in Border Patrol personnel has a much lower return than it has had in the past. The figure below illustrates this reduction in efficiency.

The Diminished Returns to More Border Agents



Source: U.S. Customs and Border Protection

Border Patrol agents are a necessary component of any effective border-security strategy, but at present levels of staffing and illegal border-crossing, the gains from additional agents are minimal. Further, those minimal gains are attenuated by systematic corruption at the U.S.

³ Gordon H. Hanson and Antonio Spilimbergo, "Illegal Immigration, Border Enforcement, and Relative Wages: Evidence from Apprehensions at the U.S.-Mexican Border," *American Economic Review* 89, no. 5 (Dec. 1999): 1337-1357.

border, a problem that is exacerbated in hiring surges, as discussed in Section II. In any case, presently, CBP has been tasked with expanding the size of the Border Patrol, which will doubtless prove difficult. In the meantime, while authorized levels far exceed current staff, the National Guard has been called to step in.

B. Augmenting Border Staff: The National Guard

National Guard troops have been used to augment the staff at the border various times since 1988. While this practice has most recently stirred controversy under the Trump administration, National Guard troops are expressly authorized to support federal law enforcement agencies, and border security in particular, under Titles 10 and 32 of the U.S. Code, though they remain under the command of the governors rather than the president.⁴

Under Operation Jump Start in 2006, President Bush oversaw the deployment of over 6,000 troops at the border, technically under the command of Southwestern governors, to augment Border Patrol staff as a hiring surge took place. As Border Patrol's own staff grew, the size of the National Guard contingent was diminished until it was entirely withdrawn in mid-2008. Then, in 2010, President Obama oversaw the deployment of 1,200 troops to the border in response to calls from Southwestern governors but cut that number back to 300 in 2012 and withdrew them by the end of 2013.⁵ The period 2014-2016 saw the deployment of 1,000 troops when the governor of Texas wanted to respond to the influx of unaccompanied children from Central

America. In 2016, Alabama Gov. Robert Bentley also sent National Guard troops and resources.⁶

Most recently, in April 2018, President Trump issued a presidential memorandum to deploy troops to the border. They will be sent from Southwestern states with Republican governors (i.e., Arizona, Texas, and New Mexico); California has agreed to contribute troops with special restrictions on their activity. It remains unclear whether the governors will agree to send the full 2,000 to 4,000 troops President Trump has indicated he hopes to deploy. That number would be higher than under President Obama but lower than under President Bush. However, it bears noting that both CBP staffing as well as the apprehension rate at the border are much closer today to the levels seen under President Obama than under President Bush.

II. CORRUPTION AND ABUSE AT THE BORDER

The 2006-2010 hiring surge at CBP was accompanied by a spike in corruption, attempts at infiltration of the agency, and excessive use of force at the border. These problems neither are not unique to hiring surges, but lots of new hires do exacerbate them.

From October 2004 to March 2018, 210 CBP officers and Border Patrol agents were arrested on corruption-related charges, many of which related to working closely with drug cartels.⁷ That is a disproportionate amount of corruption-related arrests compared to other law enforcement agencies at the federal level.⁸

⁴ Carla N. Argueta, [Border Security: Immigration Enforcement Between Ports of Entry](#), CRS Report, R42138 (Washington, D.C.: Congressional Research Service, 2016).

⁵ R. Chuck Mason, [Securing America's Borders: The Role of the Military](#), CRS Report for Congress, R41286 (Washington, D.C.: Congressional Research Service, 2013).

⁶ Argueta, "Border Security."

⁷ Department of Homeland Security, "[Corruption-Related Case Tracking Since October 2004](#)," 13 March 2018.; in Mia Steinle, "[13 CBP Employees Arrested for Corruption this Administration](#)," Project on Government Oversight, 23 April 2018.

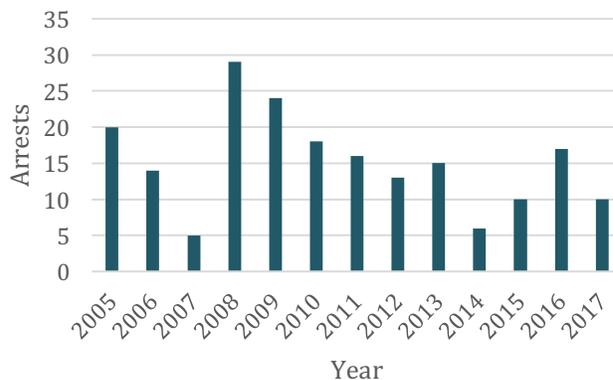
⁸ Homeland Security Advisory Council, "[Interim Report of the CBP Integrity Advisory Panel](#)," June 29, 2015.

About a third of the cases include charges related to drug trafficking, a quarter include charges related to bribery, and a quarter, human smuggling. But that number masks a much higher rate of corruption, since it only represents cases in which an arrest was actually made. James Tomscheck, then the assistant commissioner in CBP's Office of Internal Affairs, testified before Congress that the number of internal corruption investigations was also increasing as a result of the surge and that in 2009 alone, there were nearly 600 allegations of corruption.⁹ To make matters worse, at the same time, CBP was failing to meet its requirements to reinvestigate Border Patrol personnel every five years.

In response to increasing corruption at the Southern border, Congress passed the Anti-Border-Corruption Act of 2010, which required pre-employment polygraphs of all applicants for law enforcement positions at CBP. A heavily redacted report issued by the Credibility Assessment Division within DHS revealed that the polygraph requirement thwarted hundreds of applicants who admitted during the examination to, among other shocking behaviors, links with cartels, intent to infiltrate CBP, participating in human trafficking, defrauding the government, and even murders.¹⁰ These admissions were made by more than 2 percent of unique applicants who made it to the exam stage. Though small in percentage terms, that one in 50 applicants gets to the polygraph stage with such sordid histories and with criminal intent shows the importance of the polygraph system. A study from Internal Affairs at CBP corroborates this, finding that law enforcement officers who were subjected to pre-employment polygraphs were less than half as likely to engage in misconduct.¹¹ The figure below

illustrates the number of corruption-related arrests throughout the period of the hiring surge and both before and after the polygraph requirement was enacted.

Corruption-related Arrests of CBP Officers and Border Patrol Agents (2005-2017)



Source: FOIA obtained by Project on Government Oversight

However, the polygraph examinations required by the Anti-Border-Corruption Act have come under scrutiny. First, the examinations have exhibited irregularities, compared to polygraph exams at other agencies. CBP applicants fail their exams at double the rates experienced by other agencies that use polygraphs, and the exams take much longer on average.¹² This raises questions about the integrity and efficiency of the exams as they are being conducted, as well as the question of how many qualified and honest applicants are being deterred from applying altogether. Second, and relatedly, there are charges, with some merit, of a high number of false positives—in other words,

⁹ Committee on Homeland Security and Governmental Affairs, United States Senate, "[Report to Accompany the Anti-Border Corruption Act of 2010](#)," 111-338, 111th Congress, 2nd Session, September 29, 2010.

¹⁰ DHS, "[Significant Admissions Summary Obtained During Polygraph Examinations Administered by the Credibility Assessment Division](#)."

¹¹ Integrity Programs Division - Behavioral Research Branch, Office of Internal Affairs, CBP, "[Test vs. No-Test: Pre-Employment Polygraph Exams and Subsequent Record with Internal Affairs](#)," September 16, 2010.

¹² Associated Press, "[Two out of three Border Patrol job applicants fail polygraph test, making hiring difficult](#)," *Los Angeles Times*, January 13, 2017.

polygraphs are screening out a high number of good applicants. Third, too many applicants were getting to the polygraph stage when they could be screened out earlier by changing the hiring procedures.

In response to these criticisms, Congress reformed the Anti-Border-Corruption Act in late 2016, allowing CBP to waive the polygraph requirement for veterans with Top Secret/Sensitive Compartmented Information clearances. With President Trump's new surge, more reforms have been called for as well, including broadening the waiver.

In addition to corruption, excessive use of force accompanied the hiring surge. Over a dozen Border Patrol agents beat immigrant Anastacio Hernandez to death in 2010. The incident followed seven other deaths at the hands of Border Patrol agents in the preceding two years. None of the officers in any of the cases faced any charges. CBP commissioned an external review of use of deadly force in 2013. The final report found 67 cases of deadly force used by CBP agents/officers in less than two years. It also concluded that "too many cases do not appear to meet the test of objective reasonableness with regard to the use of deadly force."¹³

III. REFORM

Reform proposals usually are designed to pursue one of two objectives, but seldom both: reducing corruption or making it easier for CBP to hire. But these goals do not necessarily have to be in tension. Indeed, they can be mutually reinforcing with properly structured reform. On the one hand, less corruption means a more effective force less in need of new hires. And more importantly, lower attrition, under the right circumstances and safeguards, can mean a more professional and experienced workforce that can make corruption less likely and better weed out corruption where it

exists. Indeed, and unsurprisingly, an analysis by the Center for Investigative Reporting found a decreasing likelihood of a corruption arrest the longer an agent had been with the Border Patrol.¹⁴

Therefore, a balanced anti-corruption effort should aim to reduce the number of hires necessary to meet a staffing target in the first place. If one hire fills a position for longer and with an employee with more experience, then the agency can devote greater resources to identifying and ending actual corruption instead of being forced to deploy resources to weeding out and predicting potential corruption among new hires.

The recommendations below attempt to take both objectives seriously.

A. Polygraph Reforms

In response to continued struggles with hiring, some Republicans in Congress have proposed expanding the polygraph waiver established in 2016 to veterans and law enforcement who had to take polygraph exams for their previous job and who hold specific security clearances. Notwithstanding some misleading reporting that implied this would gut the polygraph requirement as we know it and usher in a new wave of corruption, it is difficult to predict precisely what the effects of the change would be. On the one hand, we might expect such a change to shift the composition of the applicant pool toward more honest applicants. But on the other hand, it is conceivable that any relaxation would be compromising. It is, after all, certainly true that law enforcement and military veterans are not immune to corruption. Indeed, a spokesperson for CBP told this author that an internal CBP analysis of polygraph data for 2015 and 2016 "revealed no difference between the military/law enforcement failure rates compared to the civilian rates."¹⁵ However, as we have seen, there are compelling reasons to believe CBP's polygraphs are somewhat irregular. We could be much more certain about the effects of such a bill

¹³ Police Executive Research Forum, "[U.S. Customs and Border Protection Use of Force Review: Cases and Policies](#)," February 2013.

¹⁴ Andrew Becker, "[Crossing the Line: Corruption at the Border](#)," *The Center for Investigative Reporting*.

¹⁵ Email message to author, December 15, 2017.

if we had data on corruption rates of new hires with military and law enforcement backgrounds, rather than polygraph-failure rates of applicants. Unfortunately, I have been told no such study has been conducted.¹⁶

Therefore, it may be best to assume the rule would not improve integrity, even if it helped alleviate CBP's hiring woes. If negative, we would not expect the effect to be large. With that in mind, one potential reform reveals itself. Instead of maintaining the status quo in pre-employment polygraph requirements and offering limited resources for post-employment polygraphs, Congress could expand the waiver to include law enforcement and people with lower-level security clearances *combined* with a requirement that such new hires be given a post-employment polygraph 3-5 years after starting. After all, more corruption cases involved people who were compromised after starting the job than who went into CBP with criminal intent.

Another important change is to require in-person interviews before the polygraph so resources are not being wasted on polygraphs for unsuitable applicants.

B. Surging Support Staff

Surges should not only increase staff at the border but also increase support staff. For instance, the human resource departments in CBP are closely engaged in the hiring process. Not only does an impaired and disorganized HR department mean a slower hiring process, it also impairs training of new hires and may contribute to the high attrition rate at CBP because personnel are not adequately served. And, even if a better HR department can't lower the attrition rate directly, it can help determine the underlying causes of why so many

employees leave and make recommendations on how to respond appropriately.

DHS told the Government Accountability Office that an "inefficient and disjointed hiring process has limited the department's hiring abilities" and that the "hiring process involves numerous systems and multiple hand-offs which result in extra work and prolonged hiring. This inefficient process is one factor that could have contributed to ... skill and workforce gaps." The GAO issued recommendations for a better and more streamlined process that could alleviate some of the problems.¹⁷ But the issue does not come down only to efficiency in the HR department at CBP specifically and at DHS generally: CBP's HR department itself is understaffed. In fact, there are fewer HR positions in DHS than among all large federal agencies, at a measly 1 in nearly 150.¹⁸ Increasing HR staff and other staff necessary in the hiring process, like investigators and polygraph operators, will not only improve the integrity of CBP, but allow it to make new hires at the border more quickly.¹⁹

When Congress wants to increase personnel resources at CBP, it should allow the agency some discretion, rather than picking a favored particular type of staff on a granular level. Congress also should make sure that authorized staffing levels and accompanying appropriations are raised in tandem for different units within CBP. Higher levels of Border Patrol officers and agents should be paired with higher levels of HR personnel, investigators, and polygraph operators. Indeed, designated polygraph operators would also facilitate post-employment polygraphs (see a). And new personnel and greater resources at CBP must also include Internal Affairs, which must have the capacity to investigate all reports of abuse.

¹⁶ Ibid.

¹⁷ [Homeland Security: Oversight of Neglected Human Resources Information Technology Investment is Needed](#), GAO-16-253 (Washington, D.C.: Government Accountability Office, February 2016).

¹⁸ Office of the Inspector General, [Special Report: Challenges Facing DHS in Its Attempt to Hire 15,000 Border](#)

[Patrol Agents and Immigration Officers](#), OIG-17-98-SR, (Washington, D.C.: Department of Homeland Security, July 27, 2017).

¹⁹ Office of the Inspector General, [DHS is Slow to Hire Law Enforcement Personnel](#), OIG-17-05 (Washington, D.C.: Department of Homeland Security, October 31, 2016).

CBP should also develop objective, quantifiable effectiveness measures that can be used to inform Congress when hiring is likely to improve security and where within CBP resources are lacking and best deployed.

C. Integrity Advisory Panel

Congress should require CBP to follow the recommendations of the CBP Integrity Advisory Panel and fully fund the adoption of those regulations.

The CBP Integrity Advisory Panel was created in 2015, as a subcommittee of the Homeland Security Advisory Council, the team of advisors to the secretary of Homeland Security. The panel was assigned to fully review CBP's vulnerabilities and strengths and to

make findings and recommendations based on law enforcement best practices regarding use of force, preventing corruption, investigative capabilities needed to address criminal and serious misconduct within CBP, engagement in interagency task forces..., using intelligence driven approaches proactively to identify corruption and other misconduct, and addressing transparency issues.²⁰

To that end, the panel completed two reports with a total of 53 unique, technical recommendations, which it concluded would, if implemented, mean that the “risks of endemic corruption taking root within CBP will be eliminated” and make excessive use of force “a rarity.”²¹ While a list of all 53 recommendations is redundant and out of the scope of this brief, suffice it to say that such recommendations exist and should be implemented, with support from Congress and whether by CBP's own initiative or by congressional directive.

CONCLUSION

Ultimately, effective border security requires both efficiency and integrity in the law enforcement agencies tasked with securing the border. Measures to improve both are needed.

²⁰ Homeland Security Advisory Council, [Final Report of the CBP Integrity Advisory Panel](#), (Washington, D.C.: Department of Homeland Security, March 15, 2016).

²¹ Ibid.; Homeland Security Advisory Council, [Interim Report of the CBP Integrity Advisory Panel](#), (Washington, D.C.: Department of Homeland Security, June 29, 2015).