COMMENT

TWENTY-FIVE PERCENT: U.S. CUSTOMS AND BORDER PROTECTION’S NEW CHALLENGES IN INCREASING ITS FORCE

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INTRODUCTION

On January 25, 2017, President Trump issued Executive Order 13,767, mandating the construction of a contiguous wall along the United States-Mexico border in an effort to secure the border and stop illegal border crossings. In the executive order, President Trump ordered the rapid hiring of 5,000 additional Border Patrol agents. As the Border Patrol currently employs 19,828 agents, such a hiring spree would increase the number of Border Patrol agents by approximately 25%. United States Customs and Border Protection (CBP), an agency within the United States Department of Homeland Security (DHS) that has been mired by excessive force and corruption scandals in recent years, has considered eliminating certain prerequisites and aspects of the Border Patrol agent application to speed up the agent hiring process to fulfill the executive order’s mandates. Congress even introduced a bill to remove the polygraph examination from the nine-step hiring

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2. See Exec. Order No. 13,767, 82 Fed. Reg. at 8793. On April 5, 2017, the Office of Personnel Management granted Direct Hire Authority to the Department of Homeland Security (DHS), permitting Customs and Border Protection (CBP), until April 5, 2019, to hire an additional 8,721 personnel to be stationed along the U.S.-Mexico border and at duty stations in Florida and the Caribbean. See also DEP’T OF HOMELAND SEC., OIG-17-98-SR, SPECIAL REPORT: CHALLENGES FACING DHS IN ITS ATTEMPT TO HIRE 15,000 BORDER PATROL AGENTS AND IMMIGRATION OFFICERS (2017). In his weekly satirical news show Last Week Tonight with John Oliver, British comedian John Oliver critically reviewed President Trump’s Executive Order and the potentially dangerous results of a rapid Border Patrol hiring surge. See Last Week Tonight with John Oliver (HBO television broadcast Aug. 6, 2017).


5. See generally Molly O’Toole, Trump Administration Seeks to Loosen Hiring Requirements to Beef
process for certain applicants. This proposed rapid hiring process would negatively affect procedures at the border and within the Border Patrol itself.

This Comment argues that the hiring surge as proposed in the Executive Order will lead to disruption within the Border Patrol. Loosening of hiring procedures, including the proposed elimination of polygraph examinations, will lead to the hiring of unqualified and criminal candidates who could act illegally and unethically at the U.S.-Mexico border. These actions will compromise the Border Patrol’s objectives of preventing terrorists, weapons, drugs, and human smugglers from gaining access to the United States through its borders.

Part I of this Comment gives a brief overview of the history of the Border Patrol and its prior hiring standards and hiring surges. Part II discusses President Trump’s Executive Order and his ability to implement the executive order without congressional consent or the standard notice-and-comment process. Part III discusses criminal and corruption issues that plague the Border Patrol. Part IV discusses the Federal Bureau of Investigation’s (FBI’s) decision to implement pre- and post-hiring polygraph examinations to strengthen hiring standards after an espionage scandal. Finally, Part V provides analysis and agency recommendations for implementing the executive order in a more responsible and secure fashion.

I. BACKGROUND

A. History of the United States Border Patrol

Through most of the 1800s, the United States federal government paid little attention to the border that now separates Texas, New Mexico, and Arizona from Mexico. However, in the late 1800s, escalating concerns...
about Chinese agents illegally crossing the southern border and infiltrating the country led to a review of border security. Immigration restrictions targeting Chinese and Eastern European immigrants in the early 1900s focused on illegal entries at the southern border. At the time, a makeshift group consisting of state and local officers guarded the southern border. There was no uniform force and no clear method of guarding the border and apprehending those who tried to cross illegally.

In 1924, Congress established the Border Patrol as part of the Immigration Bureau through the Labor Appropriation Act of 1924. This legislation laid the groundwork for the modern border patrol by providing resources for additional land border patrol. Following this law, the original Border Patrol consisted of 450 men who were hired without passing an entrance examination or meeting any standardized set of qualifications. Congress granted these Border Patrol agents the authority to arrest and detain immigrants attempting to illegally cross the border and undocumented immigrants who successfully crossed into the United States. In the following decades, rising concern about the ability of foreign nationals to undermine the country’s security led to a steady increase in CBP agents, with the majority stationed at major ports along the U.S.-Mexico border.


10. See Hing, supra note 8, at 760.

11. See id. at 760–61.

12. See id.


15. See Hing, supra note 8, at 761.

16. See id. (citing JOHN MYERS MYERS, THE BORDER WARDENS 32 (1971)) (describing the Border Patrol agents as a mix of Mounted Guard veterans, former Texas Rangers, sheriffs, town marshals, appointees from the Civil Service Registers, and qualified railway mail clerks).

17. See Immigration and Naturalization Service (INS), Immigration Regulations, 8 C.F.R. § 100.2(d) (2000).

18. See, e.g., Julián Aguilar, Union Chief: Send 5,000 More Agents to the U.S.-Mexico Border, TEXAS TRIB. (Sept. 16, 2015), https://www.texastribune.org/2015/09/16/union-chief-
from the Border Patrol into the military, leaving the Border Patrol’s ranks depleted. This depletion, combined with fear of subversive persons crossing the border, led the Border Patrol to quickly add an additional 712 agents during the War. These agents joined the Border Patrol without a civil service exam requirement and were deployed to the border with minimal training.

The number of agents employed by the Border Patrol grew steadily throughout the second half of the twentieth century and into the twenty-first century. The Immigration Reform and Control Act, signed into law by President Reagan in 1986, increased funding for the Border Patrol. Even as a hiring freeze affected all other federal agencies in 1992 and 1993, the Border Patrol added 350 new officers in 1994 and 700 new positions in 1995. In 1997, the “Operation Rio Grande” initiative sharply increased

5000-more-border-patrol-agents-needed (noting that, as of 2015, 18,160 Border Patrol agents were stationed at the U.S.-Mexico border and that highly-trafficked sectors, including the Laredo sector, the Rio Grande Valley sector, the El Paso sector, and the Del Rio sector, were each patrolled by between 1,540 and 3,065 agents).

19. See Hing, supra note 8, at 761.
23. See id. at 761–62.
25. See Hing, supra note 8, at 762.
26. Id.
27. Id.
the number of Border Patrol agents stationed at the southern part of the U.S.-Mexico border.\textsuperscript{29} Within ten years following the September 11, 2001 terrorist attacks, CBP doubled its agents.\textsuperscript{30} This was likely due to national security concerns about potential terrorists illegally crossing into the United States via the southwest border. In 2002, Congress established the DHS, with CBP as the border agency within DHS.\textsuperscript{31} This agency structure is still in effect today, and its reach has grown since its inception. The Intelligence Reform and Terrorism Prevention Act of 2004 mandated an increase in Border Patrol agents by at least 2,000 per year between fiscal years 2006 and 2010.\textsuperscript{32} However, during President Obama’s second term, the Border Patrol’s numbers decreased slightly.\textsuperscript{33} With the continuous expansion of its forces over the years, the Border Control wields extensive powers when compared to its law enforcement counterparts and other federal agencies.

\textbf{B. Powers of the Border Patrol}

The Border Patrol is a federal law enforcement agency and makes more arrests per year than any other law enforcement agency within the United States.\textsuperscript{34} Title 8, § 287.5 of the Code of Federal Regulations bestows extensive powers on Border Patrol agents who complete basic immigration law enforcement training.\textsuperscript{35} The Immigration Act of 1990 gave Border Patrol agents greater law enforcement power, including the ability to make an arrest

\begin{itemize}
\item \textsuperscript{29} See Trevino, supra note 14, at 90 (citing INS Aims High-Tech Crackdown Along the Border, HOUS. CHRON., July 27, 1997, at A36 (stating that because of the operation the number of Border Patrol agents in Texas was to increase by 53% from 1,756 to 2,693).
\item \textsuperscript{30} See Border Patrol Agent Nationwide Staffing by Fiscal Year, supra note 3 (explaining that there were 9,212 Border Patrol agents in fiscal year 1999, which doubled to reach 21,444 agents by fiscal year 2010. This number has decreased to 19,828 agents by fiscal year 2016).
\item \textsuperscript{31} See Border Patrol History, supra note 21.
\item \textsuperscript{32} See Intelligence Reform and Terrorism Prevention Act of 2004, S. 2845, 108th Cong. § 5202 (2004) (mandating an increase in Border Patrol agents for the purpose of preventing illegal smuggling of persons and contraband across the southern border).
\item \textsuperscript{33} See Border Patrol Agent Nationwide Staffing by Fiscal Year, supra note 3 (showing a slight decrease to a total of 19,020 Border Patrol agents in fiscal year 2016 from a high of 21,444 Border Patrol agents in fiscal year 2010).
\item \textsuperscript{34} In fiscal year 2012, the Border Patrol arrested over 364,000 people illegally trying to enter the United States. See Border Patrol Overview, U.S. CUSTOMS & BORDER PROTECTION (Mar. 28, 2018), https://www.cbp.gov/border-security/along-us-borders/overview; see also Trevino, supra note 14, at 87.
\item \textsuperscript{35} See 8 C.F.R. § 287.5(b) (2016) (granting the Border Patrol authority to patrol the United States borders); see also 3 AM. JUR. 2D Aliens and Citizens § 42 (1962) (defining the term “basic immigration law enforcement training” as applied to Border Patrol agents and other law enforcement agents).  
\end{itemize}
without a warrant for any offenses that agents observe and also granted permission to carry firearms. Additional powers include the ability to conduct searches and execute warrants. In addition to “linewatching,” or border surveillance, the Border Patrol is responsible for transportation and traffic checks, and has enforcement authority within one hundred miles of the U.S. borders.

Noting that 20% of undocumented immigrants apprehended in 2014 had a criminal history, the National Border Patrol Council’s President Brandon Judd argued in 2015 that 5,000 additional agents were needed to sufficiently staff the Border Patrol. While former CBP official Jay Ahern agreed that the Border Patrol needed to hire additional agents, he cautioned that the time needed to properly screen and train new agents is “not something to be compromised.”

C. Prior and Current Hiring Procedures

Over the past fifteen years, the number of Border Patrol agents more than doubled. During the hiring increases, hiring standards for new Border Patrol agents varied. In the 1990s, the Clinton Administration and Congress increased funding and resources to the former Immigration and Naturalization Service (INS). However, rapid hiring increases during this period had critics concerned that agents were added too quickly and without the proper training or clearances. During the hiring surge from 2001 to 2011, the Border Patrol relaxed its hiring standards in an effort to rapidly increase its

37. See 8 C.F.R. § 287.3.
39. See Aguilar, supra note 18.
41. See Border Patrol Agent Nationwide Staffing by Fiscal Year, supra note 3 (showing a doubling of Border Patrol agents between 2001 and 2016, from 9,821 agents to 19,828 agents).
43. See Trevino, supra note 14, at 97.
44. See id. (noting that former Southern Arizona Border Patrol Union President Dan Hann was concerned that Border Patrol agents were hired and sent to the training academy before their background checks could be completed).
ranks.\textsuperscript{45} Border Patrol’s current nine-step hiring process involves: an application, the Border Patrol Entrance Exam,\textsuperscript{46} a qualifications review for the federal pay grade of the position, a background investigation, a medical examination, fitness tests, a structured interview, a polygraph examination, and a drug test.\textsuperscript{47} The Anti-Border Corruption Act of 2010 codified requiring polygraph examinations as a precondition for employment with CBP.\textsuperscript{48} However, the U.S. Code permits the CBP Commissioner to waive the polygraph examination for applicants he deems “suitable for employment” or veterans.\textsuperscript{49} Additionally, CBP did not retroactively test Border Patrol employees who joined the agency prior to the implementation of the polygraph exam requirement.\textsuperscript{50} Since its implementation, the polygraph examination requirement has identified applicants to the Border Patrol with criminal or otherwise suspicious backgrounds—persons who may not have been identified in the years before.\textsuperscript{51}

\textsuperscript{45} See Raff, supra note 42 (explaining that, when the Border Patrol doubled its ranks between 2001 and 2009, the agency sent some agents into the field before completing their background checks and was the only federal law enforcement agency to decline use of polygraph examinations to vet applicants).

\textsuperscript{46} Applicants who qualify at the GL–9 level, meaning that they have certain prior specialized law enforcement experience, are not required to take the exam. See Border Patrol Entrance Exam, U.S. CUSTOMS & BORDER PROT. (Jan. 8, 2018), https://www.cbp.gov/careers/car/bpa-entrance-exam (requiring all other applicants to receive a score of at least seventy to pass the exam).

\textsuperscript{47} See Border Patrol Agent Application Process, U.S. CUSTOMS & BORDER PROT. (Jan. 18, 2018), https://www.cbp.gov/careers/frontline-careers/bpa/app-proc; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-59, BORDER SECURITY: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN CBP EFFORTS TO MITIGATE RISK OF EMPLOYEE CORRUPTION AND MISCONDUCT 6 (2012) (explaining that the Custom and Border Protection Internal Affairs Credibility Assessment Division administers the polygraph examinations, interviews all Border Patrol applicants, and collects applicants’ admissions about past criminal or other misconduct that could affect their acceptance into the Border Patrol).


\textsuperscript{49} See id. §§ 221(b)(1), 221(b)(5); see also National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong. § 1097 (2017) (giving the CBP Commissioner the power to waive the polygraph requirement for certain CBP/Border Patrol applicants); U.S. Customs and Border Protection Hiring and Retention Act of 2017, S. 1305, 115th Cong. § 2 (2017) (permitting the CBP Commissioner to appoint applicants to certain vacant Border Patrol positions without administering a polygraph examination).

\textsuperscript{50} See Raff, supra note 42.

\textsuperscript{51} Josiah Heyman, AMERICAN IMMIGRATION COUNCIL, WHY CAUTION IS NEEDED BEFORE HIRING ADDITIONAL BORDER PATROL AGENTS AND ICE OFFICIERS 11 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/why_caution_is
II. THE EXECUTIVE ORDER AND RESPONSES

On January 25, 2017, President Trump announced Executive Order 13,767, Border Security and Immigration Enforcement Improvements, which orders the hiring of 5,000 additional CBP agents and their assignment to duty stations “as soon as is practicable.”

A. The President’s Authority to Issue the Executive Order

The U.S. Constitution grants the President the power to appoint public officers, with the approval of the U.S. Senate. The President appoints heads of federal agencies, such as CBP, under Article II. As the President maintains authority to appoint these agency heads, the President may likewise remove them from their positions without consent from the Senate. In addition to the ability to appoint and dismiss federal agency heads, the President is generally permitted to guide agency actions, often through executive orders, so long as the action is not prohibited by statute. Although executive orders are not mentioned in the Constitution and they do not have general statutory authorization, executive orders “issued under a legitimate
claim of authority and made public” have the force of law and must be published in the *Federal Register*.59

The use of executive orders to enforce action within federal agencies is commonplace because the “take care” clause of Article II, Section 3 of the Constitution is generally interpreted to mean that the President may guide and instruct agencies as he or she pleases.60 Should an agency head choose not to abide by an executive order, the President may replace the officer.61

Although the courts may invalidate an executive order if it violates a statute,62 there are otherwise few ways in which the other two branches of government can interfere with its implementation. In theory, Congress could pass a law to revoke or modify an executive order.63 This is rare, as such law would need sufficient support to override a presidential veto.64 Congress’s most realistic ability to prevent enforcement of an executive order is through funding appropriation. Rather than revoking prior executive orders by statute, Congress has denied agencies the funds necessary to enforce executive orders.65 Prior to finalizing the 2018 fiscal year budget, the House Committee on Appropriations originally proposed a $1.9 billion funding increase to DHS, raising its discretionary funding to $44.3 billion.66 Notably, $100 million of the budget was earmarked for the hiring of 500 new Border Patrol agents.67 However, the Consolidated Appropriations Act, 2018, which President Trump signed into law on March 23, 2018, does not include this funding.68


60. U.S. Const. art. II, § 3; *see also* Murphy & Koch, *supra* note 58, at 37 (citing *Myers*, 272 U.S. at 135) (establishing that the “take care” clause “authorizes the President to ‘super-
vise and guide’ executive officers in ‘their construction of the statutes under which they act in
order to secure that unitary and uniform execution of the laws . . . ’.”)

61. *See Myers*, 272 U.S. at 163–64.


63. *See Chu & Garvey, supra* note 59, at 9.

64. *See id.* (noting that Congress has modified less than 4% of Executive Orders).

65. *See id.* at 10 (citing Pub. L. No. 111-8, § 746; 123 Stat. 693 (2009)) (preventing funds from being used “to implement, administer, or enforce” § 5(b) of Executive Order 13,422).


67. *Id.*

68. *See Consolidated Appropriations Act, 2018*, Pub. L. No. 115-141, 132 Stat. 348 (2018) (listing the funding appropriations for CBP and failing to include funding to hire additional Border Patrol agents); *see also* Press Release, U.S. S. Comm. on Appropriations, Home-
B. Congressional and Agency Responses to the Executive Order

In response to President Trump’s Executive Order, CBP has planned certain changes to speed up its hiring process. Specifically, CBP is requesting to relax the polygraph examination requirement as well as its use of the entrance examination and background checks. A leaked 2017 memorandum signed by CBP Acting Commissioner Kevin McAleenan addressed to the Deputy Secretary of Homeland Security discussed hiring projections following Executive Order 13,767. Accounting for the Border Patrol’s high rate of attrition, the memo determines that, in order for the Border Patrol to reach its staffing goal of 26,370 agents within five years, the agency would need to hire 2,729 agents per year. To reach this goal, the memo requests limiting the CBP’s use of the polygraph examination and using the Test for Espionage, Sabotage, and Corruption, an alternative polygraph examination, for a six-month pilot period. Critics of the alternative polygraph examination express concern that the test is not rigorous enough to screen Border Patrol applicants.

69. See O’Toole, supra note 5 (noting that the leaked February 17, 2017 memo from then CBP Acting Commissioner Kevin McAleenan stated that the agency would need to urgently change its hiring standards if the Border Patrol is to expand from its current 19,627 agents to about 26,370 agents).

70. See id.

71. Memorandum from Kevin K. McAleenan, Acting Comm’r, U.S. Customs and Border Prot. to DHS Deputy Sec’y [hereinafter McAleenan Memo].

72. CBP’s annual attrition rate is about 6%, which equals 1,380 losses per year. Compare this with Immigration and Customs Enforcement’s (ICE’s) annual attrition rate, which is about 4% or approximately 795 losses per year. See Office of Inspector Gen., U.S. Dep’t of Homeland Sec., OIG-17-98-SR, Special Report: Challenges Facing DHS in Its Attempt to Hire 15,000 Border Patrol Agents and Immigration Officers 12 (2017).

73. See McAleenan Memo, supra note 71.

74. See Anti-Border Corruption Reauthorization Act of 2017, H.R. 2213, 115th Cong. (as passed by House, June 7, 2017) (requesting that the bill be prohibited from going into effect until the CBP completes a full evaluation of the Test for Espionage, Sabotage, and Corruption and the DHS Inspector General completes an assessment confirming that polygraph waivers would “not endanger national security, undermine workforce integrity, or increase corruption in the agency”).

75. Former CBP senior official James Tomsheck noted that the alternative polygraph examination is not designed for law enforcement officers and fails to question applicants about drug use and document forgery. See Raff, supra note 42.
On June 7, 2017, the House of Representatives passed a bill that permits the CBP to waive polygraph exams for certain applicants from other branches of law enforcement and the military.\textsuperscript{76} Supporters of the bill note that, due to the 1,800 vacancies in the Border Patrol, the agency needs to speed up its hiring to replenish its number of agents and comply with the President’s Executive Order.\textsuperscript{77} While the bill received bipartisan support, critics argued that increased border security should not be achieved through loosening hiring standards and waiving certain protective procedures for Border Patrol agents.\textsuperscript{78} Additionally, two out of every three CBP applicants fail the polygraph exam, a rate more than double the average for other law enforcement agencies.\textsuperscript{79}

On July 28, 2017, Texas House Representative Michael McCaul introduced the Border Security for America Act of 2017.\textsuperscript{80} The Act orders the CBP Commissioner to “hire, train, and assign sufficient [Border Patrol] agents” as to reach at least 26,370 full-time agents no later than September 30, 2021.\textsuperscript{81}

\begin{footnotesize}
\textsuperscript{76} See H.R. 2213 § 2(b); see also Maria Sacchetti, House Passes Bill to Allow Some Border and Customs Job Applicants to Skip Polygraph Test, WASH. POST [June 7, 2017], https://www.washingtonpost.com/local/social-issues/house-passes-bill-to-allow-some-border-and-customs-job-applicants-to-skip-polygraph-test/2017/06/07/5b62a9b8-4b99-11e7-9669-250d0b1583b3_story.html?utm_term=.3821da81cb11 (explaining that the bill would grant the CBP Commissioner the power to waive polygraph examinations for full-time state or local law enforcement officers who passed the test within ten years of applying to the Border Patrol, as well as for members of federal law enforcement and veterans who have undergone certain background checks and clearances).
\textsuperscript{77} See Sacchetti, supra note 76.
\textsuperscript{79} See HEYMAN, supra note 51, at 11; see also O’Toole, supra note 5. High failure rates on the polygraph examination are not the only factor eliminating Border Patrol applicants from consideration for positions. See HEYMAN, supra note 51, at 11. 50% of applicants fail the written test, 15% fail before the oral hiring board, 25% fail the medical examination, 15% fail the physical fitness examination, and 56% fail the background check. See generally Associated Press, Two Out of Three Border Patrol Job Applicants Fail Polygraph Test, Making Hiring Difficult, L.A. TIMES [Jan. 13, 2017, 1:05 PM], http://www.latimes.com/local/lanow/la-me-border-patrol-jobs-test-20170113-story.html (noting that former CBP Commissioner Gil Kerlikowske attributed the high failure rate to the Border Patrol not attracting its preferred applicants).
\textsuperscript{81} See id. § 131(a).
\end{footnotesize}
III. CRIMINAL ELEMENTS WITHIN THE BORDER PATROL

Like any agency, the Border Patrol has employed agents who do not meet its standards of conduct.82 During the Border Patrol hiring surge following the September 11, 2001 terrorist attacks, the CBP relaxed its hiring standards and stationed less-qualified agents who had not been sufficiently trained along the U.S.-Mexico border.83 Some believe that this relaxation of standards led to an increase in criminally-minded Border Patrol agents who committed crimes on- and off-duty.84 These crimes included excessive use of force against non-U.S. citizens at the southern border and corruption.85

A. Excessive Use of Force

In 1992, an Americas Watch report highlighted the excessive human rights abuses undocumented immigrants suffered at the hands of Border Patrol agents at the U.S.-Mexico border.87 The report describes routine violence against migrants at the border who were subjected to Border Patrol agents’ beatings, unnecessarily rough physical treatment, as well as racist language and verbal abuse.88 Additionally, the report cites numerous instances

82. See generally U.S. DEPT’T OF HOMELAND SEC., CBP DIRECTIVE NO. 51735-013A, U.S. CUSTOMS AND BORDER PROTECTION STANDARDS OF CONDUCT (2012) (outlining the standards to which CBP employees, including Border Patrol agents, are held, as well as consequences for violating the Standards of Conduct).

83. See generally HEYMAN, supra note 51 (explaining that past, poorly-managed agency expansions made it easier for criminal organizations to infiltrate and bribe the Border Patrol).

84. See generally id. at 3 (noting that some people successfully sought out positions within the CBP so as to further advance criminality).


86. See HEYMAN, supra note 51, at 3, 5 (discussing disproportionately high instances of corruption within the CBP and numerous allegations of excessive force leveraged against the Border Patrol); see also Greg Moran, Border Boost Spiked Corruption Cases, SAN DIEGO UNION-TRIB. (Dec. 8, 2013, 11:22 AM), http://www.sandiegouniontribune.com/news/watchdog/sdut-crossing-the-line-2013dec08-htmlstory.html (noting that nearly 160 Border Patrol officers and agents have been arrested or indicted for corruption charges since 2004).

87. See Vargas, supra note 13, at 492 (citing AMERICASWATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO (1992)).

88. See id.; see also DANIEL E. MARTINEZ, GUILLERMO CANTOR & WALTER A. EWING, AMERICAN IMMIGRATION COUNCIL, NO ACTION TAKEN: LACK OF CBP ACCOUNTABILITY IN RESPONDING TO COMPLAINTS OF ABUSE 1–2 (2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/No%20Action%20Taken_Final.pdf (arguing that Border Patrol agents’ violence against and verbal abuse of migrants at the U.S.-Mexico border...
of unjustified shootings, torture, and sexual abuse.\textsuperscript{89} Unfortunately, Border Patrol agents’ excessive use of force against migrants at the southern border has not waned since the Americas Watch report.\textsuperscript{90} Compounding these many accusations is the fact that most are not investigated and few Border Patrol agents face any meaningful discipline.\textsuperscript{91} Furthermore, assaults and shootings leveled against non-U.S. citizens at the border continue to fuel lawsuits against the Border Patrol, CBP, and DHS.\textsuperscript{92}

\textbf{B. Corruption}

Particularly at the U.S.-Mexico border, Border Patrol agents are exposed to elevated levels of human trafficking, illegal entries, and the smuggling of drugs and weapons.\textsuperscript{93} Since Border Patrol agents have higher instances of corruption compared to other federal law enforcement agencies, they should be intensively screened and trained to avoid temptations of corruption.\textsuperscript{94}

\textsuperscript{89} See id. at 4 (describing the extent of violent crimes committed by Border Patrol agents against migrants at the U.S.-Mexico border).

\textsuperscript{90} See \textit{Heyman}, supra note 51, at 5.

\textsuperscript{91} See \textit{Martinez et al.}, supra note 88, at 1–3 (noting that, of the 809 complaints alleging abuse against Border Patrol agents from January 2009 to January 2012, no action was taken in 97% of cases; see also id. at 10 (arguing that prior lack of accountability within the Border Patrol effectuated a culture of silence more pronounced than in other law enforcement agencies); Lucas R. Balchun, \textit{Reports of Abuse by U.S. Border Patrol Agents Evidence Systemic Violations of International Human Rights}, 30 Intl. Enforcement L. Rep. 309 (2014) (noting that when Homeland Security’s Office for Civil Rights and Civil Liberties, which oversees complaints against DHS agents, receives complaints that involve CBP, the cases are typically referred back to CBP with no greater oversight).

\textsuperscript{92} As recently as 2015, the family of Jose Alfredo Yanez Reyes sued the United States after Mr. Yanez was shot in the head and killed by a Border Patrol agent on the U.S. side of the U.S.-Mexico Border. See Nino v. United States, No. 13cv0469, 2015 WL 5032644, at *1 (S.D. Cal. Aug. 25, 2015); see also Dean DeChiaro, \textit{Report Pans CBP for ‘Astonishing Pattern’ of Shooting Rock Throwers}, \textit{CQ Roll Call Washington Immigration Briefing}, 2016 WL 942637 (noting that the CBP does not prohibit Border Patrol agents from using deadly force against rock throwers, as the agency considers rocks to be weapons and implements of deadly force).


\textsuperscript{94} See \textit{Homeland Sec. Advisory Council, Interim Report of the CBP Integrity Advisory Panel} 6 (2015) (stating that arrests of border agents and customs officers are far
Within the past twelve years, at least 140 CBP officials have been arrested on corruption charges. Some agents have been held accountable for corruption-related misdeeds; however, the Homeland Security Advisory Council admits that it is still unaware of the full extent to which corruption has infected the Border Patrol and greater CBP, meaning that these investigations and arrests likely account for a small percentage of corrupt Border Patrol and CBP agents. In part, this inability to eliminate corrupt agents from the Border Patrol is due to CBP’s lack of proactive anti-corruption programs.

Faced with enhanced fencing and border security technology, cartels and smugglers increasingly rely on corrupt Border Patrol and CBP agents to smuggle drugs, weapons, and people across the U.S.-Mexico border. Rather than attempt to sneak contraband past drones, sensors, and Border Patrol and CBP agents, some cartels and smugglers pay agents to assist them with smuggling drugs.

With a base salary of around $40,000 for entry-higher per capita than arrests within other law enforcement agencies).

95. See Cracks in the Wall: When Border Watchdogs Turn Criminal, TEX. TRIB. (July 7, 2016), https://apps.texastribune.org/bordering-on-insecurity/when-border-watchdogs-turn-criminal (noting that in thirty-two of those cases, the agents did not receive a prison sentence); see also HEYMAN, supra note 51, at 3 (citing Ron Nixon, The Enemy Within: Bribes Bore a Hole in the U.S. Border, N.Y. TIMES (Dec. 28, 2016), https://www.nytimes.com/2016/12/28/us/home-land-security-border-bribes.html?_r=0 (noting that “over the last 10 years almost 200 employees and contract workers of the Department of Homeland Security have taken nearly $15 million in bribes while being paid to protect the nation’s borders and enforce immigration laws”).

96. See generally Andrew Becker, Crossing the Line: Corruption at the Border, CIT. FOR INVESTIGATIVE REPORTING, http://bordercorruption.apps.cironline.org (listing 153 CBP agents and officers who have been under investigation for corruption since 2004). As recently as 2016, a Border Patrol agent stationed to the San Diego sector of the U.S.-Mexico border was arrested by the Federal Bureau of Investigation (FBI) on bribery and drug charges. See DEAN DECHARO, BORDER PATROL AGENT FACING DRUG, BRIBERY CHARGES, CQ ROLL CALL WASHINGTON IMMIGRATION BRIEFING, 2016 WL 7319939 (explaining that Border Patrol agent Noe Lopez, who had been employed as a Border Patrol agent for ten years, was charged with drug crimes, including attempted distribution of methamphetamine and cocaine, as well as bribery).

97. See HEYMAN, supra note 51, at 3.

98. This lack of programs means that CBP must base its investigations largely on reports from other employees, other government agencies, and the public. See Nixon, supra note 95.

99. See id.

100. In 2013, Border Patrol agent Ivhan Herrera-Chiang was sentenced to prison for giving sensitive border security information to a co-conspirator, who passed the information along to drug cartels. Id. He likely received over $60,000 in exchange for this information. Id. In November 2016, Border Patrol agent Eduardo Bazan admitted to receiving $8,000 in
level agents and a career that requires stationing along desolate parts of the American southwest for extended periods of time, such bribes may come as a welcome supplement to an agent’s income.101

IV. THE FEDERAL BUREAU OF INVESTIGATION’S IMPLEMENTATION OF A POLYGRAPH PROGRAM

The 2001 arrest of Robert Hanssen, a FBI agent who provided classified information to the former Soviet Union and Russia for over fifteen years,102 prompted the FBI to review its hiring and security procedures.103 The Commission for the Review of FBI Security Programs recommended a vast array of changes aimed at preventing future leaks, including the consolidation of the FBI’s security functions and the use of an intranet auditing system to flag suspicious use.104 One of the Commission’s recommendations was a review of hiring procedures and expanding the use of polygraph examinations.105

Prior to the mid-1980s, the FBI used polygraph examinations solely during criminal investigations.106 Even once the FBI began using the polygraph examination as a pre-hiring tool, the Bureau still only selectively used the examinations to test employees with access to certain sensitive information.107 By the time Hanssen was arrested, the FBI’s hiring process and use of polygraph examinations were far behind those of other intelligence agencies.108

Following Hanssen’s arrest, the FBI was forced to reevaluate its hiring and security measures.109 The FBI began testing current employees who had not received pre-employment polygraph examinations. Additionally, it added

exchange for assisting a drug trafficking organization with smuggling cocaine across the border. Id.

103. See COMM. FOR REVIEW OF FBI SEC. PROGRAMS, A REVIEW OF FBI SECURITY PROGRAMS 1 (2002).
104. See id. at 4–5.
105. See id. at 71–72. After Hanssen’s arrest, the FBI began requiring polygraph examinations during the reinvestigation process of active agents. See id. at 57.
106. Id. at 69.
107. See id.
108. See id. For example, the Central Intelligence Agency (CIA) had been using the polygraph examination as a pre-hiring screening tool since 1948. See id.
109. The CIA had overhauled its hiring procedures in part by updating its pre-hire polygraph examination program after the 1994 conviction of CIA agent and Soviet Union spy Aldrich Ames. See id. at 69–70.
polygraph examinations to the five-year security reviews of current employees as an espionage deterrent. After the September 11, 2001 terrorist attacks, the FBI increased its use of pre-employment polygraph examinations again. From fiscal years 2002 to 2005, there was a 78% increase in pre-employment and personnel screening polygraph examinations. An evaluation of pre- and post-hiring polygraph examination results during the same time period suggests that pre-hiring examinations deter potentially adverse applicants and aid hiring teams in weeding out unqualified or criminally-minded applicants.

The FBI’s pre- and post-hiring polygraph examinations that resulted from the high-profile Hanssen case were a swift response to a long-term infiltration by a bad actor. While there have been no such high-profile infiltrations since the Hanssen scandal, the subsequent polygraph requirements may have identified other FBI agents for reevaluation.

V. ANALYSIS AND RECOMMENDATIONS

President Trump’s decision to mandate the hiring of 5,000 additional Border Patrol agents could lead to the hiring of unqualified agents who are more likely to commit crimes and unethical violations while on- and off-duty.

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111. See id.
112. See id. at 35–36.
113. See, e.g., id. at 66 (showing that 67% of pre-hiring polygraph examinations had “No Deception Indicated” results, compared with 95% of post-hiring polygraph examinations with the same result).
115. See Heyman, supra note 51, at 11 (citing former CBP Deputy Commissioner Jay Ahern, who argues that lowering hiring standards can lead to criminality and other issues within the agency for decades after the original decision); see, e.g., Andrade v. United States, No. 2:15-CV-103, 2017 WL 2985637 (S.D. Tex. July 12, 2017) (suing Border Patrol agents for intentionally placing themselves in the exit path of moving vehicles in order to justify the use of deadly force against the decedent); Rodriguez v. Swartz, 111 F. Supp. 3d 1025 (D. Ariz. 2015) (suing a U.S. Border Patrol agent who shot and killed teenager while he was walking along the Mexico side of the U.S.-Mexico border); Perez v. United States, 103 F. Supp. 3d 1180 (S.D. Cal. 2015) (case brought against DHS/CBP by relatives of Mexican national who was shot and killed at border by Border Patrol agent); Hernandez v. United States, 802 F. Supp. 2d 834 (W.D. Tex. 2011) (suing the CBP after a fifteen-year-old boy was shot and killed by Border Patrol agent while playing on cement culvert separating United States from Mexico).
Rather than lowering hiring standards and eliminating vital parts of the hiring process in an effort to rapidly hire thousands of Border Patrol agents, the CBP should strengthen its current procedures to reduce the hiring of lower quality agents. Should the CBP move forward in relaxing its standards to rapidly hire Border Patrol agents, the agency risks returning to its roots as a border enforcement group with few formal requirements for enlistment.\footnote{116. See Hing, supra note 9, at 761. Former CBP Head of Internal Affairs James Tomcheck claims he was forced out of his position for attempting to rein in the Border Patrol’s “paramilitary” culture and reform discipline procedures. See Carrie Johnson, Former Border Protection Insider Alleges Corruption, Distortion in Agency, NPR (Aug. 28, 2014), http://www.npr.org/2014/08/28/343748572/former-border-protection-insider-alleges-corruption-distortion-in-agency.}

President Trump’s Executive Order does not provide a date by which the hiring should be completed; instead, it simply states that the 5,000 additional Border Patrol agents should “enter on duty and [be] assigned to duty stations as soon as is practicable.”\footnote{117. See Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).} Rather than attempt to hire the 5,000 agents within a short period of time, the agency should interpret the “as soon as is practicable”\footnote{118. See id.} deadline to include the practicability of hiring agents using the current or more stringent standards. Although the nine-step Border Patrol agent hiring process is lengthy, the CBP can confirm that it significantly reduced hiring times in recent years.\footnote{119. See, e.g., O’Toole, supra note 5 (noting that within the past two years, CBP decreased its average hiring timeline to 170 days from 400 days). The U.S. Office of Personnel Management has a 45-day hiring timeline goal; however, this goal is not legally binding on federal agencies. See Frequently Asked Questions: Employment, U.S. Office of Pers. Mgmt., https://www.opm.gov/faqs/topic/employment/?cid=5d9058d6-78fb-42a2-9d2a-9d14c22982f0&page=2 (last visited May 10, 2018).}

Assuming the Border Patrol elevates hiring standards to prevent employing unqualified agents, it is unlikely that the agency could hire and retain the 5,000 new agents. While the agency hired additional CBP officers\footnote{120. See Eric Katz, Despite Trump’s Push, the Border Patrol is Losing More Agents Than it Can Hire, GOV’T EXEC. (Dec. 5, 2017), http://www.govexec.com/management/2017/12/despite-trumps-push-border-patrol-losing-more-agents-it-can-hire/144309 (noting that CBP’s officer ranks increased by 21% in fiscal year 2017).} and Border Patrol agents in fiscal year 2017,\footnote{121. See id. (noting that the Border Patrol saw only a 4% increase in agents during fiscal year 2017).} the new Border Patrol hires are
not sufficient to offset net losses and low employment. The Border Patrol struggles with an attrition rate nearly double the federal law enforcement rate. CBP recently signed a $297 million, five-year contract with a consulting firm to help hire the mandated Border Patrol agents and other CBP employees. Accounting for the agency’s depleted ranks, difficulty attracting qualified candidates, and high attrition rates, the Border Patrol’s Acting Commissioner should consider the harmful effects of attempting to hire agents as quickly as possible before correcting the causes of the agency’s staffing problems.

A. Strengthening Hiring Standards by Requiring Polygraph Examinations

Rather than relaxing its hiring procedures and requirements, the CBP should strengthen its standards to deter potential applicants with criminal histories from applying to the Border Patrol. Stricter hiring standards would decrease the likelihood of the CBP hiring agents likely to commit crimes. Although the Administrative Procedure Act does not require agencies to go through the traditional notice-and-comment process when changing

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123. See id. (noting that as of May 2017, the Border Patrol employed about 19,500 agents, which is lower than the statutorily required minimum of 21,370 “full-time equivalent agent positions”).

124. See Nicole Ogrysko, As Trump Debates Border Security, Field Agents Decry Existing, Dire Staffing Shortages, FED. NEWS RADIO (Jan. 9, 2018), https://federalnewsradio.com/hiring-retention/2018/01/as-trump-debates-border-security-field-agents-decry-existing-dire-staffing-shortages (finding that the Border Patrol’s attrition rate is 6%, while the federal law enforcement rate is 3.2%).


126. OFFICE OF INSPECTOR GEN. supra note 110, at 35.


128. See id. § 553(b)-(c) (stating that an agency must give notice of a proposed rule by publishing it in the Federal Register and then must accept public input on the proposed rule before finalizing the rule).
rules related to personnel management and other internal policies, such as hiring, agencies must still provide such information to the public. While the CBP would not be required to accept public feedback on the new requirements, publicly announcing more stringent hiring practices may deter applicants with criminal backgrounds or intentions. By deterring unqualified or criminally-minded applicants from applying to the Border Patrol, the agency will reduce spending by using fewer resources to screen applicants who do not meet the Border Patrol’s standards. Conversely, should the CBP choose to further loosen its hiring standards and publicize these changes, drug cartels and other criminal enterprises could exploit the less-qualified new agents stationed at the U.S.-Mexico border. Through publicizing new and more stringent hiring standards, CBP could both deter unqualified applicants from applying and stymie cartel influence on Border Patrol agents.

In response to concerns about the Executive Order’s mandate for a swift

129. See id. § 553(a)(2). A traditional notice-and-comment process on a proposed agency rule would allow experts familiar with the impacts of the proposed rule to voice their support or concerns. See, e.g., Inspection of Persons Applying for Admission, 8 C.F.R. § 235 (2016) (noting that the proposed rule’s commentators included local sheriff and police departments who denied that the decision to extend the border zone twenty-five miles to fifty-five miles into New Mexico would have a negative effect on the region’s security); Waiver of Passport and Visa Requirements Due to an Unforeseen Emergency, 82 Fed. Reg. 41,867 (Sept. 5, 2017) (codified at 8 C.F.R. pt. 212) (listing individual concerns gleaned from comments in response to the proposed rule and giving CBP responses to the comments).

130. See 5 U.S.C. § 552(a)(2)(C) (requiring agencies to make available in electronic format administrative staff manuals that affect the public).

131. See Mark Handler et al., Integration of Pre-Employment Polygraph Screening into the Police Selection Process, 38 AM. POLYGRAPH ASS’N 4, 239, 249 (2009) http://www.polygraph.org/assets/docs/APA-Journal.Articles/2009/pre-employment_polygraph_screening1.pdf (explaining that polygraph examinations are an essential part of law enforcement hiring procedures as a screening-out tool because they can uncover dishonest behaviors that are incompatible with the requisite police integrity).

132. Quickly eliminating or deterring unsuitable applicants will assist CBP in reducing the administrative waste involved in interviewing and hiring unfit applicants. See, e.g., DEPT OF HOMELAND SEC., supra note 2, at 13 (noting that, based on current attrition rates and other hiring challenges, the CBP would need to receive an estimated 750,000 applications to be able to add just 5,000 Border Patrol agents); see U.S. CUSTOMS & BORDER PROT., EXPEDITED HIRING PLAN 6–7 (2015) (explaining that CBP’s initiatives to reduce employment applications from unqualified persons have allowed the agency to focus on hiring only qualified applicants).

133. See HOMELAND SEC. ADVISORY COUNCIL, supra note 98, at 29 (noting that wealthy drugs cartels that operate in Mexico attempt to target law enforcement officers near the border to assist with or facilitate the smuggling of drugs and other contraband over the U.S.-Mexico border).
increase in agent hiring and in response to concerns about corruption within the Border Patrol as well as the potential for swift hiring of unqualified agents under the Executive Order, the CBP Integrity Advisory Council and the American Immigration Council recommend expanded use of pre- and post-hiring polygraph examinations for Border Patrol agents. The introduction of the Anti-Border Patrol Corruption Act of 2010, which mandated use of pre-hire polygraph examinations for Border Patrol agents, is credited with reducing potential corruption and use of force incidents by eliminating unqualified and potentially dangerous candidates from the hiring pool. Following the implementation of the polygraph examination, various Border Patrol applicants admitted during exams that they had committed rape, child molestation, kidnapping, and considered assassinating President Obama. In many cases, the applicants who confessed to these crimes had passed the other parts of the hiring process.

Although polygraph examinations are highly recommended for screening Border Patrol applicants, these examinations have been questioned in other settings. Applicants to Immigration and Customs Enforcement are not required to submit to pre-hire polygraph examinations. However, other federal agencies, such as the FBI, Central Intelligence Agency, and National Security Agency, all require polygraph examinations prior to

134. See id. at 4, 19; HEYMAN, supra note 51, at 11–12.
136. See HEYMAN, supra note 51, at 11 (noting that the polygraph exam, in addition to other Border Patrol hiring reforms, alerted the agency to, among other things, applicants with links to organized crime).
138. See id.
139. See OFFICE OF INSPECTOR GEN., DEP’T OF HOMELESS SEC., OIG-13-114, CBP USE OF FORCE TRAINING AND ACTIONS TO ADDRESS USE OF FORCE INCIDENTS 21 (2013) (stating that pre-hire polygraph examinations have improved the CBP workforce and that pre-hire exams are the best way to keep unqualified applicants out of law enforcement).
140. Although the CBP Integrity Advisory Council recommends increased use of the polygraph examination in its 2016 report, polygraph examinations are often inadmissible in court due concerns of unreliability. See, e.g., Kevin M. Keenan & Samuel Walker, An Impediment to Police Accountability?: An Analysis of Statutory Law Enforcement Officers’ Bills of Rights, 14 B.U. PUB. INT. L.J. 185, 223 (2005).
141. U.S. DEP’T OF HOMELESS SEC. SPECIAL REPORT, supra note 2, at 12 (noting that ICE’s lack of polygraph examination, combined with higher compensation and “more desirable duty locations,” likely impede the Border Patrol’s hiring efforts).
extending offers of employment. Various local police departments make employment conditional upon successful completion of a polygraph examination as well.

Although polygraph examinations are imperfect tools, law enforcement experts recognize their value in vetting applicants and maintaining integrity among current Border Patrol agents. When reviewed in the context of Border Patrol agent hiring and employment, many law enforcement experts maintained the importance of polygraph examinations in ensuring integrity within the agency and identifying applicants with dual loyalties. Additionally, in a 2015 CBP hiring report submitted to Congress, then Deputy Commissioner Kevin McAleenan noted that “the polygraph examination has allowed CBP to evaluate an applicant’s suitability for a law enforcement position more thoroughly and accurately,” and that the examination has identified applicants who are unsuitable for employment within the CBP.

Although the Acting Commissioner authored a memo requesting permission to waive polygraph examinations, he should rethink his position based on recommendations from various sources to the contrary. If the bill’s current text is codified into law, the law will allow the Commissioner to bypass the polygraph requirement. Instead Commissioner McAleenan should

142. See HOMELAND SEC. ADVISORY COUNCIL, supra note 93, at 19.
144. See David Barnhorn & Joey E. Pegram, Note, Speak the Truth and Tell No Lies: An Update for the Employee Polygraph Protection Act, 29 HOF. LAB. & EMP. L.J. 141, 145 (2011) (“[P]sycho- logical states such as fear, anxiety, shame, embarrassment, shock, anger, and resentment can all show up as identical changes on a polygraph read-out.”).
145. A panel of law enforcement experts convened by DHS Secretary Jeh Johnson to review CBP procedures confirmed that polygraph examinations are “an important integrity tool,” and recommended that the agency periodically test its employees, as the FBI does. See Elliot Spagat, Corruption at US Border Agency Led to Lie Detectors, ASSOCIATED PRESS (Jan. 13, 2017), https://apnews.com/a4d203586a2e-4c6dbb12db43345423d9c.
146. CBP Commissioner Kevin McAleenan, who has requested permission to waive the polygraph examination for certain Border Patrol applicants, had admitted that the polygraph exam has helped identify applicants working for foreign drug cartels. See O’Toole, supra note 5.
147. See U.S. CUSTOMS & BORDER PROT., supra note 132, at 6.
reference the Homeland Security Advisory Council’s 2016 report encour-
aging expanded use of polygraph examinations to reduce corruption levels
within the CBP. While this report is not binding, it provides valuable rec-
mendations for reducing criminality within the CBP and Border Patrol. The Acting Commissioner should reference both this report and his own 2013 report, in which he praised the use of polygraph examinations in CBP hiring, in his decision to refrain from waiving the polygraph examination for Border Patrol applicants.

While polygraph examinations should be used to prevent the hiring of unfit agents and to maintain standards during periods of employment, the CBP should take great care to ensure that the agency wastes minimal funds while conducting these tests. Between 2013 and 2016, the DHS Office of Inspector General audit found that the “CBP administered polygraph examinations to applicants who previously provided disqualifying information on employment documents or during the pre-test interview.”

As the FBI has implemented pre- and post-hiring polygraph examinations, the CBP should implement the same standard for its applicants and current employees. This change should be relatively easy to implement.

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(as passed by House, June 7, 2017). The bill provides the CBP Commissioner with the discretion to waive polygraph examinations but does not mandate it. Id.

149. While the Border Patrol only began its use of polygraph examinations on new hires in 2012, other federal law enforcement and intelligence agencies, such as the FBI, the National Security Agency, and the CIA, conduct pre- and post-hire polygraph examinations, including random, unannounced examinations. See HOMELAND SEC. ADVISORY COUNCIL, supra note 93, at 19.

150. See id. at 4 (recommending that the CBP expand its use of polygraph exam to include “random and targeted” exams for current agents during the course of employment and for CBP to promptly seek necessary resources to implements the Council’s recommendations).

151. See generally id. at 3–8 (recommending the establishment of proactive anticorruption measures to remove corrupt agents before they damage the agency and the extension of the one-year probation period for new Border Patrol agents to two years to ensure additional supervision of new agents).

152. See id. at 4 (recommending that CBP expand its use of polygraph examinations).


154. CBP spent an estimated $5.1 million administering over 2,300 polygraph examinations to applicants who had made admissions before the test that should have disqualified them from consideration for positions within the agency. See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-17-99-MA, MANAGEMENT ALERT—CBP SPENDS MILLIONS CONDUCTING POLYGRAPH EXAMINATIONS ON UNSUITABLE APPLICANTS (2017).

155. See infra Part IV (explaining how the FBI implemented pre- and post-hiring polygraph examinations for its employees with access to sensitive material).

156. See, e.g., id. (noting the speed at which the polygraph examinations were implemented following the Hanssen scandal).
as it would not require the standard notice-and-comment process. Finally, the CBP should take care not to rush through the hiring and training process for Border Patrol agents simply to fill its ranks more quickly. Slowing the hiring of the 5,000 agents mandated by the Executive Order and maintaining or increasing current hiring standards and mandating frequent polygraph examinations will gradually lessen the number of violent and corrupt agents within the Border Patrol, which will better serve the Border Patrol’s mission and goals. While certain Border Patrol officials argue that the agency cannot adequately protect the border without a rapid influx of new hires,157 the potential consequences of stationing unqualified recruits in vulnerable positions only creates new opportunities for violent outbursts and drug smuggling operations.

CONCLUSION

Although President Trump’s goal is to secure the U.S.-Mexico border, rapidly hiring Border Patrol agents without proper vetting procedures would be a detriment to the agency’s ability to protect the country from weapons and drug smugglers.158 To quickly hire the 5,000 agents as instructed by the Executive Order, CBP and Congress are considering relaxing hiring standards, in part by eliminating the polygraph exam requirement for certain applicants.159 Should CBP choose to hire the 5,000 agents without full background checks, polygraph examinations, and sufficient training, the agency will become more susceptible to violence and corruption within its ranks.160 To avoid this outcome, the CBP and Border Patrol should maintain or improve upon their current hiring standards and should not deploy their agents until all background checks and other examinations have been completed and reviewed. According to its website, the Border Patrol’s mission is “preventing terrorists and terrorists[] weapons, including weapons of mass

157. See, e.g., Aguilar, supra note 18.
158. While President Trump currently supports the rapid hiring of 5,000 Border Patrol agents, it is difficult to predict any further steps due to frequent changes in the administration’s personnel and policy.
destruction, from entering the United States.”161 If the Border Patrol chooses to rapidly hire 5,000 additional agents by loosening standards and exempting some from important examinations, it will be less able to fulfill its mission and will find itself on the receiving end of more lawsuits and investigations.162

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162. See id.