

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND REFORM

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January 11, 2021

Mr. Mark Morgan
Chief Operating Officer and Senior Official Performing the Duties of the Commissioner
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20229

Dear Mr. Morgan:

On November 2, 2020, the Committee issued a subpoena compelling the production of documents that Customs and Border Protection (CBP) has withheld for more than a year. The documents relate to dozens of employees who participated in secret Facebook groups that posted racist, sexually violent, dehumanizing, and abhorrent material. The subpoena required CBP to produce a complete set of these documents by November 13, 2020.¹

CBP did not produce the subpoenaed documents by the required date. Instead, CBP withheld many of these documents from the Committee and, in documents CBP did produce, applied extensive redactions. CBP concealed the identities of employees who were disciplined, the specific abuses they committed, their roles and responsibilities, and other critical information. As a result, the Committee is unable to determine who was fired, who was suspended, who had their punishments reduced or eliminated entirely and why, and whether any of these employees continue to work with immigrant children or families. Although CBP staff offered to revisit these redactions by the end of last year, they did not do so.

CBP has failed to assert any valid privilege to withhold this information from the Committee. CBP seems to believe, incorrectly, that CBP may defy a duly authorized subpoena because the Committee may decide at some point in the future to inform the American people about the findings of its investigation. CBP's apparent position—that the Constitution includes a privilege for CBP to withhold documents from Congress merely because CBP fears public disclosure—is without any basis in law. The Committee remains extremely concerned by the lengths to which the Trump Administration is going—even in its final days—to place the interests of employees who made racist and sexually depraved posts ahead of the wellbeing of the children and families they interact with every day.

¹ Subpoena from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, to Mark Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, Customs and Border Protection (Nov. 2, 2020) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/CBP%20Subpoena%2011.02.20_FINAL.pdf).

The Committee is seeking this information not only as it considers legislation to address these abuses, but also as it conducts oversight of the expenditure of federal funds. Congress appropriates funding for CBP, including the salaries of employees who work within it. We have a core responsibility under the Constitution to ensure that funds appropriated to the Executive Branch are being spent in a manner consistent with Congress's intended purposes. There is no legitimate basis for CBP's position that Congress may not know the identity of federal employees—paid with taxpayer funds—who engage in abuses for which they are fired, suspended, or otherwise disciplined.

Although the subpoena issued by the Committee on November 2, 2020, expired at the end of the previous session of Congress, this letter serves to inform CBP that the Committee plans to renew this subpoena in the 117th Congress and that it will pursue all means available to secure CBP's full compliance. The Committee urges CBP to reverse its baseless position and, by January 22, 2021, produce a complete and unredacted set of all documents demanded.

Basis for the Committee's Subpoena

In preparing the subpoena issued by the Committee on November 2, 2020, I circulated to Committee Members a 17-page memorandum on October 30, 2020, explaining why the subpoena had become necessary. The memo described in detail the Committee's initial request for documents, CBP's deficient responses over the course of more than a year, and the multiple bases for the Committee's demand. For example, the memo explained:

These documents include information about dozens of CBP employees who engaged in misconduct by participating in secret Facebook groups that shared racist, sexually violent, dehumanizing, and abhorrent material. They made these vile posts not only about immigrants—including a father and daughter who drowned in the Rio Grande—but also about a Member of our Committee.

Chairman Elijah E. Cummings first requested these documents in July 2019. Since that time, CBP has refused to produce any documents that identify these employees or the specific abuses they engaged in, instead choosing to withhold these documents or redact them to conceal this information from the Committee.²

The memo also stated:

Even in cases in which the Trump Administration itself has determined that employees should be disciplined, suspended, or even fired, the Administration continues to maintain that it will not allow the Committee to know who these employees are, what specific

² Memorandum from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, to Members of the Committee on Oversight and Reform, *Notice of Intent to Issue Subpoena to Customs and Border Protection* (Oct. 30, 2020) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-10-30.COR%20Subpoena%20Memo%20re%20Customs%20and%20Border%20Protection.pdf>).

violations they have been disciplined for, what their roles in CBP were, and, if they are still employed, whether they continue working with children and detainees.³

The memo explained that the Committee is concerned about the significant reductions in penalties for employees who engaged in these abuses. The memo stated:

Moreover, based on the limited information produced to the Committee, it is evident that the Trump Administration significantly reduced the punishment of many of these employees, while at the same time shielding them from Congressional oversight.⁴

The memo explained that the Committee has obtained similar information about specific employees and their abuses in numerous other investigations, including relating to personnel at the Drug Enforcement Administration, the U.S. Secret Service, and other law enforcement agencies. As the memo stated:

The Trump Administration's position is legally baseless. The Committee has direct jurisdiction over federal employees and agency disciplinary procedures, and the Committee has an extensive history under both Republican and Democratic Administrations of examining wrongdoing by federal employees—as well as the discipline imposed or not imposed—in order to determine whether legislative reforms are warranted. Such oversight is especially critical for law enforcement personnel who serve in positions of power over vulnerable populations, including children.⁵

The memo continued:

The Committee has an established record of obtaining a wide range of documents for these purposes, including but not limited to personnel files and disciplinary materials relating to personnel who work in law enforcement. Because law enforcement personnel forcibly arrest, place in custody, and imprison others—including children—as part of their official duties, it is critically important that the Committee have the ability to investigate employee misconduct and evaluate agency oversight when determining whether legislative reforms are necessary.⁶

With respect to these legislative reforms, the memo set forth extensive background on legislation Congress has considered in the past, is considering currently, and may consider in the future relating to these matters, including legislation introduced and supported by both Democratic and Republican Members of Congress.⁷

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Finally, the memo considered and rejected CBP's argument that the Committee is not entitled to this information unless it agrees never to make any part of it public:

This argument is also without merit. The Committee—not CBP—has the authority to determine what information the Committee will make public. There is no legal basis for CBP to withhold from Congress the identity of federal employees who have been fired or otherwise disciplined for these atrocious actions. The Department should not be concealing from Congress the identity of racists, sexists, or violent extremists in its midst. Public opprobrium is not a valid legal basis to obstruct Congress from conducting its Constitutional oversight and legislative responsibilities.⁸

CBP's Deficient Response

On November 13, 2020, the due date set forth in the Committee's subpoena, CBP did not produce the required documents. Instead, on that date, Stephanie A. Talton, the Deputy Assistant Commissioner for the Office of Congressional Affairs, sent a two-page letter refusing to produce several categories of documents required under the subpoena. The letter was accompanied by 13 pages of documents relating to four additional cases, but as with documents CBP produced in the past, the identities of specific employees and their misconduct were redacted.⁹

CBP's letter not only acknowledged that "the Committee's purpose remains to investigate whether adequate measures were taken to investigate the allegations of wrongdoing" and that the Committee has "insufficient information to determine whether this process is adequate to deal with allegations of misconduct," but also admitted that the Committee needs the names of the individuals who engaged in these abuses "to ensure that the investigations were appropriately done."¹⁰

Even recognizing these interests, however, CBP's letter suggested that the Committee forego its own investigation and merely rely on the agency. CBP's letter stated:

In response, we would say that the agency took the conduct seriously and as a result removed 4 individuals from their posts—a decision the agency is spending considerable resources to ensure that stands—and suspended or otherwise reprimanded others.¹¹

This is not a valid basis to defy a congressional subpoena. CBP has not asserted any privilege that is legally cognizable to block the Committee from conducting its own

⁸ *Id.*

⁹ Letter from Deputy Assistant Commissioner Stephanie A. Talton, Customs and Border Protection, to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Nov. 13, 2020) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/11.13.20%20MALONEYC%20Signed%20response.pdf>).

¹⁰ *Id.*

¹¹ *Id.*

investigation. CBP's letter also failed to include any reference to employees whose recommended discipline was reduced or eliminated.

One particularly disingenuous argument in CBP's letter is that because CBP does not possess all responsive documents, it will produce none. For example, the subpoena required CBP to produce the following: "All postings and comments, including images, videos, and text, from the 'I'm 10-15' and 'The Real CBP Nation' Facebook groups."¹² CBP's letter argued that CBP cannot not produce any of these documents "because CBP does not possess *all* postings."¹³ Obviously, as the instructions to the Committee's letter requesting this information explained, the Committee required CBP to "produce all responsive documents *that are in your possession, custody, or control.*"¹⁴ If CBP has copies of such postings, it must produce them to the Committee.

Similarly, the Committee's subpoena sought the following: "Documents sufficient to identify all current and former employees who are or were members of these Facebook groups and the dates they were members."¹⁵ CBP's letter asserted that CBP will not provide any information about these employees because CBP does not have "a *comprehensive* list of Facebook users who were members of these two groups."¹⁶ CBP cites to no legal authority, and the Committee is aware of none, for the proposition that CBP's legal duty under the subpoena is obviated because it may only have partial or incomplete information.

With respect to the redacted documents, CBP's letter claimed that the Committee "flatly refused to receive, as an accommodation, the names redacted with anonymized case codes to protect the identities of Border Patrol Agents—many of whom were found to have done nothing wrong."¹⁷ Again, CBP's letter cited no legal basis for "anonymizing"—or concealing—the

¹² Subpoena from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, to Mark Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, Customs and Border Protection (Nov. 2, 2020) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/CBP%20Subpoena%2011.02.20_FINAL.pdf).

¹³ Letter from Deputy Assistant Commissioner Stephanie A. Talton, Customs and Border Protection, to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Nov. 13, 2020) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/11.13.20%20MALONEYC%20Signed%20response.pdf>) (emphasis added).

¹⁴ Letter from Chairman Elijah E. Cummings, Committee on Oversight and Reform, to Mark Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, Customs and Border Protection (July 31, 2019) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-07-31.EEC%20to%20Morgan-CBP%20re%20Secret%20Facebook%20Group.pdf>) (emphasis added).

¹⁵ Subpoena from Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform, to Mark Morgan, Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, Customs and Border Protection (Nov. 2, 2020) (online at https://oversight.house.gov/sites/democrats.oversight.house.gov/files/CBP%20Subpoena%2011.02.20_FINAL.pdf).

¹⁶ Letter from Deputy Assistant Commissioner Stephanie A. Talton, Customs and Border Protection, to Chairwoman Carolyn B. Maloney, Committee on Oversight and Reform (Nov. 13, 2020) (online at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/11.13.20%20MALONEYC%20Signed%20response.pdf>) (emphasis added).

¹⁷ *Id.*

identities of these employees, particularly since the Committee has obtained this type of information in several previous investigations of law enforcement personnel. CBP's letter also failed to cite any reason for hiding from Congress the identities of employees that even CBP has concluded must be terminated, suspended, or otherwise disciplined for their abuses.

Perhaps recognizing these deficiencies, CBP's letter made this offer:

CBP and DHS is willing to reconsider the extent of the redactions of the documents provided to date to include in the text the factors weighed by the deciding official in each case. This is to provide further evidence of the fact that CBP took the allegations seriously and made informed decisions in each case. We anticipate being able to have these documents to you by the end of the month.¹⁸

Since this offer was made, however, CBP has produced no additional documents, removed no redactions, identified no employees who engaged in these abuses, and supplied no additional information to the Committee. Instead of providing evidence that "CBP took the allegations seriously," as CBP's letter claimed, CBP's failure to follow through on its own commitments provides further evidence of the need for the Committee's investigation.

New Documents Reiterate Concerns

Although the few new documents CBP produced on November 13, 2020, are heavily redacted, they raise significant concerns that reiterate the need for the documents subpoenaed by the Committee.

According to the documents, two CBP officers who served as administrators of "The Real CBP Nation" Facebook group were given only letters of caution. These letters noted that they were "not a disciplinary action" and that they "will not be a matter of record in your Official Personnel Folder." The letters warned the employees: "As a page administrator, you failed to adequately monitor and remove inappropriate posts from the FB group page." This included failing to monitor and remove posts that were "disrespectful and depict females in an extremely negative light." They also found that "inappropriate posts on CBP Nation portrayed the Agency in a negative light." Yet, the officers—whose identities were redacted—received no disciplinary action. The same letters also explained that this Facebook group was created by a CBP Supervisory Officer. However, the name of the Supervisory Officer was redacted, and it is unclear whether that employee was disciplined.

In two other cases, Border Patrol agents received suspensions, but in both cases, the punishments were reduced. One agent's punishment was reduced to a ten-day suspension, and the other agent's punishment was reduced to a one-day suspension. In both cases, the identities of the agents and their proposed punishments were redacted. As a result, the Committee cannot determine whether they were going to receive more lengthy suspensions or even terminations—or why the agency reduced them.

¹⁸ *Id.*

Conclusion

I urge CBP to halt its obstruction of the Committee's investigation, reverse its legally baseless position, and produce a complete and unredacted set of all documents by January 22, 2021. If CBP fails to do so, the Committee will begin the process to reissue this subpoena and take all additional measures available to it to secure full compliance.

Sincerely,

A handwritten signature in blue ink that reads "Carolyn B. Maloney". The signature is written in a cursive style and is positioned above a horizontal line.

Carolyn B. Maloney
Chairwoman

cc: The Honorable James R. Comer, Ranking Member