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OFFICE OF INSPECTOR GENERAL

**U.S. Customs and Border
Protection Compliance
with Use of Force Policy for
Incidents on November 25,
2018 and January 1, 2019
(REDACTED)**

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August 24, 2020
OIG-20-64

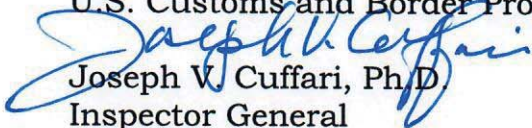


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Department of Homeland Security

Washington, DC 20528 / www.oig.dhs.gov

August 24, 2020

MEMORANDUM FOR: Mark A. Morgan
Senior Official Performing the Duties of the
Commissioner
U.S. Customs and Border Protection

FROM: 
Joseph V. Cuffari, Ph.D.
Inspector General

SUBJECT: *U.S. Customs and Border Protection Compliance with
Use of Force Policy for Incidents on November 25, 2018
and January 1, 2019 – ~~Law Enforcement Sensitive~~*

Attached for your action is our final report, *U.S. Customs and Border Protection Compliance with Use of Force Policy for Incidents on November 25, 2018 and January 1, 2019 – ~~Law Enforcement Sensitive~~*. We incorporated the formal comments provided by your office.

The report contains four recommendations to ensure compliance with the Use of Force Policy and the investigative process. Your office concurred with all four recommendations. Based on information provided in your response to the draft report, we consider recommendations 1, 3, and 4 open and resolved. Once your office has fully implemented the recommendations, please submit a formal closeout letter to us within 30 days so that we may close the recommendations. The memorandum should be accompanied by evidence of completion of agreed-upon corrective actions and of the disposition of any monetary amounts. Recommendation 2 is resolved and closed. Please send your response or closure request to OIGAuditsFollowup@oig.dhs.gov.

Consistent with our responsibility under the *Inspector General Act*, we will provide copies of our report to congressional committees with oversight and appropriation responsibility over the Department of Homeland Security. We will post a redacted version of the report on our website for public dissemination.

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Please call me with any questions, or your staff may contact Sondra McCauley, Assistant Inspector General for Audits, at (202) 981-6000.

Attachment

cc: Rodney S. Scott, Chief, U.S. Border Patrol, U.S. Customs and Border Protection

Matthew Klein, Assistant Commissioner, Office of Professional Responsibility, U.S. Customs and Border Protection

Christopher A. Bishop, Acting Director, Law Enforcement Safety and Compliance Directorate, U.S. Customs and Border Protection

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DHS OIG HIGHLIGHTS

U.S. Customs and Border Protection Compliance with Use of Force Policy for Incidents on November 25, 2018 and January 1, 2019

August 24, 2020

Why We Did This Inspection

In response to congressional concerns, we reviewed CBP's use of tear gas against migrants near the San Ysidro, California Port of Entry on November 25, 2018. We also reviewed CBP's use of tear gas in a January 1, 2019 incident near the same port of entry. Our objective was to examine circumstances surrounding the use of force in these incidents and determine whether CBP complied with its use of force policy.

What We Recommend

We made four recommendations to CBP to ensure compliance with its use of force policy and improve its investigative process.

For Further Information:

Contact our Office of Public Affairs at (202) 981-6000, or email us at DHS-OIG.OfficePublicAffairs@oig.dhs.gov

What We Found

U.S. Customs and Border Protection's (CBP) use of tear gas on November 25, 2018 and January 1, 2019, in response to physical threats, appeared to be within CBP's use of force policy. However, U.S. Border Patrol did not fully comply with CBP policies related to obtaining an acoustic device with an "alert tone" mode, as well as required less-lethal device training and certification.

Border Patrol obtained an acoustic device and used it in an "alert tone" mode on November 25, 2018, which we determined did not conform to CBP's use of force policy because Border Patrol did not get advance authorization to have a device with this capability. Using the acoustic device in this mode may increase the risk of temporary or permanent hearing loss to those exposed to the sound and thereby increase the Government's risk of liability. CBP's own internal investigation of the November 25, 2018 incident regarding the acoustic device was incomplete and inaccurate. Therefore, CBP did not have all the information it needed to determine whether the CBP officer and Border Patrol agents involved had complied with the use of force policy.

In addition, not all Border Patrol agents had the required training and certification to carry less-lethal devices. This occurred because Border Patrol lacked internal controls to ensure agents had fulfilled these requirements. Border Patrol agents using less-lethal devices for which they are not certified could result in unintended serious injury or death, and thereby increases the Government's risk of liability.

CBP's Response

CBP concurred with all four recommendations and initiated actions to address the findings. However, CBP disagrees with our characterization of the Office of Professional Responsibility's awareness of the use of the acoustic device.



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Abbreviations

AEL	Authorized Equipment List
CBP	U.S. Customs and Border Protection
LESC	Law Enforcement Safety and Compliance Directorate
OIG	Office of Inspector General
OPR	Office of Professional Responsibility
POE	Port of Entry
UOF	use of force



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Background

U.S. Customs and Border Protection (CBP) is responsible for securing the Nation's borders and preventing the illegal entry or exit of persons and goods to and from the United States. CBP officers and Border Patrol agents use CBP's *Use of Force Policy, Guidelines, and Procedures Handbook* (UOF policy) as a guide for how force can be used in carrying out their law enforcement duties. The policy permits CBP officers and Border Patrol agents to use various responses to gain control of a resistant subject. However, the level of force used must be reasonable and necessary given the "totality of circumstances." Based on a subject's level of resistance, CBP authorizes its officers and Border Patrol agents to employ a number of techniques to gain control of a subject, such as giving spoken commands and physically escorting the individual. In specified circumstances, officers and agents may also use deadly force or less-lethal¹ means, such as chemicals (e.g., tear gas)² and impact munitions (e.g., pepper ball launching system),³ referred to as less-lethal devices in this report. Although CBP's UOF policy provides guidance and parameters for use of force, it does not address tear gas or impact munitions crossing the border into Mexico. Use of force must be reasonable and necessary based on the totality of circumstances, regardless of geographic location. Appendix C shows some less-lethal devices available to CBP officers and Border Patrol agents.

In October 2018, CBP monitored an expanding group of about 7,000 migrants believed to be heading north from Honduras to the United States. According to CBP, as the group moved north, it overwhelmed Guatemalan and Mexican border security efforts with actions that included tearing down a border gate, throwing projectiles, and attempting to discharge weapons at border guards. To prepare for the migrants' arrival, CBP's San Diego Sector began taking steps to fortify border infrastructure, such as adding barbed wire-like concertina wire to border fencing and building a dirt berm⁴ in the Tijuana River channel where no fencing existed. According to CBP, these measures were intended to mitigate any mass migration attempts by the group's members to enter the United States and to protect both public and law enforcement personnel. Figures 1 and 2 show border fencing with concertina wire and the Tijuana River channel dirt berm.

¹ Less-lethal force is not likely to cause serious physical injury or death. Less-lethal devices or weapons may be used in situations in which lower level techniques are not sufficient to control disorderly or violent subjects.

² Less-lethal chemical munitions contain either Oleoresin Capsicum, O-Chlorobenzylidenemalonitrile, or PAVA pepper powder, which are irritants and cause discomfort to the individual exposed. These chemical munitions are typically referred to as tear gas.

³ A pepper ball launching system is a less-lethal impact/chemical irritant delivery system powered by compressed air.

⁴ A berm is a wall or barrier to separate off an area, as shown in figure 2.



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Figure 1: Border Fencing and Concertina Wire
Source: CBP OPR



Figure 2: Tijuana River Channel with Concertina Wire and Dirt Berm
Source: CBP OPR

On November 25, 2018, about 1,000 migrants attempted illegal entry into the United States near the San Ysidro, California Port of Entry (POE) in the San Diego Sector. On January 1, 2019, a group of about 100 migrants attempted to enter the United States illegally west of the San Ysidro, California POE. CBP personnel who used less-lethal devices in connection with both incidents generally reported they did so to protect themselves or other officers and agents from migrants throwing rocks and other projectiles. Less-lethal force included using some of the devices identified in appendix C. In both incidents, the wind carried the tear gas into Mexico and some of the munitions crossed the border and landed in Mexico. Additionally on November 25, 2018, according to CBP, it intended to employ an acoustic device to broadcast spoken announcements to deter migrants from illegally crossing into the United States. However, the device was used in an “alert tone,” reportedly to deter migrants from throwing rocks and projectiles.⁵ See figure 3 for an image of the acoustic device. CBP’s actions temporarily stopped the rock and projectile throwing, as well as attempts to cross the border, and ended when Mexican law enforcement arrived. During the November 25 incident, six agents reported being hit with rocks and other projectiles.



Figure 3: Image of the Acoustic Device
Source: CBP Special Operations Detachment, San Diego Sector

⁵ The acoustic device can be used for intelligible, long-range announcements, similar to a bullhorn, and with an alert tone. The alert tone produces a loud, piercing sound to gain attention or to cause physical discomfort in a target. The device can produce sound pressure levels that have the potential to cause temporary or permanent hearing damage.



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CBP conducted internal investigations of both incidents in accordance with its *The Use of Force Incident Guide* and a Use of Force Review Board⁶ determined the level of force employed by the CBP officer and Border Patrol agents involved in both incidents was consistent with CBP's UOF policy. CBP also presented its two internal investigative reports to the United States Attorney's Office, Southern District of California, which concluded there was no violation of law.

The use of less-lethal devices in response to rock throwing incidents is not unprecedented. Since 2016, CBP reported 74 assaults with rocks and projectiles on Border Patrol agents in which agents used less-lethal devices in response. Agents were injured in four of those incidents.

In response to congressional concerns, we reviewed CBP's use of tear gas against migrants near the San Ysidro, California POE on November 25, 2018. We also reviewed CBP's use of tear gas in the January 1, 2019 incident near the same POE. Our objective was to examine circumstances surrounding the use of force in these incidents and determine whether CBP complied with its UOF policy.

Results of Inspection

CBP's use of tear gas on November 25, 2018 and January 1, 2019, in response to physical threats, appeared to be within CBP's UOF policy. However, U.S. Border Patrol did not fully comply with CBP policies related to obtaining an acoustic device with an "alert tone" mode, as well as required less-lethal device training and certification.

U.S. Border Patrol obtained an acoustic device and used it in an "alert tone" mode on November 25, 2018, which we determined did not conform to CBP's use of force policy because Border Patrol did not get advance authorization to have a device with this capability. Using the acoustic device in this mode may increase the risk of temporary or permanent hearing loss to those exposed to the sound and thereby increase the Government's risk of liability. CBP's own internal investigation of the November 25, 2018 incident regarding the acoustic device was incomplete and inaccurate. Therefore, CBP did not have the information it needed to determine whether the CBP officer and Border Patrol agents involved had complied with the UOF policy.

In addition, not all Border Patrol agents had the required training and certification to carry less-lethal devices. This occurred because Border Patrol

⁶ Use of Force Review Boards review UOF investigative reports and presentations, and vote to determine if force was consistent with CBP UOF policy. Additionally they may make recommendations concerning tactics, training, and equipment and refer potential misconduct and administrative violations to the Office of Internal Affairs.



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lacked internal controls to ensure agents had fulfilled these requirements. Border Patrol agents using less-lethal devices for which they are not certified could result in unintended serious injury or death, and thereby increases the Government's risk of liability.

CBP's Use of Tear Gas on November 25, 2018 and January 1, 2019 Appeared Compliant with Its Use of Force Policy

Given the totality of circumstances surrounding both incidents and the evidence we reviewed, we determined CBP's use of tear gas on November 25, 2018 and January 1, 2019 appeared to be within CBP's UOF policy. We based our determination on incident statements from Border Patrol agents and a CBP officer, investigative reports from CBP's Office of Professional Responsibility (OPR), and audio and video recordings from both incidents. The UOF policy requires officers' and Border Patrol agents' use of force to be "objectively reasonable" given the "totality of circumstances." Specifically, the level of force applied must reflect all circumstances surrounding the situation, including the presence of "imminent danger" to CBP officers and Border Patrol agents or others. According to the UOF policy, the totality of circumstances includes, but is not limited to, the following factors: training, age, size, strength of the individual officer or Border Patrol agent compared to the subject; weapons involved; and presence of other officers, subjects, or bystanders. Finally, although not prohibited, according to the UOF policy, CBP officers and Border Patrol agents should consider alternatives to using chemical and impact munitions on small children, pregnant women, and the elderly. In a 2013 study, the Police Executive Research Forum⁷ recommended CBP use less-lethal devices to de-escalate and avoid use of deadly force during rock throwing assaults.

The November 25, 2018 incident involved multiple groups totaling more than 1,000 migrants. The groups attempted to make entry into the United States at various locations along a 3-mile span of the international border fence on either side of the POE. For example, one group of about 100 migrants attempted illegal entry into the United States through the southbound San Ysidro POE vehicle lanes. While still in Mexico, Mexican authorities turned the group away. According to CBP, about 20 CBP officers and 80 Border Patrol agents worked to control the situation at these multiple locations.

⁷ The Police Executive Research Forum is an independent research organization focused on critical policing issues. The forum has identified best practices on fundamental issues such as reducing police use of force, developing community policing and problem-oriented policing, using technologies to deliver police services to the community, and evaluating crime reduction strategies. CBP commissioned the Forum to conduct a review of the use of force by CBP officers and agents resulting in the referenced study.



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In incident statements, Border Patrol agents generally indicated that migrants began making verbal threats and throwing rocks at them, while damaging fencing and the dirt berm in the Tijuana River channel. Six Border Patrol agents reported individuals in Mexico were throwing rocks at CBP personnel while hiding behind members of the media. Figure 4 is a photo of a rock being thrown from Mexico toward Border Patrol agents on November 25, 2018. One CBP officer and 39 Border Patrol agents responded multiple times with various less-lethal devices, such as those shown in appendix C, reportedly to protect either themselves or other CBP officers and Border Patrol agents. See figure 5 for a map of the November 25, 2018 incident and the approximate locations where the CBP officer and Border Patrol agents responded with less-lethal devices.



Figure 4: Rock Being Thrown at Border Patrol Agents

Source: CBP OPR



Figure 5: Map of November 25, 2018 Incident

Source: CBP OPR and Office of Inspector General (OIG) markings

In incident reports, CBP personnel generally cited several concerns about the November incident. The CBP officer and Border Patrol agents described apprehension about the large number of migrants compared to the number of CBP personnel at the scene. In addition, they were fearful about the likelihood of more assaults on officers and agents and potential injuries to migrants if large numbers of them forced their way through the infrastructure and came into physical contact with CBP personnel. Finally, the Border Patrol incident commander expressed concern about the close proximity of a shopping mall to the southern border and the potential danger to the public.



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The November 25, 2018 incident lasted for approximately 3 hours until Mexican law enforcement dispersed the multiple groups on the southern side of the border. Six agents reported being hit with rocks or other projectiles, and one agent was diagnosed with a serious injury resulting in temporary total disability preventing him from working. As of July 10, 2019, he remained in limited work status. Additionally, a CBP vehicle window was broken by a rock.

On January 1, 2019, two similar incidents occurred at the same location, at two separate times between approximately 1:45 am and 2:45 am. In the first incident, CBP estimated 100 migrants were congregating in a large open space overlooking the international boundary fence approximately 5 miles west of the San Ysidro, California POE. The second incident involved approximately 45 migrants congregating in the same location. In incident statements, Border Patrol agents said individuals, including young children, were being lowered over the international boundary fence into the United States near concertina wire. According to CBP, Border Patrol agents instructed the migrants to move away from the fence, but instead they moved toward it and began illegally crossing into the United States. Figure 6 shows a person being lowered over the border fence on January 1, 2019. In both incidents, Border Patrol agents reportedly deployed smoke devices⁸



Figure 6: Migrant Being Lowered over Border Fence

Source: CBP OPR

While some members of the migrant group dispersed, others began throwing rocks across the border at the agents. According to CBP, it requested assistance from Mexican law enforcement officials who said they were unavailable because of increased activity in Tijuana, Mexico, due to the New Year's Eve holiday.

According to CBP, 20 Border Patrol agents responded collectively to the January 1, 2019 incidents. Twelve Border Patrol agents responded with a variety of less-lethal devices, dispersing the groups. No agents reported being hit with rocks or other projectiles. See figure 7 for a map of the January 1, 2019 incidents and the approximate location where agents responded with less-lethal devices. (Figure 1 is a close-up view of the border fence and concertina wire near the location of the January 1, 2019 incidents.)

⁸ Smoke does not contain tear gas and when



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Figure 7: Map of the January 1, 2019 Incident

Source: CBP OPR and OIG markings

Given the totality of circumstances on November 25, 2018 and January 1, 2019, and the evidence we reviewed (i.e., incident statements from the CBP officer and Border Patrol agents, OPR investigative reports, and audio and video footage), we did not find circumstances inconsistent with CBP’s UOF policy. CBP’s use of tear gas and other authorized less-lethal devices may have contributed to the de-escalation of the dangerous situations, preventing further injuries to officers and Border Patrol agents, avoiding serious injuries to migrants, and possibly avoiding the use of deadly force. In its request for this review, Congress also expressed concerns about children being in the areas where tear gas was used. By reviewing available video⁹ and statements of the CBP officer and Border Patrol agents present, we determined that, where tear gas was used, the groups were predominantly adult males and CBP did not specifically target children.

Border Patrol Did Not Comply with CBP’s UOF Policy in Obtaining an Acoustic Device Used on November 25, 2018

Border Patrol obtained an acoustic device and used it in an “alert tone” mode on November 25, 2018, which we determined did not conform to CBP’s use of force policy because Border Patrol did not get advance authorization to have a device with this capability. According to CBP, the alert tone was used to deter migrants from throwing rocks and projectiles. Using the acoustic device in this mode may increase the risk of temporary or permanent hearing loss to those exposed to the sound and thereby increase the Government’s risk of liability. CBP’s own internal investigation of the November 25, 2018 incident regarding the acoustic device was incomplete and inaccurate. Therefore, CBP did not have all the information it needed to determine whether the CBP officer and

⁹ The limited video evidence of the incidents on November 25, 2018, and January 1, 2019, was often grainy, did not always include audio, and did not cover all instances of UOF.



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Border Patrol agents involved had complied with the use of force policy when using an acoustic device.

Border Patrol Obtained an Acoustic Device with an Unauthorized Capability

According to CBP's UOF policy, CBP officers and Border Patrol agents are only permitted to carry equipment and devices on its Authorized Equipment List (AEL). The AEL identifies the law enforcement equipment and devices CBP's Law Enforcement Safety and Compliance Directorate (LESC) has tested, evaluated, and determined to be suitable for deployment. According to CBP, using weapons not on the AEL is strictly prohibited without written approval from the executive director of LESL.

We concluded from audio evidence that, on November 25, 2018, Border Patrol agents used an acoustic device in alert tone mode,¹⁰ even though LESL had previously established that using the device in this mode was an unauthorized use of force due to its limited effectiveness and risk of hearing loss. Because of LESL's determination, the acoustic device is not on CBP's AEL and its use in alert tone mode does not comply with the component's UOF policy. In addition to similarly warning of acoustic exposure limits and the potential for hearing loss, the manufacturer's documentation also recommends operators of the acoustic device follow specific rules of engagement that consider these risks. Although CBP's UOF policy would have permitted use of the alert tone in a manner reasonable and necessary for self-defense or the defense of another person in threatening, emergent situations,¹¹ CBP's use of force policy does not authorize the carrying of any weapon for duty use that is not authorized and listed on the AEL or specifically approved by the director of LESL.

Had CBP followed its UOF policy, the acoustic device with the alert tone capability would not have been carried or used.

Two factors enabled CBP to obtain the acoustic device with the unauthorized capability. First, San Diego Sector Border Patrol did not consult LESL before obtaining the device and subsequently using it in alert tone mode. On November 15, 2018, the sector borrowed the acoustic device from the manufacturer to use for demonstration and testing in preparation for the migrant group's arrival. According to a San Diego Sector official, the device

¹⁰ The alert tone produces a loud, piercing sound to gain attention or to cause physical discomfort in a target.

¹¹ CBP's UOF policy permits officers and agents to use any available weapon in a manner that is reasonable and necessary for self-defense or the defense of another person in threatening, emergent situations.



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was to be used to gain attention and clearly communicate messages to a large group of people.

The official also said the sector was unaware that use of the acoustic device in alert tone mode was not authorized. Second, LESC did not formally communicate to CBP stakeholders it had determined the acoustic device, when used in alert tone mode, was unauthorized for use by CBP.

CBP San Diego Sector Border Patrol should have consulted LESC prior to obtaining and using the device. Although San Diego Sector Border Patrol may have intended to use the acoustic device only for communicating messages, it would have been prudent to coordinate with LESC given the warnings in the manufacturer's documentation. Operating the acoustic device in the potentially harmful alert tone mode increased the risk of unintended injury and thereby increased the Government's risk of liability.

OPR's Internal Investigation on Use of the Acoustic Device Was Inaccurate and Incomplete

CBP's *The Use of Force Incident Guide* includes procedures for investigating use of force incidents. Such incidents are examined to determine whether CBP officer and Border Patrol agent actions comply with policy. Review results are presented in an investigative report to a CBP Use of Force Review Board. The guide requires the investigative report presented to the board to be thorough, factual, and objective. CBP OPR conducted an investigation of the November 25, 2018 incident and presented its report to a Use of Force Review Board on December 12, 2018. The board determined that the CBP officer and Border Patrol agents involved had complied with CBP's UOF policy.

We determined the CBP OPR investigative report for the November 25, 2018 incident was inaccurate regarding use of the acoustic device. Specifically, OPR was aware the acoustic device was used in alert tone mode, but did not report it as a use of force. Although the manufacturer's documentation states the device can cause physical discomfort and temporary or permanent hearing damage, OPR officials said they were unaware of the device's capabilities and did not consider it a weapon.

We noted the following instances of inaccuracy and incompleteness, as well as inconsistencies between the OPR investigative report and Border Patrol agents' incident statements. For example:

- The investigative report stated the acoustic device was used only in "audio function" or "audio mode" although agents did not include such information in their statements.



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- OPR’s summaries of CBP’s November 25, 2018 radio transmissions had gaps and did not document Border Patrol discussions about the use of the acoustic device or the presence of the alert tone.
- OPR received video files of the November 25, 2018 incident, but the investigative report did not contain an analysis of the video files, one of which contained audio of the acoustic device in alert tone mode.
- The Use of Force Review Board’s executive summary report indicated the acoustic device was used for “audio only as a public address system,” although OPR had radio transmission and video evidence that the device was used in alert tone mode.

According to OPR, these inaccuracies were due to errors. We believe these issues occurred because OPR did not fully investigate the use of the acoustic device and did not ensure the investigative report was accurate and complete based on the evidence obtained.

Due to the shortcomings of the investigative report, the Use of Force Review Board did not have all the information it needed before determining CBP officers and Border Patrol agents complied with CBP’s UOF policy during the November 25, 2018 incident. OPR reopened the investigation once informed of our findings regarding CBP’s use of the acoustic device and the OPR investigative report. We referred these issues to the DHS OIG Office of Investigations for review, at which time OPR was directed by DHS OIG to cease investigative activity. Although we determined that Border Patrol did not comply with CBP’s UOF policy in obtaining the acoustic device used on November 25, 2018, our internal investigations did not substantiate criminal wrongdoing or result in judicial action.

Border Patrol Agents Carried Less-Lethal Devices for Which They Lacked Required Certification

According to CBP’s UOF policy, CBP officers and Border Patrol agents must maintain and annually demonstrate an acceptable level of proficiency in the use of less-lethal devices. CBP officers and Border Patrol agents are prohibited from carrying any less-lethal device until they have successfully completed training and received certification for its use. Nonetheless, in emergency situations, CBP UOF policy permits using any available weapon “in a manner that is reasonable and necessary for self-defense or the defense of another person.”

We determined some Border Patrol agents were carrying less-lethal devices although they had not fulfilled training and certification requirements. For example, 8 of 12 Border Patrol agents who used less-lethal devices on January



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1, 2019 were not certified for the less-lethal devices they were carrying before the incidents. According to a San Diego Sector Special Operations Detachment official, during Operation Secure Line¹² they gave their agents unrestricted access to less-lethal devices without first verifying agents were certified to use them and did not maintain records indicating when and where less-lethal devices were issued to agents. As a result, Border Patrol violated the UOF policy by permitting agents to carry less-lethal devices they were not trained and certified to use. Given the emergency situation on January 1, 2019, use of the devices was not a violation of policy, but uncertified agents carrying the devices before and after the actual incident was an infraction.

In another example, two uncertified agents in the San Diego Sector were able to check out less-lethal devices from their station at the beginning of their shift. According to Border Patrol, this was due to a communication problem in the information system used to verify certifications and issue equipment. The system did not notify the supervisors that the agents were not certified to use the less-lethal devices they were checking out. Border Patrol officials said the system was not configured correctly for four of eight San Diego Sector Border Patrol stations. Therefore, supervisors were unable to properly verify certifications prior to issuing devices. Although these specific agents did not use the less-lethal devices on January 1, 2019, carrying devices for which they were not certified constituted a violation of CBP's UOF policy. Although UOF policy allows for use of such devices in emergency situations, use by uncertified agents could pose the risk of unintended serious injury or death and thereby increase the Government's risk of liability. San Diego Sector Border Patrol provided support that it corrected the system's communication problem on May 13, 2019.

Recommendations

Recommendation 1: We recommend the Chief, U.S. Border Patrol ensure Border Patrol follows existing policy requiring consultation with LESC before conducting demonstrations or testing devices not on the CBP Authorized Equipment List if they are intended to be directed at or on an individual or a group.

Recommendation 2: We recommend the Chief, U.S. Border Patrol implement controls to ensure San Diego Sector's Special Operations Detachment issues equipment only to certified individuals and retains issuance records.

¹² CBP initiated Operation Secure Line to prepare for the mass migration in the San Diego Sector Area of Responsibility associated with the two incidents discussed in this report.



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Recommendation 3: We recommend the Director, Law Enforcement Safety and Compliance Directorate, ensure CBP stakeholders are formally notified of the requirement to consult LESC prior to acquiring, purchasing, borrowing, or utilizing any item marketed with capabilities intended to modify the behavior or compel compliance of an individual or group with pain or discomfort.

Recommendation 4: We recommend the Assistant Commissioner, Office of Professional Responsibility, use the findings and deficiencies noted regarding the investigation, reporting, and review of the November 25, 2018 use of force incident for training and education to improve the overall quality of *The Use of Force Incident Guide* products, as well as the efficacy of Use of Force Review Board proceedings.

Management Comments and OIG Analysis

CBP provided its written response to the report on June 26, 2020. CBP concurred with all four recommendations and provided corrective action plans and completion dates, as required. CBP maintained that, in light of the threat created by the unprecedented surge of individuals attempting illegal entry during the incidents in question, Border Patrol agents responded reasonably and within their statutory authority, including with respect to use of force. CBP stated the collective response contributed to de-escalation and prevented injury to all involved.

CBP disagreed with the OIG's characterization of OPR's awareness of the use of the acoustic device. CBP acknowledged OPR was aware of use of the acoustic device as a public address system. However, according to CBP, at the time of its investigation, OPR was not aware of the capability for, or use of, the device in alert tone.

When our inspection team met with individuals from OPR, they told us they knew the acoustic device was used in alert tone mode, but did not report it as a use of force. In our meeting, OPR officials indicated they did not believe the alert tone was a use of force, and attributed the inconsistencies we found in their investigation to errors resulting from OPR's lack of understanding of the device's functionality.

We received technical comments on the draft report and revised the report as appropriate. Appendix B contains CBP's management comments in their entirety. We consider recommendations 1, 3, and 4 resolved and open, and recommendation 2 closed. The following is a summary of CBP's responses and our analysis.



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CBP response to Recommendation 1: Concur. Border Patrol will issue clarifying guidance specifically related to UOF policy during exigent situations. The guidance will address training and proficiency requirements, as well as ensuring all equipment used is on the AEL and any equipment not on the list is coordinated through LESC for proper testing, evaluation, approval, procurement, and implementation as use of force equipment. The estimated completion date is August 28, 2020.

OIG Analysis of CBP's Response: Border Patrol's actions satisfy the intent of this recommendation. We consider this recommendation resolved and open until Border Patrol provides support for the corrective actions taken.

CBP response to Recommendation 2: Concur. Border Patrol San Diego Sector mandates that all stations, including the Special Operations Detachment, daily use the Issue Room application in the Shared Web Application Portal to check out equipment, including that in its weapon armory. San Diego Sector will also ensure supervisors maintain such records in CBP's official system of record, the Firearms Armor and Credential Tracking System. Additionally, to ensure proper certification, any agents detailed to the San Diego Sector Special Operations Detachment will be required to present a hard copy of their current less-lethal device certifications prior to issuance of any less-lethal devices. CBP requested that OIG consider this recommendation resolved and closed based on supporting documentation previously provided.

OIG Analysis of CBP's Response: Border Patrol San Diego Sector's corrective actions satisfy the intent of the recommendation. We reviewed the actions described in CBP's response and the San Diego Sector's equipment issuance documentation. We consider this information sufficient to resolve and close the recommendation.

CBP response to Recommendation 3: Concur. In August 2019, LESC issued a memorandum, "*Testing, Evaluating, Approval, Procurement, and Implementation of CBP Use of Force Equipment.*" This guidance covers the review process for considering specific equipment, clarifies that new equipment is not authorized until the LESC makes a determination about it, and describes responsibilities of the LESC director and CBP component heads. In addition, the LESC will further define use of force equipment for all CBP components as any item designed or marketed as a device intended to cause pain or discomfort to modify the behavior of an individual or group. The estimated completion date is July 31, 2020.

OIG Analysis of CBP's Response: LESC's corrective actions satisfy the intent of the recommendation. We consider this recommendation resolved and open until LESC provides support for the corrective actions taken.



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CBP response to Recommendation 4: Concur. In addition to UOF Incident Team instruction for new investigators, OPR collaborated with LESC to provide up-to-date training, including lessons learned, from these events. OPR will ensure training incorporates confirmation of use of force tools used and presentation to Use of Force review boards. OPR previously conducted a week-long working group to identify deficiencies in the UOF Incident Team process, and is now preparing recommendations to improve the program. The estimated completion date is September 30, 2020.

OIG Analysis of CBP's Response: OPR's corrective actions satisfy the intent of the recommendation. We consider this recommendation resolved and open until OPR provides support for the corrective actions taken.



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Appendix A

Objective, Scope, and Methodology

The Department of Homeland Security Office of Inspector General was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*.

Our objective was to examine circumstances surrounding CBP's use of force near the San Ysidro, California POE on November 25, 2018 and January 1, 2019, and determine whether CBP complied with its UOF policy. We conducted this inspection between February 2019 and June 2019. During this review, we visited CBP Headquarters in Washington, DC; CBP Law Enforcement Safety and Compliance in Harpers Ferry, West Virginia; and CBP sector and stations in San Diego, California.

We interviewed relevant CBP personnel including OPR, Office of Policy, Office of Chief Counsel, CBP Foreign Operations San Diego Sector leadership, San Diego Sector Intelligence, San Diego Sector Special Operations, and San Diego Sector Local Use of Force Review Board. We met with officials from the U.S. Department of State regarding its formal response to the Government of Mexico. We also interviewed external officials from the acoustic device company. In addition, we toured the area involving both use of force incidents in San Diego, California during both day and night hours.

We reviewed and analyzed CBP's UOF policy, OPR's investigative reports for both incidents, and CBP's supporting evidence, including OPR's results of findings letter. We examined the San Diego Sector's Operation Secure Line Response Plan; Border Patrol agents' training certifications on less-lethal devices; Border Patrol agents' incident statements; Use of Force Incident Team reports; audio recordings and video footage from November 25, 2018, and January 1, 2019; and relevant prior DHS OIG audits and inspections. The limited video evidence of the incidents on November 25, 2018 and January 1, 2019 was often grainy, did not always contain sound, and did not cover all UOF incidents. The team was generally unable to identify specific CBP officers and Border Patrol agents, but used the video, along with other evidence listed, to make its determination. During our inspection, we referred issues to DHS OIG Office of Investigations. The investigations were completed on May 13, 2020.

We conducted this inspection between February 2019 and June 2019 under the authority of the *Inspector General Act of 1978*, as amended, and according to the *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency. We believe the evidence



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obtained provides a reasonable basis for our findings and conclusions based upon our inspection objectives.



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Appendix B
CBP Comments to the Draft Report

1300 Pennsylvania Avenue NW
Washington, DC 20229



U.S. Customs and
Border Protection

June 26, 2020

MEMORANDUM FOR: Joseph V. Cuffari, Ph.D.
Inspector General

FROM: Henry A. Moak, Jr. *[Signature]*
Senior Component Accountable Official
U.S. Customs and Border Protection

SUBJECT: Management Response to Draft Report: "U.S.
Customs and Border Protection's Use of Force
Near the San Ysidro, California Port of Entry
on November 25, 2018 and January 1, 2019"
(Project No. 19-035-AUD-CBP)

Thank you for the opportunity to review and comment on this draft report. The U.S. Customs and Border Protection (CBP) appreciates the work of the Office of Inspector General (OIG) in planning and conducting its review and issuing this report.

CBP is pleased with OIG's acknowledgment that CBP's use of chemical irritants on November 25, 2018 and January 1, 2019, in response to physical threats, was consistent with CBP's use of force (UOF) policy. OIG made clear that, "given the totality of circumstances on November 25, 2018 and January 1, 2019, and the evidence we reviewed . . . we did not find circumstances inconsistent with CBP's UOF policy."

CBP is committed to ensuring that it has sufficient personnel, appropriate and functional equipment, and the necessary infrastructure to access and respond to threats at, and areas between the ports of entry (POEs) in a sustainable and timely manner. CBP continuously reassesses existing programs, policies, and processes to optimize enforcement capabilities.

On November 25, 2018 and January 1, 2019, CBP faced an unprecedented surge of individuals attempting illegal entry into the United States along the southwest border. The U.S. Border Patrol (USBP) San Diego Sector was the center of focus for caravans with thousands of individuals attempting to illegally cross through,



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and around, the San Ysidro, California POE. Crossing the United States border between POEs is illegal (8 U.S.C. § 1325 (a)), and USBP is charged with enforcing the law to protect our nation's borders and infrastructure while ensuring the health and safety of the public. The USBP agents responding to this threat performed their duties within their authority, reasonably, and with vigilance. The USBP response, including the UOF applied to affect an appropriate law enforcement conclusion to this rapidly evolving event, deescalated the dangerous situations, preventing injuries to all involved: CBP Officers, Agents, and to those individuals attempting illegal entry.

CBP's use of chemical irritants in response to physical threats is within its UOF policy. CBP policy on the UOF by Authorized Officers/Agents is derived from and consistent with constitutional law, as interpreted by federal courts in cases such as *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985), federal statutes, and other relevant DHS and CBP policies. Accordingly, authorized Officers/Agents may use "objectively reasonable" force only when necessary to carry out their law enforcement duties.

CBP's May 2014 "Use of Force Policy, Guidelines, and Procedures Handbook" establishes that the "reasonableness" of a particular UOF is based on the totality of circumstances known by the officer/agent at the time of the UOF and weighs the actions of the officer/agent against the rights of the subject, in light of the circumstances surrounding the event. Reasonableness is judged from the perspective of a reasonable officer/agent with similar skill and experience on the scene, rather than with the benefit of 20/20 vision in hindsight (on which OIG's report relies). Further, reasonableness allows for the fact that law enforcement officers/agents are often forced to make split-second decisions—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

On November 25, 2018, CBP also employed a public address system, which is an acoustic device to broadcast spoken announcements to deter migrants from illegally crossing into the United States. The OIG report acknowledges that "CBP's actions temporarily stopped the rock and projectile throwing, as well as attempts to cross the border." The public address system used was a Long Range Acoustic Device (LRAD), which also produced an "alert tone," during the November 2018 event.

CBP is concerned, however, that the OIG's draft report states that CBP Office of Professional Responsibility (OPR) "was aware the acoustic device was used in alert tone mode, but did not report it as a UOF." CBP disagrees with this characterization. During the investigation of the November 25, 2018, incident, OPR concluded the acoustic device was used as a public address system and did not know that the acoustic device had an alert tone mode. During the OIG's audit, and subsequent to the presentation and



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determination by the Local Use of Force Review Board on December 12, 2018, OPR learned that the acoustic device alert tone was used.

The draft report contained four recommendations with which CBP concurs. Attached find our detailed response to each recommendation. CBP previously submitted technical comments under a separate cover for OIG's consideration.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Attachment



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**Attachment: Management Response to Recommendations
Contained in Project No. 19-035-AUD-CBP**

OIG recommended that the Chief, USBP:

Recommendation 1: Ensure Border Patrol follows existing policy requiring consultation with [Law Enforcement Safety and Compliance Directorate] LESC before conducting demonstrations or testing devices not on the CBP Authorized Equipment List if they are intended to be directed at or on an individual or a group.

Response: Concur. Currently the USBP Use of Force branch utilizes the Firearms Armor and Credential Tracking System (FACTS) to provide updates to sectors and staff to ensure sectors are informed as to the equipment that is approved for field use, testing, and demonstrations. The Operations Support Law Enforcement Safety and Compliance (OS-LESC) Directorate updates the CBP Authorized Equipment List (AEL) twice a year, and sectors are informed of these updates through a mass-notification sent out through email to all use of force instructors recorded within FACTS.

USBP will issue clarifying guidance specifically related to use of force policy during exigent situations. This guidance will address: 1) training and proficiency requirements; 2) ensuring that equipment utilized is in the AEL; and 3) ensuring that any equipment not in the AEL is coordinated through LESC for proper testing, evaluation, approval, procurement and implementation of use of force equipment.

Estimated Completion Date (ECD): August 28, 2020.

Recommendation 2: Implement controls to ensure San Diego Sector's Special Operations Detachment issues equipment only to certified individuals and retains issuance records.

Response: Concur. The USBP San Diego Sector (SDC) mandates that SDC stations utilize the Issue Room application to check out equipment, and the Force Options Training Branch (FOTB) application to ensure all agents are scheduled for mandatory quarterly training (e.g., firearms and defensive tactics). These applications are developed in SDC and are not mandated for use in other USBP sectors, except for the El Centro Sector. SDC ensured that FACTS and SAP, a system used for tracking equipment and credentials, contain matching CBP asset tracking numbers. The SDC Special Operations Detachment (SOD), including the SDC Mobile Response Team/Strike Team, now use the Issue Room application in the Shared Web Application Portal (SWAP) portal on a daily basis. The SDC MRT/Strike team have installed a desktop computer, with a LAN line, in their weapons armory to ensure they maintain the SWAP capability.



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Maintaining equipment items in the Issue Room and scheduling training through the FOTB application are not a national requirement or considered a system of record. The FOTB is a locally developed system that is maintained by SDC, FACTS is the official CBP system of record that all Supervisors and Use of Force instructors are required to use. In addition to using its locally developed systems as a best practice, SDC will ensure that FACTS, as the CBP system of record, is also maintained.

Additionally, SOD has personnel assigned that are certified as less lethal instructors, each of whom have access to query the FACTS database for certifications at a national level. When agents are detailed to SDC SOD from other Sectors, detailers will be required to present a hard copy of their current less lethal device certifications to an SDC SOD Supervisor prior to issuance of any less lethal devices to ensure they are certified to use the less lethal device

CBP requests the OIG consider this recommendation resolved and closed, as implemented.

OIG recommended that the Director, LESC:

Recommendation 3: Ensure CBP stakeholders are formally notified of the requirement to consult LESC prior to acquiring, purchasing, borrowing, or utilizing any item marketed with capabilities intended to modify the behavior or compel compliance of an individual or group with pain or discomfort.

Response: Concur. In August 2019, to provide guidance to all CBP components the OS-LESC Directorate formally issued a memorandum entitled "Testing, Evaluation, Approval, Procurement, and Implementation of CBP Use of Force Equipment." Specifically, the guidance:

- Identified the process to have specific equipment reviewed for consideration;
- Clarified that new use of force equipment is not authorized until a determination has been made by LESC as to its reliability;
- Specified that the LESC Director authorizes Use of Force equipment for CBP and publishes authorized equipment in the AEL; and
- Identified that the head of a CBP component approves which equipment from the AEL his/her personnel may implement for field use.

In addition, the OS-LESC will further define Use of Force equipment for all CBP components as any item designed or marketed as a device intended to cause pain or discomfort to modify the behavior of an individual or group. This includes, but is not limited to, devices that may modify an individual's behavior through acoustics; focused or directed light; electrical current; directed energy; kinetic impact and chemicals.



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ECD: July 31, 2020.

OIG recommended that the Assistant Commissioner, OPR:

Recommendation 4: Use the findings and deficiencies noted regarding the investigation, reporting, and review of the November 25, 2018 use of force incident for training and education to improve the overall quality of The Use of Force Incident Guide products, as well as the efficacy of Use of Force Review Board proceedings.

Response: Concur. The CBP Office of Professional Responsibility (OPR) conducts Use of Force Incident Team (UFIT) training to all new OPR investigators at the OPR Special Agent Training course held two times per year at the CBP Advanced Training Center. In response to identified investigative issues, OPR collaborated with OS-LESC to provide up to date training that incorporates lessons learned. OPR will ensure training incorporates confirmation of the use of force tools used during a use of force incident are authorized by CBP LESC. Ensuring identified use of force tools are presented to the Use of Force Review Board to determine compliance with CBP's Use of Force Policy. Further, prior to this finding being presented to OPR, OPR conducted a weeklong working group to identify existing deficiencies in the UFIT process and is currently preparing recommendations for complete improvement of the program. The Investigative Operations Division is responsible for ensuring compliance.

ECD: September 30, 2020.

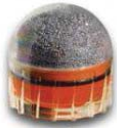


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Appendix C
Photos and Descriptions of Less-Lethal Devices



Oleoresin Capsicum Spray – A short-range less-lethal device capable of delivering 20 to 25 short bursts of chemical irritant at a range of 10 to 12 feet.



FN303 Compressed Air Launcher – Less-lethal impact/chemical irritant delivery system powered by compressed air capable of delivering a variety of projectiles, including PAVA powder projectiles. The removable magazine holds 15 .68 caliber projectiles. Authorized for less-lethal use at ranges between 10 and 225 feet.



Pepper Ball Launching System – Less-lethal impact/chemical irritant delivery system powered by compressed air capable of delivering a variety of projectiles, such as PAVA powder projectiles. The removable “hopper” holds about 180 projectiles and can fire 10–12 projectiles per second. Authorized for less-lethal use at ranges between 3 and 150 feet.



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Riot Control Grenade – A high volume, continuous discharge grenade designed for outdoor use in crowd control situations. Once activated, the device expels chemical irritant for about 20–40 seconds.



Triple Chaser Grenade – A fast burning, medium volume canister designed for outdoor use in crowd control situations. It contains three separate canisters with separating charges between each section. When activated, the grenade will separate into three distinct sub-munitions about 20 feet apart, which expel chemical irritant for about 20 to 30 seconds.



Pocket Tactical Grenade – A quick burning, smaller volume, continuous discharge grenade that produces less chemical irritant than the Riot Control or Triple Chaser grenades.



SAF-Smoke Grenade – A high volume, quick burning continuous discharge grenade that can be used for concealing the movement of agency personnel or as a carrying agent/multiplier for smaller chemical munitions.



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Stinger Grenade – Used as a crowd management tool in both indoor and outdoor environments, the Stinger is capable of projecting 25 .60 caliber rubber balls within a 50-foot radius. The Stinger may also disperse chemical munitions, such as Oleoresin Capsicum powder.



40MM Munitions Launcher – Less-lethal specialty impact/chemical munition delivery system designed to deliver an impact, chemical, or combination projectile with more accuracy, higher velocity, and longer range than the hand thrown versions of the projectiles.





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Appendix D
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