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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

August 18, 2025

VIA ELECTRONIC TRANSMISSION

The Honorable Rodney Scott
Commissioner
Customs and Border Protection

Dear Commissioner Scott:

In May of this year, the Department of Homeland Security (DHS), under the leadership of Secretary Noem and President Trump, promoted Fred Wynn, Mike Taylor, and Mark Jones to supervisory roles at Customs and Border Protection (CBP), making right what the Biden administration refused to do.¹ These men blew the whistle on the government's failure to comply with the DNA Fingerprint Act of 2005. I am grateful to DHS leadership and the Trump administration for bringing these whistleblowers back to their rightful roles when the Biden administration failed to do so.² To ensure that retaliation does not happen again at DHS, CBP, or any of the Department's other component agencies, the bureaucrats that retaliated against Mr. Wynn, Mr. Taylor, and Mr. Jones must be held accountable. On April 30, 2025, during your confirmation hearing, you stated in response to my question:

Thank you for always stepping up and supporting the whistleblowers. I think it's a critical part of our government, it pushes transparency... I do know those three [whistleblowers], and I know one allegation that's never been levied against them is a challenge of their integrity. I will look into [this], and I will hold people accountable if they've violated policies.³

As I stated at the hearing, holding the retaliators accountable would send a clear message throughout the agency that this type of behavior towards whistleblowers cannot and will not be tolerated.⁴

In my May 22, 2024, letter to the DHS Office of Inspector General (OIG), I outlined corroborated instances of whistleblower retaliation, as well as the names of alleged retaliators.⁵ I've enclosed that letter for your reference.

In addition to the examples outlined in my May 22, 2024, letter to the OIG, the Office of Special Counsel (OSC), on December 2, 2021, confirmed that management engaged in retaliation against these whistleblowers.⁶ Specifically, the OSC report stated that, "OSC's investigation supports a conclusion that the agency's actions constituted both a violation of section 2302(b)(8) and (b)(9)(c). Specifically, the agency retaliated against the Complainants for actual or perceived disclosures of wrongdoing."⁷ OSC's report further noted that CBP's Office of Intelligence (OI) management staff, which included then-Executive Director of

¹ Press Release, Office of Sen. Charles E. Grassley, *Grassley Helps Restore Three CBP Whistleblowers' Careers after Nearly a Decade of Retaliation* (May 5, 2025), <https://www.grassley.senate.gov/news/news-releases/grassley-helps-restore-three-cbp-whistleblowers-careers-after-nearly-a-decade-of-retaliation>.

² *Id.*

³ Press Release, Office of Sen. Charles E. Grassley, *Grassley Secures Key Backing from CBP Nominee on Whistleblower Protections, Counterfeit Prevention* (Apr. 30, 2025), <https://www.grassley.senate.gov/news/news-releases/grassley-secures-key-backing-from-cbp-nominee-on-whistleblower-protections-counterfeit-prevention>.

⁴ *Id.*

⁵ Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Joseph Cuffari, Inspector General, Department of Homeland Security, Office of Inspector General (May. 22, 2024), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dhs_oig_-_cbp_dna_collection.pdf.

⁶ Letter from Alejandra Dove, U.S. Office of Special Counsel, to Mary M. Musilek, Attorney, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, (Dec. 2, 2021), at 1, 21-22, Exhibit 1.

⁷ *Id.* at 1.

Intelligence Operations Ronald Ocker and then-Acting Deputy Executive Director of Intelligence Operations Juan Fernandez, improperly removed the DNA collection project from Jones, Wynn, and Taylor.⁸ According to OSC, “the evidence does not support OI’s stated reason for removing the project from the WMD team.”⁹ OSC also noted that Fernandez did not name Mr. Jones Acting Deputy Director of Operational Field Testing Division (OFTD), despite stating in a March 6, 2018, email that it would happen.¹⁰ Further, OSC found that both Ocker and Fernandez engaged in retaliation when they passed Mr. Jones over for Director of the OFTD when it stated, “the agency does not have strong evidence in support of its stated reason or decision not to interview Mr. Jones or fairly consider him for the OFTD Director position.”¹¹ The OSC report further stated that:

While non-selections are, generally, difficult to establish as retaliatory, what is particularly telling in Mr. Jones’s case is that he did not even receive an interview for the OFTD Director position in June 2018, despite management’s prior willingness to temporarily promote him while OI attempted to secure higher-graded, permanent positions for the WMDD and prior conversations about the prominent and collaborative role the WMDD would have upon the merger of the two divisions.¹²

Although it’s unclear to me whether all retaliators have faced consequences, I’ve been made aware that some have been promoted.¹³ For example, according to disclosures to my office, Ronald Ocker was promoted to Assistant Commissioner of OI and Juan Fernandez was promoted to Executive Director of OI.¹⁴ As such, I am requesting that CBP investigate these reported instances of whistleblower retaliation and hold accountable, as appropriate, all individuals responsible for the seven-year nightmare these brave whistleblowers endured.

Thank you for your prompt attention to this matter. Should you have any questions, please contact Tucker Akin on my Committee staff at (202) 224-0642.

Sincerely,



Charles E. Grassley
Chairman
Senate Judiciary Committee

Enclosure

CC:

The Honorable Kristie Noem
Secretary
Department of Homeland Security

⁸ *Id.* 17-28

⁹ *Id.*

¹⁰ *Id.* at 13.

¹¹ *Id.* at 20.

¹² *Id.* at 16.

¹³ Disclosures on File with Committee Staff

¹⁴ Disclosures on File with Committee Staff.

EXHIBIT 1



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
[REDACTED]

December 2, 2021

VIA ELECTRONIC MAIL: [REDACTED]

Ms. Mary M. Musilek
Attorney, Office of Assistant Chief Counsel
U.S. Customs and Border Protection

Re: OSC File Nos. MA-18-4868 (Fred Wynn), MA-18-4869 (Mike Taylor), and MA-18-4870 (Mark Jones)

Dear Ms. Musilek,

The U.S. Office of Special Counsel (OSC) is nearing completion of its investigation¹ into allegations that the U.S. Department of Homeland Security (DHS), Customs and Border Patrol (CBP) committed prohibited personnel practices against Mr. Fred Wynn, Mr. Mike Taylor, and Mr. Mark Jones (the Complainants); namely, that it took, or failed to take, personnel actions against the Complainants in retaliation for the Complainants' perceived whistleblowing and disclosure to OSC, in violation of 5 U.S.C. § 2302(b)(8) and (b)(9)(C).

I. Summary

OSC's investigation supports a conclusion that the agency's actions constituted both a violation of section 2302(b)(8) and (b)(9)(c). Specifically, the agency retaliated against the Complainants for actual or perceived disclosures of wrongdoing. The evidence shows that officials knew about a February 15, 2018, e-mail sent to DHS Headquarters employees; identified the email as a report of wrongdoing against CBP involving DNA collection; perceived that the Complainants, as members of the Weapons of Mass Destruction Division (WMDD), intended to disclose the wrongdoing; and lost trust in the WMDD team because of the perceived disclosure. The evidence also shows that officials knew that the Complainants reported allegations of wrongdoing to OSC.

In addition, the evidence shows that, from February 2018 through the present, officials subjected the Complainants to a significant change in duties, responsibilities, and working conditions; issued the Complainants a lower performance award for FY 2018 than the prior year; issued Mr. Taylor and Mr. Jones no performance award any year thereafter for the first time in their employment history with CBP; and did not select Mr. Jones for the Operational Field Testing Division (OFTD) Director position. Given that these actions against the Complainants were taken in close temporal proximity to the perceived whistleblowing, they satisfy the knowledge/timing test. Having established a prima facie case through the knowledge/time test, the burden now shifts to the agency to prove by clear and convincing evidence that it would have

¹ OSC is finalizing its investigation into several new personnel actions that were recently raised; this letter addresses those personnel actions for which OSC has completed its investigation.

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taken the same actions in the absence of the perceived whistleblowing and disclosure to OSC. In our view, it is unlikely that the agency will be able to meet this burden. Rather, from the evidence we have seen, it seems clear that the agency does not have strong evidence in support of the personnel actions against these Complainants, and that the actions were motivated by the agency's displeasure with the Complainants' perceived and actual involvement in bringing to light the agency's intentional, decade-long failure to implement a law designed to protect public safety.

In light of our investigative findings, we are approaching the agency for corrective action. Below is a more-detailed summary of our preliminary findings.

II. Background

Pursuant to multiple Presidential Policy Directives (PPD),² CBP is required to provide detection equipment and weapons of mass destruction (WMD) and counterproliferation training to personnel stationed at the numerous ports of entry, U.S. Border Patrol (USBP) stations, and immigration checkpoints. The Office of the Commissioner, Joint Operations Directorate (JOD) was tasked with implementing a WMD division for this mission and, in early 2016, the division informally moved from the JOD to CBP's Office of Intelligence (OI).³ The Assistant Commissioner for OI, David Glawe, requested the division's transfer. The WMDD's focus, either under OI or the JOD, was on the CBP law enforcement mission and to protect the nation from the use and introduction of chemical, biological, radiological, nuclear and explosive (CBRNE) weapons to include their pre-cursors, components, materials, and operational weapons systems. Additionally, the WMDD focused on counterproliferation in concert with the Departments of Energy (DOE), Commerce, State, Defense, Federal Bureau of Investigation (FBI), Homeland Security Investigations, and other classified partners. Thus, the WMDD was comprised of a small group of individuals who worked together with different offices and agencies on all matters related to WMD, and on multiple projects assigned by management.

Mr. Jones was an Operations Manager, GS-1801-14, and the Acting Director (a GS-15 level position) of the WMDD for approximately two years—from the time of its informal move to OI until February 2018.⁴ In 2012, CBP had specifically requested that Mr. Jones join the JOD as the WMD Branch Chief, based on his specialized education and experience.⁵ OI management

² PPDs 17, 22, 25, 35 and 42 promulgate Presidential decisions on national security matters covering improvised explosive devices, national special security events, government response to terrorist threats or incidents in the United States and overseas, control and safety of nuclear weapons, and preventing and countering weapons of mass destruction.

³ In May 2016, the agency issued its final approval to add the WMDD to OI's organizational chart under the Intelligence Operations Directorate (IOD).

⁴ While Mr. Jones is not in a law enforcement position that entitles him to enhanced retirement benefits, his position grants him law enforcement authorities under Title 19 of the U.S. Code, such as the authority to bear a firearm. He maintains his firearms certification quarterly.

⁵ Mr. Jones has a master's degree in Criminology and WMD and was a member of the FBI's WMD Directorate Executive Staff. He has received in-depth training in CBRNE weapons; ballistic missiles; and investigative and case

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recognized Mr. Jones as a GS-15 leader and behaved as if he was already in the role in that he was able to carry out the full load of division head responsibilities and was sent to Senior Executive Service (SES) interview trainings and Senior Leader Off-Sites during the years 2016 to 2018.

Mr. Taylor was an Operations Manager, GS-1801-14, with the WMDD and the Acting Deputy Director from its informal move to OI through February 2018. CBP had also previously specifically requested that Mr. Taylor join the JOD based on his specialized education and experience.⁶

Mr. Wynn was an Operations Manager, GS-1801-14, with the WMDD since August 2016. Mr. Jones requested that Mr. Wynn be laterally reassigned to the WMDD from the CBP JOD Incident Management Division based on his relevant training and experience.⁷

The evidence shows that, when the WMDD became an official OI division, it was management's goal to assign permanent supervisory slots, when personnel and budgetary limitations allowed. All divisions within OI had a designated director and deputy director. As such, Mr. Jones and Mr. Taylor believed they were on a management career track given their experience and seniority within the division, the expansion of their duties and supervisory roles over time, and the WMDD's prospects within OI.

During Mr. Wynn's time with the WMDD, he was focused on building professional relationships and developing promising initiatives in counterproliferation, in coordination with outside agencies or offices internal or external to DHS. He took trainings related to radiological-nuclear weapons, which he had the opportunity to attend, as one of the few individuals in CBP with a Q clearance. His career trajectory was taking him down a few narrow but critical paths, each requiring specialized knowledge and training.

In October 2016, Commissioner Gil Kerlikowske asked OI to discuss with the FBI Terrorist Explosive Device Analytical Center their interest in collaborating with CBP to match DNA collected from Special Interest Aliens with DNA collected from improvised explosive devices. OI, in turn, asked the WMDD to initiate the discussion. In their endeavor, the WMDD team soon learned that, pursuant to the DNA Fingerprint Act of 2005, CBP was required to collect DNA from arrested or detained individuals and identified the need to develop a DNA collection pilot project that would get CBP on track to comply with the law and submit DNA data to the FBI's Combined DNA Index System (CODIS). OI Acting Deputy Assistant

management. He has also attended various courses at DOE related to nuclear weapons. Mr. Jones holds clearances and access through DOE to programs and information related to WMD, CBRNE, and counterintelligence activities.

⁶ In addition to Mr. Taylor's customs law enforcement experience, he had a radiological-nuclear background. He attended several radiological-based schools and assisted in the development of CBP's Radiological Covert Testing Program, which was mandated by the SAFE Port Act of 2006, and had a Q clearance, which gave him access to nuclear weapons-related data that would otherwise be restricted.

⁷ During Mr. Wynn's time as a Supervisory Investigative Program Specialist with the Office of Internal Affairs (now the Office of Professional Responsibility) he received training and became familiar with CBP's radiological-nuclear detection and interdiction architecture.

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Commissioner Timothy Jennings testified that he supported the group's efforts on the CODIS DNA collection project that he believed could lead to a pilot program. The DNA collection project was a division-wide project led by Mr. Jones, who was involved in numerous internal and external meetings, briefings, and discussions related to the effort.

In addition, in early 2017, Mr. Jennings assigned the team to develop an MS-13 Working Group for DHS, which was part of the federal government's efforts to disrupt and dismantle the MS-13 gang and prosecute and deport its members. For all intents and purposes, the MS-13 project was also a WMDD project. Mr. Jones, as Acting Director, had direct oversight over the project.⁸ Moreover, Mr. Jennings did not distinguish any particular employee's involvement in the project from that of the entire team. He testified that he assigned the team to complete the task and that they immediately took charge of the project and that they did an excellent job. Mr. Jennings further testified that he assigned the MS-13 project to the WMDD because he believed that, as OI, they were one office, not different kingdoms, and he thought the WMDD could support CBP with the project. On October 26, 2017, in response to an e-mail from Mr. Jones discussing the Secretary's request for a briefing on the MS-13 Working Group successes, Mr. Jennings wrote: "That is awesome and is a tribute to the hard work of you, your team, and all the partners." In addition, in August 2017, both Mr. Jennings and OI Assistant Commissioner Jennifer Ley recognized the work of the WMDD team on the MS-13 project during the Office of Intelligence Town Hall. Mr. Jennings testified that the main assignments the WMDD team members were working on were the DNA and MS-13 projects.

The WMDD was also responsible for executing, on behalf of OI and/or CBP, approximately forty other activities, programs, and initiatives related to WMD and counterproliferation threats. These were summarized in a February 23, 2018 e-mail that Mr. Jones sent to Ms. Ley, Mr. Jennings, OI Chief of Staff Ty Eanes, and then Acting Executive Director of Intelligence Operations in OI Juan Fernandez.⁹

On February 15, 2018, Chad Wood, a DHS employee who was detailed to the WMDD at the time, sent an e-mail to DHS Headquarters employees, including Miles Taylor, the Principal Advisor to Secretary Kirstjen Nielsen, discussing the WMDD's DNA collection project. The e-mail triggered a series of phone calls between executive level CBP officials and the Secretary's Office, which put CBP on notice that the White House and the Department of Justice (DOJ) were now inquiring into CBP's compliance with the relevant DNA law and regulations.

Within days after Mr. Wood sent the February 15, 2018 e-mail, OI canceled Mr. Wood's detail and instructed that he be escorted out of the building. Mr. Jennings testified to OSC that he made the decision to end Mr. Wood's detail after he communicated with Ms. Ley and the Commissioner's Office, and that the decision was a direct result of the February 15, 2018 e-

⁸ Mr. Jones's role as head of the division necessitated that he be consulted on MS-13 related matters, and kept informed of developments, as was confirmed through witness testimony. He was responsible for briefing the chain of command on the status of this very high-profile project, which not only involved OI leadership, but CBP and DHS leadership as well, and included oral and written briefings.

⁹ Mr. Fernandez is currently the Deputy Executive Director of the IOD.

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mail. Mr. Jennings testified that Mr. Wood's act was "very unprofessional," that he never should have gone to the Secretary's Office, and that he ended Mr. Wood's detail based on his lack of trust in his professionalism and his inability to act within CBP.

In May 2018, the Complainants reported allegations of wrongdoing to OSC. Specifically, they reported CBP's delay in collecting DNA from detained individuals based on the DNA Fingerprint Act of 2005 and subsequent regulations.

III. Factual and Legal Analysis

A. Preponderant evidence establishes a prima facie case that CBP violated 5 U.S.C. § 2302(b)(8) and (b)(9)(c).

As relevant here, section 2302(b)(8)(A) prohibits federal agencies from threatening to take or taking personnel actions because federal employees make disclosures of information that they reasonably believe evidence gross mismanagement or a violation of any law, rule, or regulation. Section 2302(b)(9)(c) prohibits federal agencies from threatening to take or taking personnel actions because federal employees cooperate with or disclose information to the Special Counsel. To establish a prima facie violation of these provisions, OSC must demonstrate two elements by preponderant evidence: 1) the complainants made a protected disclosure and participated in a protected activity, and 2) the disclosure and participation in the protected activity was a contributing factor in the personnel actions in question.¹⁰

Moreover, a person perceived as a whistleblower is entitled to section 2302(b)(8) protection even if that individual did not actually make a protected disclosure.¹¹ In perceived whistleblower cases, the analysis is focused on the agency's perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the person made or intended to make disclosures that evidenced the type of wrongdoing listed under section 2302(b)(8).¹²

1. Preponderant evidence establishes that CBP perceived the February 15, 2018 e-mail to have disclosed wrongdoing protected under 5 U.S.C. § 2302(b)(8).

Multiple management officials within OI testified to OSC that it was their belief that the February 15, 2018 e-mail reported wrongdoing. Particularly, Mr. Jennings stated in his testimony that, as he understood it, the email explained the WMDD's efforts related to DNA sampling, stated CBP was intentionally slow-rolling the process to avoid complying with the relevant DNA sampling law, and requested that DHS step in to encourage compliance. Therefore, the facts evidence that Mr. Jennings perceived that the e-mail to DHS reported, at a minimum, a violation of law, the disclosure of which is protected under section 2302(b)(8).

¹⁰ See *Chavez v. Dep't of Veterans Aff.*, 120 M.S.P.R. 285, 294 (2013).

¹¹ See *Schaeffer v. Dep't of the Navy*, 86 M.S.P.R. 606, 617 (2000).

¹² *King v. Dep't of the Army*, 116 M.S.P.R. 689, ¶ 8 (2011).

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2. Preponderant evidence establishes that CBP perceived the Complainants as whistleblowers.

During Mr. Jennings's testimony to OSC, he stopped referring to Mr. Wood, specifically, and, instead, began speaking about the WMDD as a whole. He stated it was unprofessional and unwarranted for the *division* to go to the Secretary when the team members determined that the DNA project was not progressing according to their expectations. Mr. Jennings testified that he believed the group shared Mr. Wood's views that CBP was setting obstacles in place to prevent implementation of a DNA collection pilot, and that it was his impression that Mr. Jones and the team, which included Mr. Taylor and Mr. Wynn, had encouraged the e-mail based on their insistence to move the project forward despite continuing to receive questions from OI officials about the viability of the project.

On February 20, 2018, OI management sent an e-mail to Mr. Jones, instructing that neither he nor any division member communicate with DHS or DOJ in any manner concerning DNA collection unless otherwise directed, and described the February 15 e-mail as "totally inappropriate." On February 21, 2018, OI management, including Mr. Jennings and Mr. Fernandez, met with Mr. Jones. During the meeting, Mr. Jennings told Mr. Jones that he had lost confidence in him. Mr. Jennings testified to OSC that he made the statement to Mr. Jones as a direct result of the e-mail.¹³ Mr. Jennings also stated in a February 21, 2018 e-mail to Ms. Ley that he had lost confidence in the team and their efforts. Thus, the facts evidence that OI leadership perceived that the Complainants, who were part of the WMDD team, disclosed wrongdoing.

3. Preponderant evidence establishes that the Complainants disclosed wrongdoing to OSC, which is protected under 5 U.S.C. § 2302(b)(8) and (b)(9)(c).

In May 2018, the Complainants reported allegations of wrongdoing to OSC, which OSC referred to the DHS Secretary on July 23, 2018, under 5 U.S.C. § 1213. The allegations involved the same subject matter at issue in the February 15, 2018 e-mail: namely, CBP's delay in collecting DNA from arrested or detained individuals based on the DNA Fingerprint Act of 2005. The Secretary delegated to CBP Deputy Commissioner Robert Perez the authority to review and sign the report and CBP's Office of Professional Responsibility conducted the investigation. The agency determined that Mr. Taylor's allegations were not substantiated, based on its assertion that a 2010 DNA collection exception granted by Attorney General Eric Holder to DHS Secretary Janet Napolitano still applied, although there was no indication that the exception was intended to be permanent. On August 21, 2019, the Special Counsel informed the President and multiple congressional committees that he determined that the agency's findings were unreasonable and that CBP's failure to collect DNA as mandated by law "has allowed

¹³ OSC obtained testimony from separate witnesses who: confirmed Mr. Jennings's statement to Mr. Jones on February 21, 2018; described Mr. Jennings's conversation with Mr. Jones as a "serious dressing down"; indicated there was an appearance that Mr. Jennings had lost trust or confidence in the team; and believed that Mr. Jennings's frustration was directed at the whole division.

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subjects subsequently accused of violent crimes, including homicide and sexual assault, to elude detection” and is an “unacceptable dereliction of the agency’s law enforcement mandate.”

OSC published its findings, which garnered media attention at the time and continued to do so as the agency faced additional pressures to comply with the law, undoubtedly due to the Complainants’ disclosure. Throughout this process, the Complainants were identified by name and are, therefore, known whistleblowers.

After OSC published its finding, the DHS Office of Inspector General (OIG) initiated an investigation regarding DHS’s compliance with the DNA Fingerprint Act of 2005. On May 19, 2021, the OIG published a report that echoed OSC’s finding regarding CBP’s decade-long failure to comply with the Act. According to the OIG report, OSC’s finding served as the impetus for DOJ to reach out to DHS to finally have CBP, in January 2020, begin the process of implementing DNA collection.

4. Preponderant evidence establishes that the Complainants’ perceived whistleblowing and protected activity contributed to the personnel actions.

Whether a disclosure is a contributing factor to the personnel action is typically demonstrated through the “knowledge/timing test,” which shows that the agency knew of the whistleblower’s protected disclosures or activities and took personnel actions within a period of time such that a reasonable person could conclude that the disclosures or activities were a contributing factor in the personnel actions.¹⁴ The preponderance of the evidence establishes each of these elements.

Under this test, we found that the Complainants’ perceived and actual whistleblowing activity contributed to the following personnel actions:

a. Significant change in duties, responsibilities, and working conditions

The Merit Systems Protection Board (Board) has held that a significant change in duties, responsibilities, or working conditions is a personnel action and one that “should be interpreted broadly. [It] is intended to include any harassment or discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system, and should be determined on a case-by-case basis.”¹⁵ Rep. McCloskey explained that the 1994 amendment to the Whistleblower Protection Act expanded the definition of personnel actions that could have a

¹⁴ 5 U.S.C. § 1221(e)(1); *Redschlag v. Dep’t of the Army*, 89 M.S.P.R. 589, ¶ 70 (2001).

¹⁵ *Shivae v. Department of the Navy*, 74 M.S.P.R. 383, 388 (1997), quoting 140 CONG. REC. H11,421 (1994) (statement of Rep. Frank McCloskey) (internal quotations marks omitted); *Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583, ¶ 15 n. 4 (2010).

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debilitating effect on an employee's career. Further, the Board has recognized that a “change” can occur through the failure to assign work, in addition to the removal of duties.¹⁶

i. Removal of high-profile projects and other tasks

In February 2018, the WMDD was heavily invested in developing the DNA collection project and was continuing its work on the MS-13 project. These projects were a large focus for the team and they stood apart from the team’s other responsibilities in that they were high-profile matters that gave the team an opportunity to address current and pressing national issues, have a more significant and lasting impact on CBP’s mission, and maximize the use of their skills and expertise, all while gaining greater visibility within CBP and DHS more broadly.

After the February 15, 2018 e-mail, Mr. Jennings immediately removed from the team both the DNA collection and MS-13 projects, which had consumed much of the team’s time and had earned the group high praise and performance awards.¹⁷ Multiple witnesses testified as to the high quality of work the team produced on the DNA collection project. Mr. Jennings also testified that the WMDD jumped on the MS-13 project and successfully created a group that was rolled out into a DHS-wide working group. The removal of these duties alone was noteworthy and had the potential to hurt the Complainants’ ability for career development and advancement. The actions isolated the WMDD from interaction with upper-level agency officials and minimized its role within OI. A witness testified to the stark contrast in communication between OI management and the WMDD team members before and after the February 15, 2018 e-mail.

In light of the agency’s immediate reaction to the e-mail and the disclosure’s implications for the agency, these factors together suggest that the disclosure contributed to the removal of the DNA collection project. As for the removal of the MS-13 project, the evidence shows the perceived whistleblowing activity was also a contributing factor. We note that within the same February 21, 2018 e-mail chain between Mr. Jennings and Ms. Ley, in which the officials discuss loss of trust and other consequences related to the team’s outside communications, Mr. Jennings indicates that he is removing the MS-13 project from the WMDD, thereby connecting the perceived disclosure to the change in duty.

Additionally, following the February 15, 2018 email, the Complainants no longer received support to carry out the majority of the approximately forty activities, programs, and initiatives addressing WMD and counterproliferation threats, as summarized in the aforementioned February 23, 2018 email, that the WMDD had been responsible for executing on

¹⁶ In *Ingram v. Department of the Army*, the Board found that an employee, who was no longer assigned work by a Project Manager who was outside his chain of command, experienced a significant change in duties, responsibilities, or working conditions. 116 M.S.P.R. 525, 531 (2011).

¹⁷ In FY 2017, Mr. Jones received a \$3,500 performance award and Mr. Wynn and Mr. Taylor each received a \$3,000 award. Approximately, only 17 percent of OI employees who received a performance cash award for FY 2017, received a \$3,000 performance award or higher.

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behalf of OI and/or CBP. Mr. Jones has been removed of meaningful job duties and assignments. The only WMDD program Mr. Jones continues to support is the FBI's Weapons of Mass Destruction Strategic Group (WMDSG). Currently, Mr. Taylor only has permission to participate in three of the programs. Mr. Taylor believes CBP has allowed him to continue working on these specific programs due to a lack of personnel with the requisite security clearances, experience, and personal relationships to effectively engage in these classified programs. Specifically, the programs that Mr. Taylor continues to support, which are all led by the FBI, are the Dust Demon program, the FBI Critical Incident Response Group (CIRG), and the FBI's WMDSG.¹⁸

Moreover, Mr. Taylor had been tasked with leading CBP's participation in National Special Security Events (NSSEs), which are responsible for procuring and assigning CBP law enforcement personnel and aircraft and marine assets to support events, such as the 2013 and 2017 U.S. Presidential Inaugurations. Mr. Taylor last participated in an event planning in January 2018.

Mr. Taylor had also been on the Commissioner's Active Shooter Response Team, which meant that if the CBP Commissioner or DHS Secretary were in the Reagan building and an attack occurred, Mr. Taylor, who had electronic access into the "bullet proof" safe room, was to respond heavily armed to the Commissioner's Office. In March 2018, Mr. Jennings questioned the WMDD's firearms inventory and Mr. Taylor's frequent firearms training. He reached out to outside individuals and units and inquired about these matters, which, previously, he had never looked into. Shortly after, Mr. Taylor's electronic access to secondary areas like service elevators and secure hallways was terminated and he was never again asked to assist in any executive personnel movements or Commissioner's Office Active Shooter Response drills. Mr. Taylor is one of the original firearms coordinators/instructors/responders for the CBP Active Shooter Response Team.

CBP, and specifically the WMDD team members who represented the agency, stopped attending training and collaborative events despite multiple invitations. Management began disapproving travel to these events, claiming that it was not necessary, although funding had been designated to support these programs. The Complainants allege that CBP's "no-show" status was noted and reported out. The team was invited less often to meetings and training and finally was perceived as having abandoned the WMD and counterproliferation programs, which led to isolation from the classified interagency WMD community.

The change in Mr. Jones's and Mr. Taylor's duties is also reflected in the decrease in frequency of work travel and a reduction in their pay. In 2016 and 2017, Mr. Taylor reported that he took twelve separate trips to various government bases and facilities that were directly related to counterproliferation, missile and nuclear weapon technology smuggling/interdiction,

¹⁸ According to Mr. Taylor, the support has been limited to no-cost travel or telephonic/face-to-face engagement due to the removal of travel funding.

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and WMD mitigation efforts. By comparison, in 2018 and 2019, he reported that he traveled a total of five times for similar purposes. Of the five trips, CBP had committed to three trips prior to February 2018 and only one trip took place in 2019. Given that Mr. Taylor no longer had the duties that necessitated that he work fifty plus hours a week, as before, he received less compensation in overtime and premium pay. In 2019, according to his calculations, he received \$15,000 less than in 2017. Similarly, Mr. Jones reported that he took thirteen trips in 2016 and 2017. However, since 2018, the number of trips also reduced. In 2019, Mr. Jones took three trips and he has not taken any other work-related trips since then. Moreover, since 2018, Mr. Jones reports that he has lost approximately \$30,000 in overtime.

In addition, while DHS Headquarters authorized Mr. Taylor and Mr. Jones Home-To-Work vehicles to support the CIRG and WMDSG programs, Mr. Taylor and Mr. Jones reported that OI later opted to use the vehicles for other purposes.

Together, these actions, which also had a chilling effect on whistleblowing, rise to the level of a significant change in duties, responsibilities, or working conditions. They are so closely tied to the perceived whistleblowing activity (the duties began to be removed within days after the February 15, 2018 e-mail, which was widely discussed among OI staff and regarded as a disclosure of wrongdoing), that they satisfy the knowledge/timing test.

ii. Decision not to assign additional projects

The evidence suggests that management made the deliberate decision to no longer assign or allow the WMDD to work on projects similar to the DNA collection and MS-13 projects as a result of the team's perceived whistleblowing activity. In a February 21, 2018 e-mail, Mr. Jennings stated to Ms. Ley that because of his loss of confidence in Mr. Jones, he would have the team focus on nothing other than their pre-established duties. Whether or not additional similar project opportunities became available is irrelevant. The evidence establishes that, even if other opportunities were to exist, management would not be willing to assign these projects to the WMDD.

iii. Reputational harm

The facts evidence that OI leadership's view of the WMDD changed after they perceived the team had engaged in whistleblowing. Officials—specifically, Mr. Jennings—made statements to offices and officials internal and external to CBP and DHS that, by reasonable standards, would cause harm to the WMDD team members' solid professional reputations. In response to the sudden surge of DNA collection-related calls from the Secretary's office and DOJ, and in defense of CBP's position on DNA collection, OI and CBP presented a narrative that spoke generally about the WMDD and highlighted the team's alleged missteps. Multiple witnesses testified that, based on the narrative presented by leadership, the general consensus was that, in working the DNA collection project, the WMDD had acted without OI and CBP management authority, without input from the operators, and for self-recognition, all of which

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the Complainants adamantly deny. The evidence suggests that the WMDD continuously kept management informed of their developments on the project, that they collaborated with the other CBP offices that had an interest in the effort, and that they did so to advance the agency's mission and satisfy its legal obligations. The Complainants are now associated with the alleged unprofessional actions attributed to the division as a whole. The narrative expressed by management officials, as previously outlined, was that the agency had lost trust in the WMDD. Together with the removal of high-profile projects and their other responsibilities, these statements greatly harmed each team member's reputation throughout CBP.

Specifically, the apparent reputational harm has caused Mr. Jones and Mr. Taylor to be sidelined. They allege that they directly felt the loss of management's support, altering the clear path they each saw for their career within OI and discouraging any other prospects. And while Mr. Jones was detailed to the White House from July 2020 to January 2021, and was recently requested by name to be detailed to the U.S. Senate's Homeland Security and Governmental Affairs Committee's Permanent Subcommittee on Investigations, this does not refute his claim of reputational harm or evidence that Mr. Jones has not suffered reputational harm within CBP or DHS in the over three years that have transpired since he was first perceived as a whistleblower. Mr. Jones was presented with the detail opportunities particularly because of his strenuous efforts to defend his professional reputation and duty to uphold the law after he became a public whistleblower and was subjected to career exile.

As for Mr. Wynn, the agency's actions led him to leave OI and take a position with USBP, doing Management/Program Analyst work that is more generalist in nature. After the February 15, 2018 e-mail, Mr. Wynn found himself for months not working on any WMD-related responsibilities and unable to use his clearance or the subject matter expertise he had accumulated. He came to the realization that OI would never again give him substantive assignments, essentially ending his envisioned career path. He made the difficult decision to leave an office that at one time had offered him highly specialized career options rather than endure a prolonged period of doing nothing. And while it may be that Mr. Wynn continued to be employed, this does not negate that his departure from a position, for which he was specifically recruited because of his specialized experience, has impacted his professional growth opportunities and the vision he had for his career.

Moreover, CBP officials have continued harming the Complainants' reputations. Shortly after OSC published its finding that CBP's explanation regarding its noncompliance with the DNA Fingerprint Act of 2005 was unreasonable, Acting CBP Commissioner Mark Morgan stated that he would not comment on or confirm current employment of the whistleblowers in a General Leadership Messaging statement that was issued in September 2019, under the heading "DNA Collection Program / Whistleblower." The statement, which was made available to all CBP employees, was accompanied by the same claim OSC found unreasonable; namely, the denial that CBP was in violation of the law and the rejection of the whistleblowers' claims. By putting into question the Complainants' continued employment with the agency, the statement not only suggests that their disclosures could lead to their removal, but arguably indicates an intent to chill the speech of any potential future whistleblowers.

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Further, we note that, as previously mentioned, this year the DHS OIG issued and published a report that echoed OSC's findings regarding CBP's decade-long failure to comply with the DNA Fingerprint Act of 2005. OSC's whistleblowers (though not identified by name) were mentioned in the report. Again, we note that the Complainants' identity as whistleblowers is well-known. Thus, as we have seen for over three years, the disclosure at issue in this case has continuously re-surfaced, each time affirming the Complainants' role as whistleblowers on this important issue and continuing to expose them to additional retaliation.

Mr. Jones and Mr. Taylor assert that prior to February 2018, they were consistently treated exceptionally well by CBP leadership and staff. Mr. Taylor alleges that after the disclosure, front office staff, in any CBP office, stopped acknowledging him. As an example, the former Deputy Commissioner Perez, whom he has known for 20 years and would always affectionately greet him, stopped recognizing Mr. Taylor after the February 2018 email.

iv. WMDD's move under the Operational Field Testing Division and subsequent standing within OI

Ms. Ley became the Acting Assistant Commissioner of OI in January 2017. Shortly thereafter, Ms. Ley ordered a Deloitte study to evaluate OI's structure, divisions, and processes. Although the study recognized the WMDD's important function, it questioned its fit and placement within OI. When Ms. Ley officially assumed the OI Assistant Commissioner role in January 2018, she elected to merge the WMDD and the Operational Field Testing Division (OFTD). However, while it appears OI leadership still intended to grow the WMDD's program, the evidence suggests that the February 15, 2018 e-mail caused management to change the division's plan for growth, handle the merger haphazardly, to the team's detriment, and begin taking actions that led to the program's ultimate dissolution.

There is no indication that, prior to February 15, 2018, management had taken any formal administrative action to eliminate WMDD as a separate division within OI's organizational structure. Moreover, the evidence shows that, at the time, OI had not yet clarified to the WMDD and OFTD management officials what the merger would look like operationally or how everyone's roles would be defined. It appears that the WMDD and OFTD employees were in the very early stages of that process. Yet, on February 21, 2018, Mr. Jennings suddenly ordered the merger to immediately take place. That was the same day that Mr. Jennings expressed he had lost trust in the WMDD because of the February 15, 2018 e-mail. This suggests a causal connection between the disclosure of wrongdoing and the sped-up merger, which led to confusion and a misunderstanding about the different programs' roles, as well as continuous tension and conflict among the two former independent divisions that may have been avoided with a gradual and open process.

As to the WMDD's standing in OI before the February 15, 2018 e-mail, the evidence suggests that OI leadership wanted the program to grow. Prior to the February 15, 2018 e-mail, the team submitted a management-approved budget for FY 2020-2024, which projected the group would grow to 25 full-time positions by FY 2024. Mr. Jennings testified that he

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successfully pushed for Mr. Jones to get a 120-day temporary promotion to the Acting Director, GS-15, position in order to grow the WMDD's program. He also testified that he believed Ms. Ley wanted WMDD to continue growing as well. Moreover, the Complainants allege that, prior to the e-mail, Mr. Jennings spoke to the team about the prominent and collaborative role WMDD would have with OFTD upon the merger of the two divisions. OI staffing tables showed OFTD and WMDD as equals under one same director. However, following the February 15, 2018 email, all discussions about the division's growth stopped and Mr. Jennings and Mr. Fernandez's communications focused instead on reminding the group of its place as a branch under OFTD. Almost immediately, officials reduced the WMDD's size by two employees. Specifically, the agency ended Mr. Wood's detail and Mr. Jennings reassigned Robert Pennese to the Confidential Human Source Division (CHSD).

Management did not give the team an opportunity to have a prominent and collaborative role following the move. First, Mr. Jones did not receive even an interview for the OFTD director position in June 2018, although OI officials had told Mr. Jones to apply for the position allegedly as a way to make the WMDD assume a lead role within OFTD. Second, management did not name Mr. Jones Acting Deputy Director of OFTD, as Mr. Fernandez had previously stated in an e-mail would happen.¹⁹ Third, management did not create or announce an OFTD WMD supervisory position, as indicated in OI's hiring priorities submission for FY 2018. Thus, while Mr. Jones was head of the WMDD and Mr. Taylor operationally and administratively supervised three employees before the WMDD's move to OFTD, there was no indication that they would be able to have a similar opportunity in the future based on OI's apparent intent to keep the program's growth at bay.

It is also noteworthy that the team members were made to leave the office space that had been specifically built for the division. However, that was not the only move for Mr. Jones and Mr. Taylor with the WMD program. As previously mentioned, Mr. Wynn left the WMDD due to the agency's actions, which suggested he would no longer have career growth potential within OI. However, the employees who remained with the program have been bounced around from place to place since then. A few short months after leadership decided to merge WMDD with OFTD, it moved the group again. In June 2018, they were placed under CBP's Laboratories and Scientific Services (LSS). During the transition process, LSS would oversee the team's operations while OI would be responsible on the administrative side. For nearly two years, the team was left idling, with no budget, clear direction, or official activities/duties, as the agency never formally transitioned the former WMDD team members to LSS. On January 23, 2020, the agency decided not to finalize the move and returned the team to OI.

The decision to move the group a third time occurred shortly after OSC published its finding regarding CBP's failure to collect DNA based on the DNA Fingerprint Act of 2005, which garnered media attention and included the Complainants' vocal and public opposition to CBP's failure to substantiate their allegations. Witness testimony provided by an LSS

¹⁹ In a March 6, 2018 e-mail to the Acting Director of OFTD, Mr. Fernandez stated, "I suggest you have Mark as the acting Deputy for OFTD so that the division is always on top of both subjects."

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management official suggests that the Complainants' disclosure to OSC and the related activity that followed contributed to the agency's decision to move the group out of LSS.

Moreover, we note that, when leadership transferred the team back to OI, it placed Mr. Jones and Mr. Taylor back under the supervision of, and in physical proximity to, the same officials they were alleging had retaliated against them. At that time, OSC had already put the agency on notice of the Complainants' prohibited personnel practice complaint and was in the middle of facilitating a resolution of the matter via mediation. In addition, after the group's return to OI, the idling continued. Management failed to clarify where the team fell within the organization or to define its mission. In March 2020, OI leadership informed the team that they had no role in CBP WMD matters, which was now the responsibility of the Office of Field Operations. In May 2020, the team received a notification from OI leadership that the WMDD had been officially dissolved, without any mention of how the agency would be allocating the funding purportedly dedicated to the WMD and counter proliferation mission. However, despite receiving instruction from OI leadership that Mr. Jones and Mr. Taylor could no longer speak for CBP on WMD matters, there were numerous instances in which OI leadership demanded that they respond to certain related inquiries and taskings, particularly from DHS Headquarters and/or Congress. In one instance, Mr. Fernandez instructed Mr. Taylor that he brief Mr. Fernandez and the new Assistant Commissioner on the exact same programs that Mr. Fernandez and other OI managers had essentially ended and defunded almost two years prior. This caused confusion for Mr. Jones and Mr. Taylor regarding OI's actual oversight role regarding WMD-related matters, as well as fear that they could be accused of insubordination if they did or did not comply with the requests.

Six months after transferring out of LSS, on June 19, 2020, OI leadership informed the team members that they would move a fourth time and return to OFTD, though no longer under even a WMD branch. However, OI officials omitted referencing OFTD's pending transfer out of OI, which the team learned about from other sources. Mr. Jones and Mr. Taylor were more in the dark about their mission and place within OI or CBP than before, causing them to be greatly concerned about their potential career growth, as they had been rendered unable to perform meaningful work for an extended period. And while it may be that Mr. Jones and Mr. Taylor continued to have a job and have been incorporated into the OFTD team in the same way as any other employee, this does not negate that the multiple moves and changes to their duties, for which they were specifically recruited because of their specialized experience, have impacted their professional potential. By continuing to sporadically assign Mr. Jones and Mr. Taylor certain WMD-related tasks, CBP has demonstrated that it clearly understands the expertise that Mr. Jones and Mr. Taylor have, yet CBP refuses to allow that expertise to be reflected in regular work duties or promotions.

v. Hostile work environment

In addition to the above-referenced actions and statements made by agency officials, Mr. Jones and Mr. Taylor also allege that they were subjected to a hostile work environment based on a series of other behavior, which—when taken together and considered as a whole—further

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evidence that they experienced a significant change in duties, responsibilities, and working conditions as a result of their perceived whistleblowing and protected activity. The alleged behavior includes, but is not limited to, the following instances:

- After the team's return to OI from LSS, OI leadership accused the team of being AWOL, although the team was on their Regular Day Off (RDO) based on a 4-day a week work schedule in place for multiple years.
- During Mr. Jones's White House detail, OI leadership instructed Mr. Jones to move out of his assigned office and into a cubicle and relocate expensive equipment for which he is liable with little notice, in order to assign the office to another employee. This occurred when staff presence in the office was minimal and officials could have easily made other arrangements.

b. Non-selection of Mr. Jones for the OFTD Director position

With regard to Mr. Jones's non-selection for the OFTD Director position, we find it qualifies as a covered personnel action. The position was announced from April 23, 2018, through May 4, 2018, as an 1801 series position, which covers positions that supervise, lead, or perform inspection, investigation, enforcement, or compliance work. Mr. Jones applied for the position and human resources personnel referred his name to OI management officials on the certificate of eligible candidates. Mr. Fernandez reviewed the resumes of all the applicants listed on the certificate of eligible candidates and selected six candidates to interview. He then presented the list of six candidates, with their corresponding resumes, to Ronald Ocker, who approved the selection.²⁰ On May 31, 2018, Mr. Fernandez officially notified human resources personnel of the six candidates selected for an interview. Mr. Jones was not selected for an interview. The interviews for the OFTD Director position occurred in June 2018. The agency selected Sarah Deutschmann for the OFTD Director position.

Although Mr. Ocker was new to OI, Mr. Fernandez had been with the agency for many years and was aware of the whistleblowing activity attributed, in part, to Mr. Jones. Mr. Fernandez confirmed to OSC that he was present during the February 21, 2018 meeting in which Mr. Jennings informed Mr. Jones that he had lost confidence in him as a result of the perceived whistleblowing. He also testified to OSC that he believed something of trust/confidence in Mr. Jones had been lost after that meeting. In an e-mail that Mr. Fernandez sent Mr. Jones on February 21, 2018, after the meeting, Mr. Fernandez wrote, "This has been an unfortunate turn of events, however I am confident your team will bounce back and make CBP's WMD program the pinnacle of DHS," appearing to recognize the gravity of the situation and the impact it was having on the WMDD team members. On February 23, 2018, Mr. Fernandez directed Mr. Jones to collect Mr. Wood's building badge, suspend his computer access, and walk him out, as a direct result of the February 15 e-mail that Mr. Wood sent, which Mr. Fernandez identified as a report of wrongdoing against CBP that "sparked outrage." In addition, we note that Mr. Jennings was

²⁰ Mr. Ocker, who was the selecting official for the OFTD Director position, became the Executive Director of OI's IOD on May 7, 2018, and was new to the agency.

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still the Deputy Assistant Commissioner of OI at the time that Mr. Fernandez made the decision not to interview Mr. Jones for the position, which occurred a short time after Mr. Jones's perceived whistleblowing (about three months). We also note that the effects of the perceived whistleblowing activity lingered and officials continued to suspect the WMDD team of trying to advance DNA sampling within CBP, which OI now opposed. On April 18, 2018, Mr. Fernandez sent an e-mail to Ms. Ley regarding a request from the Commissioner's office for assistance with the development of a concept of operations for a DNA collection pilot.²¹ In the e-mail, he states he will find out how the issue "bubbled up to ensure it wasn't our folks pushing it."

On approximately May 21, 2018, Mr. Ocker met with Mr. Jones, who put Mr. Ocker on notice of the whistleblowing activity and the actions the agency had taken that he perceived to be retaliatory. Mr. Fernandez, who was also present, told OSC that, during the meeting, Mr. Ocker told Mr. Jones that CBP had decided the direction the agency wanted to go in (with regard to not collecting DNA samples) and that he had to respect the decision.

While non-selections are, generally, difficult to establish as retaliatory, what is particularly telling in Mr. Jones's case is that he did not even receive an interview for the OFTD Director position in June 2018, despite management's prior willingness to temporarily promote him while OI attempted to secure higher-graded, permanent positions for the WMDD and prior conversations about the prominent and collaborative role the WMDD would have upon the merger of the two divisions. It is also telling that, in attempting to explain the agency's failure to interview Mr. Jones, the agency has provided shifting explanations, as further discussed below. Thus, we believe the evidence suggests that Mr. Jones's perceived whistleblowing activity contributed to his non-selection for the OFTD Director position.

c. Lower or no performance awards

Decisions concerning pay, benefits, or awards are personnel actions under 5 U.S.C. § 2302(a)(2)(A). During FY 2017, Mr. Jones received a \$3,500 performance award, which was significantly reduced in FY 2018 to \$1,500. Mr. Taylor received a \$3,000 performance award in FY 2017, which was also significantly reduced to \$1,500 in FY 2018.

According to CBP's data, in FY 2017, 176 OI employees received a cash award. Of those, 30 employees received a cash award that was between \$3,000 to \$5,000 (the maximum amount issued), which represents about 17 percent of employees. In FY 2018, 165 OI employees received a cash award. Of those, 47 employees received a cash award within the same range, or about 28 percent of employees. Therefore, Mr. Jones and Mr. Taylor went from being among the relatively few employees to receive a high award to among the few who received a lower award. Of the employees who received a cash award in FY 2018, 68 percent received a cash award higher than Mr. Jones and Mr. Taylor.

²¹ In an April 19, 2018 e-mail to Ms. Ley, Mr. Fernandez explains that the Commissioner's office's request is the result of the Attorney General pressing the DHS Secretary to have CBP collect DNA.

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Moreover, Mr. Jones reports that he has not received any merit awards thereafter. Likewise, since 2018, Mr. Taylor reports that he has not received any cash award or other acknowledgement for his performance and that these are the only two years in almost 28 years of federal service that Mr. Taylor has not been recognized for his consistent performance.

OI management also reduced Mr. Wynn's performance award during FY 2018. Mr. Wynn, who received a \$3,000 performance award in FY 2017, received a \$2,000 award in FY 2018. Unlike Mr. Jones and Mr. Taylor, whose roles and positions remained tied to the WMDD and the path CBP chose for the team after the February 15, 2018 e-mail, Mr. Wynn did not stay with the WMDD team, or under OI, after FY 2018. Any awards Mr. Wynn may have received after FY 2018 were not linked to any WMD-related work and were issued by USBP officials under an entirely different chain of command.

It is telling that, in addition to the three Complainants, at least one other employee who was with the WMDD during the February 15, 2018 disclosure of wrongdoing also received a lower cash award in FY 2018.

B. CBP cannot sustain a defense under the clear and convincing evidence standard.

Once a complainant establishes a *prima facie* case of retaliation, the agency has the burden of rebutting the case by showing by clear and convincing evidence that it would have taken the same personnel actions against him in the absence of his protected disclosures.²² In evaluating whether clear and convincing evidence exists, the Board examines a number of factors, including the strength of the agency's evidence in support of its personnel action and the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision.²³

1. Strength of evidence in support of the personnel actions

a. Significant change in duties, responsibilities, and working conditions

The agency does not appear to have strong evidence in support of its decision to remove the DNA collection project from the WMDD. Mr. Jennings testified that the project was removed to combine different DNA collection efforts throughout CBP and coordinate agency-wide next steps. However, the evidence suggests that, at the time OI management removed the project from the team, officials knew CBP had no intention to pursue the team's specific DNA collection project, which would supply the FBI-run CODIS system with the detainees' DNA in order to aid in the identification of criminals and the resolution of cold cases. In an e-mail chain between Ms. Ley and Mr. Jennings on February 21, 2018, Ms. Ley indicated that she spoke to CBP Commissioner Kevin McAleenan, who expressed adamant opposition to CODIS DNA collection. Shortly thereafter, management removed the project from the team, and then CBP

²² 5 U.S.C. § 1214(b)(4)(B)(ii).

²³ *Carr v. Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

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effectively shut it down. Thus, the evidence does not support OI's stated reason for removing the project from the WMD team.

Instead, the evidence suggests that the project was removed from the team in response to the perceived whistleblowing activity. In the same February 21, 2018 e-mail chain, Ms. Ley indicated that, whereas OI management may have tried to find a way to compromise with CBP leadership and pursue the CODIS DNA collection project, this was no longer an option because of the team's "little stunt," which refers to the team's communications within and outside of the Department—including the February 15, 2018 e-mail—that elevated the CODIS DNA collection matter. As such, the evidence suggests the WMDD would have likely continued with the CODIS DNA collection project if not for the perceived whistleblowing.

As for the removal of the MS-13 project from the WMDD team, it does not appear the agency could definitively show it would have taken that action if not for the perceived whistleblowing activity. We considered that within the same February 21, 2018 e-mail chain that Mr. Jennings and Ms. Ley discussed loss of trust related to the February 15, 2018 e-mail, Mr. Jennings indicated that he was removing the MS-13 project from the WMDD; that the decision came to a surprise to the team; that WMDD team member Mr. Pennese, who was mainly associated with the MS-13 project, had previously requested to move to the WMDD from the CHSD because of personality conflicts with management, yet was sent back to work under the same CHSD officials along with the MS-13 project; that Mr. Pennese had a very good working relationship with the WMDD team; that the WMDD had consistently received high praise for the work on the project; and that, while there were benefits to having the project under CHSD, there is no indication it could not have continued successfully under WMDD.

Moreover, the agency does not appear to have strong evidence in support of its decision to drastically reduce the team's other functions and essentially eliminate the WMD program that was six years in the making. Mr. Jennings testified that the WMDD represented OI well in various meetings with different offices and agencies to keep up with all matters related to WMD. Moreover, the team had the allocated funding to carry out these duties and there was still an apparent need for the team's involvement in these topics, as evidenced by the numerous instances in which OI leadership later instructed Mr. Jones and Mr. Taylor to respond to certain related inquiries and taskings.

b. Non-selection of Mr. Jones for the OFTD Director position

The agency does not appear to have strong evidence in support of its decision not to interview Mr. Jones for the OFTD Director position and the agency has provided shifting explanations for the non-selection. More specifically, the agency represented to OSC that it wanted someone in the position who had experience in producing intelligence analysis reports, and that Mr. Jones lacked that experience, particularly compared to the selectee's experience. Based on Ms. Deutschmann's resume, however, it is unclear what experience she had in producing intelligence analysis reports. While Ms. Deutschmann appears to have had policy analyst experience, her intelligence-related experience appears limited to the position she held as

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the Branch Chief of the Commissioner's Briefing Team (CBT) for under a year, in which she supervised the production of and delivered intelligence and special-interest briefings to the Commissioner, as well as the 12-month temporary duty assignment she had on the DHS Secretary's Briefing Staff. If the agency views the briefings as intelligence analysis reports, we question why the agency does not view Mr. Jones's experience in the same light. In his various roles, such as WMD Branch Chief at JOD and Supervisory Chief Security Officer for the FBI's WMD Directorate, Mr. Jones's resume reflects that he produced, managed the production of, and delivered briefings to high level officials on WMD-related matters.

Moreover, while the agency highlights Mr. Jones's lack of experience producing intelligence analysis reports, Mr. Fernandez testified to OSC that intelligence analysis experience was not the only factor considered and stated he did not think it would have been heavily weighed. A factor Mr. Fernandez stressed as important was supervisory experience in light of the demands of a GS-15 role. He indicated that, because the GS-15 grade level is the highest level before an employee can become a member of the SES, the applicant's leadership qualities and capabilities are more important given that an SES official needs to be able to perform well, regardless of where they are placed. Mr. Jones's resume reflects that, at the time he applied for the position, he had been head of the WMDD for six years (since its time in the Office of the Commissioner, JOD) and had other supervisory experience prior to that. According to the selectee's resume, the CBT Branch Chief position is the only supervisory role listed other than a previous 60-day acting deputy director role.

We note that, in his testimony, Mr. Fernandez stressed that it was important for the candidate to have fully held the supervisory role, rather than acting in it, appearing to disparage the experience Mr. Jones gained while serving as the acting director. However, it appears that Mr. Jones took on the full role and responsibilities of the WMDD Director position during the nearly two years he held the role. We also note that, during that time, he received a 120-day temporary promotion to the GS-15 grade level while OI attempted to secure higher-graded, permanent positions for the division. It is unclear why Mr. Jones's two-year acting role would be less meaningful, have less value, or was less demanding than if he had held the role in a permanent and official capacity. (We surmise that Mr. Fernandez would want management to give the extended experience Mr. Fernandez gained from his roles as Acting Executive Director and Acting Deputy Executive Director the consideration it is due when determining his qualification for higher management positions.)

Further, Mr. Fernandez told OSC that Mr. Jones's resume needed to describe his supervisory experience, including dealing with difficult situations and dealing with problematic employees. The level of detail that Mr. Fernandez stated he expected to find on the resume, with regard to supervisory experience, is not typical, as far as OSC is aware. Rather, it is generally during the interview process that such specificity of supervisory experience is usually addressed, which makes Mr. Fernandez's expectation appear, at the very least, unreasonable and questionable. Moreover, we note that no such reference to specific supervisory experience was included on Ms. Deutschmann's resume.

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We would also like to highlight as concerning management's alleged refusal to consider any knowledge that officials may have had of Mr. Jones's experience outside of what he included on his resume. Mr. Fernandez and Mr. Ocker stressed to OSC that they focused exclusively on the candidates' resumes when deciding which candidates to interview. Specifically, Mr. Fernandez told OSC that, although he was familiar with Mr. Jones's experience, he did not select to interview him because Mr. Jones had likely failed to fully describe on his resume the experience that was most relevant to the position. However, given that Ms. Deutschmann's resume does not appear to have a high level of detail, we question whether Mr. Jones's application received differential treatment. Moreover, we question the agency's stated approach on focusing exclusively on the four corners of the resume given that in-house experience and management's familiarity with an applicant's work are often the benefits of being an internal applicant and consideration of those factors does not necessarily signify that the candidate is being granted an unauthorized advantage.

Lastly, we note management believed Mr. Jones was qualified to hold a high-level management role, as evidenced by the agency's approval of a 120-day temporary promotion for Mr. Jones to the Acting Director, GS-15, position in 2016, and his two-year role as division head. Due to the foregoing, the agency does not have strong evidence in support of its stated reason or decision not to interview Mr. Jones or fairly consider him for the OFTD Director position.

c. Lower or no performance awards

The agency does not appear to have strong evidence in support of its decision to lower the Complainants' performance award or to fail to later issue Mr. Jones and Mr. Taylor an award. There is no indication that budgetary limitations are to blame for the reduction. As previously mentioned, 17 percent of employees received a cash award that was between \$3,000 to \$5,000 in FY 2017, versus 28 percent in FY 2018. Therefore, the data demonstrates that even more employees received a high cash award the year that CBP reduced the Complainants' award. There is also no indication that Mr. Jones or Mr. Taylor have not successfully carried out the tasks that have been assigned to them.

2. Motive to retaliate

The evidence suggests management had a strong motive to retaliate against the WMD team. Based on testimony OSC obtained from OI officials, the February 15, 2018 e-mail was not received well by CBP officials. Numerous witnesses testified that it "sparked outrage" and "caused a lot of backlash" because it escalated allegations related to CBP's DNA collection requirements to the Secretary's office. Mr. Jennings, too, indicated to OSC that the e-mail caused a "huge issue." He stated it led to many phone calls between executive level officials and the Secretary's Office and that these conversations put CBP on notice that the White House and DOJ were inquiring into CBP's compliance with the relevant DNA law and regulations. Mr. Jennings also stated that the e-mail caused him to apologize to the Commissioner's Office for the way the situation evolved. Ms. Ley's February 21, 2021 e-mail describes that the Commissioner

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became upset with the developing situation and that it cast OI in a negative light. Both Ms. Ley and Mr. Jennings expressed how they had lost trust and confidence in the team and highlighted their displeasure with the team's decision to go outside of CBP, which they felt put pressure on CBP to act against its will. Ms. Ley indicates in the e-mail chain that she explicitly told the team not to go outside CBP.

While we acknowledge that elevating matters up the chain of command can promote the efficient management of government matters, the law is clear that channeling communications through a chain of command does not apply to disclosures of wrongdoing, whether actual or perceived.

We also note that, notwithstanding determinations by both OSC and DHS OIG on CBP's failure to comply with the law, CBP still takes the position that it need not comply. This suggests CBP's stance is fostered by the agency's strong opposition against DNA collection. Indeed, to avoid complying with its legal obligations, CBP down-played the WMDD's efforts in the development of the DNA sampling project and spoke ill of them. This response demonstrates that CBP had—and continues to have—a strong motive to retaliate against the Complainants for setting the actions in motion that have ultimately led the agency to collect DNA, in compliance with the law.

IV. Conclusion

The agency's actions, which evidence violations of sections 2302(b)(8) and (b)(9)(c), harmed the Complainants. Mr. Jones and Mr. Taylor went from leading a division within OI with a growing program and entrusted with high-profile projects, to performing standard duties of regular staff members within a unit that does a minimal amount of work related to WMD. Their career goals and trajectory, which were to firmly establish the WMDD as a stand-out division, full of capable staff and always available to fully address the agency's WMD detection and mitigation needs, drastically changed. The progress that was six years in the making abruptly came to a halt and the WMDD is now non-existent. The Complainants strongly felt a loss of management's support, altering the clear path that they saw for their own careers within OI and discouraging them from seeking any other WMD-related prospects or career advancement opportunities within CBP. The narrative expressed by management officials, as previously outlined, was that the agency had lost trust in the team. Together with the removal of high-profile projects, these statements greatly harmed the team members' reputation throughout CBP. It is reasonable to see how Mr. Jones and Mr. Taylor felt any other effort they made to advance their career within CBP would be fruitless.

Mr. Jones and Mr. Taylor were on a management career track. However, after the February 2018 perceived whistleblowing incident, the agency no longer showed any support for their career advancement. The agency specifically denied Mr. Jones supervisory opportunities within OI and in his field of expertise. Given Mr. Jones's and Mr. Taylor's level of experience and unblemished disciplinary record, it seems likely that the agency would have supported their

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professional development or used their skillset to the agency's greater benefit, as it had previously done, if not for the perceived and actual whistleblowing activity. Yet, despite their level of experience, CBP allowed Mr. Jones and Mr. Taylor to float from unit to unit with no clear purpose or career path for over three years. All of these actions have led witnesses, who are aware of management's strong reaction to the February 15, 2018 e-mail and know about the team's whistleblowing activity, to describe the team as having been "taken off the table" or "pushed down." Further, Mr. Jones and Mr. Taylor allege that, on a personal level, these actions have impacted almost every facet of their lives, leaving an indelible mark on them and on those around them as well. Additionally, the agency's treatment of the Complainants is particularly pernicious because it has a potential chilling effect on other agency employees, as it sends the clear message that whistleblowing will derail one's career.

Mr. Wynn's career goal and trajectory also drastically changed. It is reasonable to see how Mr. Wynn felt he had no prospects within OI or that any effort he made to advance his career in his field of expertise would not yield any results. Mr. Wynn alleges that, on a personal level, he has suffered for being wrongfully accused of unethical behavior after spending years building a reputation on hard work and dedication to CBP's mission.

[REDACTED]

Sincerely,



Alejandra Dove

United States Senate

WASHINGTON, DC 20510

May 22, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Joseph Cuffari
Inspector General
Department of Homeland Security

Dear Inspector General Cuffari:

As you are aware, since 2018, I have conducted oversight of the Department of Homeland Security (DHS) and Customs and Border Protection's (CBP) implementation of the DNA Fingerprint Act of 2005.¹ I copied you on three separate letters dated August 18, 2023, September 11, 2023, and September 27, 2023, to DHS and CBP regarding U.S. Office of Special Counsel (OSC) findings from their investigation into allegations of retaliation against Mr. Fred Wynn, Mr. Mike Taylor, and Mr. Mark Jones.² Since the August and September 2023 letters, I also sent two separate letters on November 1, 2023, and February 26, 2024, regarding DHS and CBP's continued failure to fully implement the DNA Fingerprint Act of 2005.³ In light of the clear retaliation against these brave whistleblowers – which continues to the date of this letter – and the blatant failures by DHS and CBP to comply with the DNA Fingerprint Act, I request that you immediately investigate both matters.

¹ Letter from Sen. Charles E. Grassley, Chairman, Senate Judiciary Committee, to the Honorable Kirstjen Nielsen, Secretary, Department of Homeland Security (Nov. 20, 2018); *see also* Letter from Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Alejandro Mayorkas, Secretary, Department of Homeland Security (Aug. 18, 2023), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dhs_-_whistleblower_retaliation.pdf; *see also* Letter from Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Alejandro Mayorkas, Secretary, Department of Homeland Security, and Troy A. Miller, Senior Official performing the Duties of Commissioner, Customs and Border Protection (Sept. 11, 2023), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dhs_-_whistleblower_retaliation_follow-up.pdf; *see also* Letter from Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Alejandro Mayorkas, Secretary, Department of Homeland Security, and Troy A. Miller, Senior Official performing the Duties of Commissioner, Customs and Border Protection (Sep. 27, 2023) https://www.grassley.senate.gov/imo/media/doc/ceg_to_dhs_-_cbp_ny_post_comments.pdf; *see also* Letter from Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Alejandro Mayorkas, Secretary, Department of Homeland Security, and Troy A. Miller, Senior Official performing the Duties of Commissioner, Customs and Border Protection (Nov. 1, 2023), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dhs_-_cbp_dna_collection.pdf; *see also* Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Alejandro Mayorkas, Secretary, Department of Homeland Security, and Troy A. Miller, Senior Official performing the Duties of Commissioner, Customs and Border Protection (Feb. 26, 2024), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dhs_-_cbp_dna_collection1.pdf.

² Letters from Senator Grassley on Aug. 18, 2023, Sep. 11, 2023, and Sep. 27, 2023, *supra* note 1.

³ Letters from Senator Grassley on Nov. 1, 2023, and Feb. 26, 2024, *supra* note 1.

Whistleblower Retaliation

As noted in my August 18, 2023, and September 11, 2023, letters, on December 2, 2021, OSC sent a letter to DHS and CBP providing a summary of their findings from their investigation of whistleblower retaliation against Mr. Wynn, Mr. Taylor, and Mr. Jones.⁴ OSC found that CBP committed prohibited personnel practices in retaliation for their whistleblowing, violating 5 U.S.C. § 2302(b)(8) and (b)(9)(C).⁵ OSC stated, in part:

OSC's investigation supports a conclusion that the agency's actions constituted both a violation of section 2302(b)(8) and (b)(9)(C). Specifically, the agency retaliated against the Complainants for actual or perceived disclosures of wrongdoing.

...

In addition, the evidence shows that, from February 2018 through present, officials subjected the Complainants to a significant change in duties, responsibilities and working conditions....⁶

Further, these whistleblowers provided additional context and examples of retaliation to your office and the DHS Office of the General Counsel (OGC) on December 20, 2022, that took place following OSC's investigation.⁷ These examples included:

- George Talton IV, the acting Director of the Operational Field Testing Division (OFTD), during a U.S. Border Patrol (USBP) "all-hands meeting," which included the Chief of the Border Patrol, Rodney Scott, and hundreds of agents and staff, stated that there was an "issue" with whistleblowers assigned to the office creating a negative implication about lawful and protected whistleblower disclosures.⁸
- According to Mr. Jones, Mr. Talton admitted to Mr. Jones that he was aware of retaliation against the three of them, but his only concern was OFTD.⁹
- Mr. Jones and Mr. Taylor were the only two out of 10-15 employees who suffered financial and professional impacts because of the changes in titles and responsibilities outlined in a June 23, 2022, memorandum informing employees of their new Investigative Program Specialist titles.¹⁰ Specifically, Mr. Jones and Mr. Taylor were informed that their firearms and law enforcement (LE) authority would be removed. This

⁴ Letters from Senator Grassley on Aug. 18, 2023, and Sep. 11, 2023, *supra* note 1.

⁵ Letter from Alejandra Dove, U.S. Office of Special Counsel, to Mary M. Musilek, Attorney, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, (Dec. 2, 2021), On file with Committee staff.

⁶ *Id.*

⁷ Email from Fred Wynn, to DHS OIG Whistleblower Protection Coordinator and DHS Office of General Counsel, (Dec. 20, 2022), Exhibit 4.

⁸ *Id.*

⁹ *Id.*; see also Letter from Senator Grassley on Aug. 18, 2023, *supra* note 1.

¹⁰ Memorandum from George Talton, Acting Director, Operational Field Testing Division, CBP to All Employees, Operational Field Testing Division, (June 23, 2022), Exhibit 1; see also Letter from Senator Grassley on Aug. 18, 2023, *supra* note 1.

meant that Mr. Taylor would have his LE retirement coverage taken after 30 years of federal service.¹¹ The removal of their LE authority was effective February 26, 2023, as outlined in a letter to Mr. Jones and Mr. Taylor from Ms. Lissette Blanks, Director of OFTD, on February 7, 2023.¹² Ms. Blanks, according to the whistleblowers, was directed by Jakob Brecheisen (CBP OCC), Joshua Gough (Executive Director of OFTD), and Josiah Toepfer (Deputy Executive Director of OFTD) to move forward with removing Mr. Jones and Mr. Taylor's LE authority.¹³

Additional examples of retaliation, include:

- On March 6, 2018, according to Mr. Jones, during a meeting between Acting Deputy Executive Director of Intelligence Operations, Juan Fernandez, and Mr. Jones, Fernandez stated to Mr. Jones that he needed to “stop, just stop and knock it off,” and told Mr. Jones that if he was quiet it will “go easier on me.”¹⁴
- On January 23, 2020, Mr. Jones and Mr. Taylor were placed under the supervision of Executive Director of Intelligence Operations Ronald Ocker and Acting Deputy Executive Director of Intelligence Operations Juan Fernandez. This is particularly concerning given that during this time, not only was there documentation of alleged retaliatory behavior by both Ocker and Fernandez, there was also an open investigation into the prohibited personnel practices of these individuals.¹⁵
- In his personal impact statement and subsequent disclosures to the OSC on December 17, 2020, Mr. Wynn highlighted the consequences he faced as a result of the retaliation. Specifically, Mr. Wynn saw that “purchase orders [were] killed and money abruptly reallocated, and, most significantly, WMD-related projects were allowed to fall off the table for no other reason than [Mr. Wynn, Mr. Jones, and Mr. Taylor] had been the ones working on them.”¹⁶ Mr. Wynn was also denied professional growth opportunities.¹⁷ Specifically, he was “put [] in the unique position of being the intermediary between the people who develop WMDs for a living and the Officers who had a chance to interdict potentially dangerous materials before they got into the hands of bad actors. To be blunt, it was mind-blowing stuff, and CBP killed it out of a juvenile spite.”¹⁸

¹¹ LEO Special Retirement Coverage, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/employee-resources/benefits/retirement/leo-ecbpo/leo-special-retirement-coverage>. In order to qualify for Law Enforcement retirement, a total of twenty (20) years of law enforcement service must be completed. Therefore, removing this designation effectively erases fifteen (15) years of LEO services and disqualifies Mr. Taylor from an increased retirement payment; *see also* Letter from Senator Grassley on Aug. 18, 2023, *supra* note 1.

¹² Memoranda from Lissette Blanks, Director Operational Field Testing Division, CBP to Mark Jones, Operations Manager – Operational Field Testing Division, and Michael Taylor, Operations Manager – Operational Field Testing Division, (Feb. 7, 2023), Exhibits 2 and 3.

¹³ *Id.*; Disclosures on File with Committee staff.

¹⁴ Disclosures on File with Committee staff.

¹⁵ *Supra* note 5. “Moreover, we note that, when leadership transferred the team back to OI, it placed Mr. Jones and Mr. Taylor back under the supervision of, and in physical proximity to, the same official they were alleging had retaliated against them. At that time, OSC had already put the agency on notice of the Complainants’ prohibited personnel practice complaint and was in the middle of facilitating a resolution of the matter via mediation.”

¹⁶ Disclosures on File with Committee staff.

¹⁷ Disclosures on File with Committee staff.

¹⁸ Disclosures on File with Committee staff.

- According to Mr. Taylor, he had an April 4, 2023, conversation with Lissette Blanks, a member of the CBP OFTD team and the individual that signed the memo removing Mr. Jones and Mr. Taylor's LE authority, firearms, credentials, badges, and LE retirement. In that conversation, according to Mr. Taylor, Lissette Blanks' "comment was to the effect that the agency wants to bankrupt us, make us quit, die, kill ourselves or preferably all of the above. I would like to emphasize that she was not saying it maliciously towards me but basically summarizing the agency's clear intentions for Mark and me."¹⁹
- On March 19, 2024, Mr. Jones was subject to continued retaliation.²⁰ Specifically, Mr. Jones and members within his office were asked to move to a different workspace. When Mr. Jones arrived at his new workstation, he was the *only* employee without connectivity, power, or phone access at his workstation, which lasted for over three weeks.²¹

According to disclosures by Mr. Wynn, Mr. Taylor, and Mr. Jones, they contacted DHS OIG by direct letter, Hotline/Joint Intake Center Filings, and emails with little or no response from DHS OIG employees.²² Though your office has been aware of the OSC's findings and the additional whistleblower disclosures, it appears DHS OIG has not taken any actions to investigate those involved in the retaliation of Mr. Wynn, Mr. Taylor, and Mr. Jones. If that is not the case, please explain.

Those who subjected these whistleblowers to retaliation must be fully investigated and held accountable.

Implementation of DNA Fingerprint Act of 2005

According to OSC, the failure to fully implement the DNA Fingerprint Act has continued for nearly a decade—an assertion DHS and CBP disagree with.²³ On March 9, 2020, the Department of Justice (DOJ) settled the matter and finalized a rule that lifted the exemption that, as described in a U.S. Government Accountability Office (GAO) report, "had allowed DHS to not collect DNA samples from certain noncitizens for whom such collection is not feasible due to operational exigencies or resource limitations."²⁴

¹⁹ Disclosures on File with Committee staff.

²⁰ Disclosures on File with Committee staff.

²¹ Email from Mr. Jones to Committee staff.

²² Email from Mr. Taylor (Dec. 20, 2023), Exhibit 4; Letter and Email from Mr. Jones to DHS IG Joseph Cuffari (Oct. 2, 2019), Exhibit 5.

²³ Letter from Henry J. Kerner, U.S. Office of Special Counsel, to Donald J. Trump, President of the United States of America (Aug. 21, 2019), <https://osc.gov/Documents/Public%20Files/FY19/DI-18-3920,%20DI-18-3924,%20and%20DI-18-3931/Redacted%20DI-18-3920,%20DI-18-3924,%20DI-18-3931%20Letter%20to%20the%20President.pdf>.

²⁴ Letter from Senator Grassley on Nov. 1, 2023 *Id.*; see also On March 9, 2020, the Department of Justice (DOJ) finalized a rule that removed 28 CFR 28.12(b)(4), which authorized the Secretary of DHS to exempt certain detained aliens from the DNA-sample collection requirement. The Federal Register states, "[a]s a result, the rule restores the Attorney General's plenary authority to authorize and direct all relevant Federal agencies, including the Department of Homeland Security, to collect DNA samples from such individuals." DNA – Sample Collection From Immigration Detainees, 85 Fed. Reg. 13,483-13,484 (Mar. 9, 2020) (codified at 28 C.F.R. pt. 28), <https://www.govinfo.gov/content/pkg/FR-2020-03-09/pdf/2020-04256.pdf>; see also, U.S. Gov't Accountability

After the rule change, on May 17, 2021, DHS OIG released a report entitled, *DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees*, which recommended that “DHS oversee and guide its law enforcement components to ensure they comply with the requirements of the DNA Fingerprint Act of 2005 and 28 C.F.R. § 28.12.”²⁵ Specifically, the report found that, “[o]f the five DHS law enforcement components we reviewed that are subject to these DNA collection requirements, only [the] United States Secret Service consistently collected DNA from arrestees. U.S. Immigration and Customs Enforcement and the Federal Protective Service inconsistently collected DNA, and U.S. Customs and Border Protection and the Transportation Security Administration collected no DNA.”²⁶ Notably, the DHS OIG report referenced the August 2019 letter from OSC to the President stating that:

CBP has failed to fulfill its responsibilities under the law and in so doing has compromised public safety. The failure to collect DNA clearly inhibits law enforcement's ability to solve cold cases and to bring violent criminals to justice. Furthermore, although CBP was granted a one-year exemption, as stated in the language of the exemption itself, CBP was supposed to use that period to begin complying with DNA collection. The passage of nearly a decade without compliance is unacceptable.²⁷

According to the report, DHS concurred with all four recommendations.²⁸ As of May 6, 2024, according to DHS OIG, two of these recommendations remain open.²⁹

Further, my staff has been provided an internal – and from what they were told, active – DHS and CBP directive from December 2020, which was signed by Mark Morgan, Chief

Office, GAO-23-106252 DNA Collections: *CBP is Collecting Samples from Individuals in Custody, but Needs Better Data for Program Oversight* (May 24, 2023), <https://www.gao.gov/assets/gao-23-106252.pdf>.

²⁵ DHS, Office of Inspector General, *DHS Law Enforcement Components Did Not Consistently Collect DNA from Arrestees*, <https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-35-May21.pdf> (May 17, 2021).

²⁶ *Id.*

²⁷ *Id.* at 27-28; see also *supra* note 20.

²⁸ *Id.* at 14, 30-33. “Recommendation 1: We recommend the DHS Office of the Secretary establish an oversight structure with central policy guidance and direction to ensure DHS law enforcement components comply with the DNA Fingerprint Act of 2005 and 28 C.F.R. § 28.12. Recommendation 2: We recommend the DHS Office of the Secretary ensure ICE, FPS, CBP, and TSA fully implement DNA collection for arrestees and non-U.S. detainees to comply with the DNA Fingerprint Act of 2005 and 28 C.F.R. § 28.12. Recommendation 3: We recommend the DHS Office of the Secretary ensure ICE, FPS, CBP, and TSA implement internal controls, including modifying booking systems to track and verify DNA collection. If components pursue memorandums of agreement with other agencies to collect DNA samples, they must implement internal controls to track and verify DNA collection. Recommendation 4: We recommend the FPS Policy Division update the FPS Detention and Arrest Directive to align with 28 C.F.R. § 28.12.”

²⁹ *Id.* “Recommendation 2: We recommend the DHS Office of the Secretary ensure ICE, FPS, CBP, and TSA fully implement DNA collection for arrestees and non-U.S. detainees to comply with the DNA Fingerprint Act of 2005 and 28 C.F.R. § 28.12. Recommendation 3: We recommend the DHS Office of the Secretary ensure ICE, FPS, CBP, and TSA implement internal controls, including modifying booking systems to track and verify DNA collection. If components pursue memorandums of agreement with other agencies to collect DNA samples, they must implement internal controls to track and verify DNA collection.”; see also Emails on file with Committee Staff.

Operating Officer and Senior Official Performing the Duties of the Commissioner of CBP.³⁰ This directive states that “CBP is required to collect DNA samples and accompanying biographical data for submission to CODIS from all persons in CBP custody that are arrested on federal criminal charges and from non-U.S. persons detained under CBP’s authority, who are not otherwise exempt from the collection requirement.”³¹ Despite being required by law and internal directives, and after the DHS OIG and OSC reports highlighted failures to follow the law, whistleblower disclosures indicate that DHS and CBP continue to fail to fully implement the DNA Fingerprint Act of 2005.

The consequences of this failure are clear. In my November 1, 2023, letter, I noted that according to the GAO and legally protected whistleblower disclosures relating to CBP’s DNA collection practices, in FY 2022, of the nearly 1.7 million individuals encountered by Border Patrol and the Office of Field Operations, the agencies collected DNA samples from about 634,000 of these individuals, or 37%.³²

In my follow up letter on February 26, 2024, to DHS and CBP, I highlighted that, according to legally protected whistleblower disclosures related to CBP’s DNA collections, in the first three quarters of FY 2023, the FBI received an alarmingly low percentage of DNA samples.³³

Quarter/ Fiscal Year	Nationwide Encounters ³⁴	DNA Samples FBI Received ³⁵	% FBI Received
Q1 FY23	865,333	347,231	40.13%
Q2 FY23	682,533	213,011	31.21%
Q3 FY23	762,659	282,786	37.08%

CBP’s DNA samples have led to hundreds of confirmed hits in CODIS, linking illegal immigrants via DNA matches to criminal conduct such as fraud, sexual assaults, homicides, burglaries, and assault on federal officers.³⁶ These DNA samples have been connected to unsolved cases.³⁷ Failing to collect these DNA samples at the border is not only a violation of law, but it undermines the service of justice and allows criminals to enter the United States to commit more crimes and threaten the safety of American citizens.

Recent legally protected whistleblower disclosures have given more cause for concern and show that DHS and CBP continue to fail to fully implement the DNA Fingerprint Act.

³⁰ Department of Homeland Security, U.S. Customs and Border Protection Directive, *DNA Sample Collection for CODIS* (Dec. 30, 2020). On file with Committee staff.

³¹ *Id.* at 2.

³² Letter from Senator Grassley on Nov. 1, 2023, *supra* note 1; *see also*, GAO-23-106252 *supra* note 19.

³³ Documents on file with Committee staff.

³⁴ U.S. Customs and Border Protection, *Nationwide Encounters*, (last modified Feb. 13, 2024) <https://www.cbp.gov/newsroom/stats/nationwide-encounters>; *see also* Letter from Senator Grassley on Feb. 26, 2024, *supra* note 1.

³⁵ Letter from Senator Grassley on Nov. 1, 2023, *supra* note 1; *see also*, GAO-23-106252 *supra* note 19.

³⁶ *Id.*

³⁷ *Id.*

According to whistleblower disclosures to my office, CBP officials went to USBP processing facilities in Tucson, Casa Grande, Yuma, and San Diego and at no facility that these officials visited was DNA being collected.³⁸ This blatant disregard of the law deserves to be investigated, and those responsible should be held accountable.

I request DHS OIG fully investigate the acts of whistleblower retaliation as outlined in the OSC report and disclosures to your office, to include meeting with these brave whistleblowers. I also request DHS OIG perform a full and complete review of DHS and CBP's failure to implement the DNA Fingerprint Act of 2005.

If you have any questions, please contact Tucker Akin on my committee staff at (202) 224-0642.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Budget

Enclosure

³⁸ Email on file with Committee Staff.

EXHIBIT 1

1300 Pennsylvania Avenue, NW
Washington, DC 20229



U.S. Customs and
Border Protection

MEMORANDUM FOR: All Employees, Operational Field Testing Division
Planning, Analysis and Requirements Evaluation Directorate
Operations Support

THROUGH: Josiah Toepfer
Deputy Executive Director
Planning, Analysis, and Requirements Evaluation Directorate
Operations Support

FROM: George Talton
Acting Director
Operational Field Testing Division
Planning, Analysis, and Requirements Evaluation Directorate
Operations Support

SUBJECT: Updating Investigative Program Specialist Position
Description and Reassignment of all GS-13 and 14 Personnel

JOSIAH A
TOEPFER

Digitally signed by
JOSIAH A TOEPFER
Date: 2022.06.23
16:14:09 -0400

GEORGE M
TALTON IV

Digitally signed by
GEORGE M TALTON IV
Date: 2022.06.23
15:00:05 -0400

Last year, Operations Support (OS) realigned the Operational Field Testing Division (OFTD) under the Planning, Analysis, and Requirements Evaluation Directorate (PARE). During this organizational change, the Office of Human Resources Management (HRM) and the Office of Chief Counsel (OCC) reviewed all aspects of the process to ensure that realignment complied with Federal employment laws, regulations, and policies. This comprehensive review revealed outdated and inaccurate position descriptions (PDs). As a result, we have determined, with the support of HRM Classification Operations and OCC, that the PDs for all OFTD employees must be updated to reflect the new and current organizational location, accurate job duties, and responsibilities.

Updated PDs (attached) were developed by PARE/OFTD and classified by HRM for the Investigative Program Specialist (OFTD Covert), GS-1801-13 and 14 positions, which more accurately describe the current location, duties, and responsibilities performed by the Investigative Program Specialists, Operations Managers/OAT, Intelligence Research Specialists, and Program Managers, assigned to OFTD. HRM's Classification Operations and OCC advised that these positions have not previously and will not meet the requirement for special retirement coverage and are classified as non-law enforcement positions in CBP, and subsequently the new Position Descriptions continue to reflect that determination.

This change will not have financial and professional impacts for most employees, and we encourage you to review them for any individual impacts. Therefore, OS leadership is providing

OFTD Reassignment Notification

you with a 90-day notice prior to the effective date of reassignment to the updated PDs, to provide you with time to make any personal and professional decisions you deem necessary. All OFTD employees will be reassigned to the new PDs effective September 25, 2022 (pay period 20).

Let me reassure you that this will not change our mission or performance expectations. This change merely ensures we comply with all legal and regulatory requirements.

If you have any concerns or questions regarding the new position description, please contact me directly at [REDACTED] or at [George.M.Talton-IV](#) [REDACTED]

EXHIBIT 2

1300 Pennsylvania Avenue, NW
Washington, DC 20229



**U.S. Customs and
Border Protection**

February 7, 2023

MEMORANDUM FOR: Mark J. Jones
Operations Manager
Operational Field Testing Division (OFTD)

Through: Joshua S. Gough **JOSHUA S GOUGH** Digitally signed by
JOSHUA S GOUGH
Date: 2023.02.08
07:16:00 -05'00'
Executive Director
Planning, Analysis, and Requirements Evaluation (PARE)
Operations Support

From: Lisette Blanks **LISSETTE BLANKS** Digitally signed by
LISSETTE BLANKS
Date: 2023.02.07
15:18:41 -05'00'
Director, Operational Field Testing Division
Planning, Analysis, and Requirements Evaluation (PARE)
Operations Support

SUBJECT: Updating Investigative Program Specialist Position Description and
Reassignment of Mark J. Jones

By memorandum dated June 23, 2022, you were notified that Operations Support (OS) officially realigned the Operational Field Testing Division (OFTD) under the Planning, Analysis, and Requirements Evaluation Directorate (PARE), and that affected OFTD position descriptions (PDs) must be updated to reflect the new and current organizational location, accurate job duties, and responsibilities.

Additionally, the June 23, 2022 memorandum provided all OFTD employees impacted by the PD change with a 90-day notice prior to the effective date of reassignment to allow time to make any necessary personal and professional decisions. The original reassignment date was September 25, 2022 (pay period 20 of Fiscal Year 2021).

Prior to the original reassignment date, you asked that CBP identify alternative positions to which you could be reassigned. CBP identified a specific position within CBP Watch, and you submitted a lateral reassignment request. You were granted an extension of the reassignment date to provide an opportunity for a lateral transfer. You were offered a lateral transfer to a position within the CBP Watch, you declined that offer, and you made no other lateral transfer requests. The reassignment process to the new OFTD PDs must now continue.

Accordingly, you will be reassigned to the Investigative Program Specialist PD, PL059A, effective February 26, 2023 (Pay Period 05).

If you have any concerns or questions regarding the new position description, please contact me directly at Joshua.S.Gough [REDACTED]

EXHIBIT 3

1300 Pennsylvania Avenue, NW
Washington, DC 20229



**U.S. Customs and
Border Protection**

February 7, 2023

MEMORANDUM FOR: Michael Taylor
Operations Manager
Operational Field Testing Division (OFTD)

Through: Joshua S. Gough **JOSHUA S** Digitally signed by
Executive Director **GOUGH** JOSHUA S GOUGH
Planning, Analysis, and Requirements Evaluation (PARE) Date: 2023.02.08
Operations Support 07:17:11 -05'00'

From: Lisette Blanks **LISSETTE** Digitally signed by
Director, Operational Field Testing Division **BLANKS** LISSETTE BLANKS
Planning, Analysis, and Requirements Evaluation (PARE) Date: 2023.02.07
Operations Support 15:00:07 -05'00'

SUBJECT: Updating Investigative Program Specialist Position Description and
Reassignment of Michael Taylor

By memorandum dated June 23, 2022, you were notified that Operations Support (OS) officially realigned the Operational Field Testing Division (OFTD) under the Planning, Analysis, and Requirements Evaluation Directorate (PARE), and that affected OFTD position descriptions (PDs) must be updated to reflect the new and current organizational location, accurate job duties, and responsibilities.

Additionally, the June 23, 2022 memorandum provided all OFTD employees impacted by the PD change with a 90-day notice prior to the effective date of reassignment to allow time to make any necessary personal and professional decisions. The original reassignment date was September 25, 2022 (pay period 20 of Fiscal Year 2021).

Prior to the original reassignment date, you asked that CBP identify alternative positions to which you could be reassigned. CBP identified a specific position within CBP Watch, and you submitted a lateral reassignment request. You were granted an extension of the reassignment date to provide an opportunity for a lateral transfer. You were offered a lateral transfer to a position within the CBP Watch, you declined that offer, and you made no other lateral transfer requests. The reassignment process to the new OFTD PDs must now continue.

Accordingly, you will be reassigned to the Investigative Program Specialist PD, PL059A, effective February 26, 2023 (pay period 05).

If you have any concerns or questions regarding the new position description, please contact me directly at Joshua.S.Gough [REDACTED]

EXHIBIT 4

From: mjojtay@ [REDACTED]
Subject: Fwd: Ongoing Whistleblower Retaliation at U.S. Customs and Border Protection
Date: March 25, 2024 at 2:36 PM
To: jones.mark@ [REDACTED]

M

Sent to OIG. Separate emails with the same message were sent to other oversight groups on the same day. You should have been CC'd.

----- Original Message -----
From: FW <fredw17801@ [REDACTED]>
To: "whistleblowerprotectioncoordinator@ [REDACTED]" <whistleblowerprotectioncoordinator@ [REDACTED]>, "ogcfrontoffice@ [REDACTED]" <ogcfrontoffice@ [REDACTED]>, "whistleblower@ [REDACTED]" <whistleblower@ [REDACTED]>
Cc: "jones.mark@ [REDACTED]" <jones.mark@ [REDACTED]>, "mjojtaylor@ [REDACTED]" <mjojtaylor@ [REDACTED]>
Date: 12/20/2022 4:52 PM EST
Subject: Ongoing Whistleblower Retaliation at U.S. Customs and Border Protection

Greetings:

If you are receiving this message, you and your organization are aware of the U.S. Office of Special Counsel's (OSC) findings regarding U.S. Customs and Border Protection's (CBP) intentional obstruction of the implementation of the DNA Fingerprint Act of 2005. (OSC letter to POTUS dated August 21, 2019 – Attached.) While the U.S. Attorney General and others promptly took explicit action to ensure that DHS and CBP enacted the law as required, we have been perpetually punished by CBP despite our assertions being upheld and our designation by the OSC as Whistleblowers. Each of your investigative or oversight groups has declined to investigate or further pursue this issue due to the blanket deferral of these matters to the OSC due to their Prohibited Personnel Practice (PPP) investigative authority.

Over four years later, the OSC has finally closed our Prohibited Personnel Practices (PPP) cases and issued a scathing letter (December 2, 2021- Attached) to CBP informing them of the agency's multiple acts of wrongdoing and reprisal against upheld Whistleblowers. The letter notes that "from February 2018 through the present, (CBP) officials subjected the Complainants to a significant change in duties, responsibilities, and working conditions...CBP had—and continues to have—a strong motive to retaliate against the Complainants". In short, based upon our identification of CBP's failure to comply with the law and our efforts to bring CBP into compliance, the agency dismantled our Division (the Weapons of Mass Destruction Division, or WMDD), abolished our positions, repurposed our funding, and left us idle with little to no duties and responsibilities, effectively icing us and bringing our careers to an abrupt halt. The agency continues to engage in ongoing retaliation despite the fact that we have all filed cases with the Merit Systems Protection Board (MSPB).

We should not have to remind anyone included on this message distribution that CBP has repeatedly refused to respond to multiple oversight entities' inquiries regarding this issue, starting with Senator Grassley's Letter from November 2018, which still remains unanswered by CBP. (Grassley's letter attached). Now that the OSC has removed itself from this matter, there are no excuses for not completing the misconduct and oversight investigations that are long overdue. In the August 21, 2019, Special Counsel Letter to the President and Oversight Committees, the Special Counsel stated "I write this letter to inform both the President and congressional oversight committees of this misconduct, and it is my hope that further action can be taken to bring CBP into compliance with the law. I strongly urge Congress to continue its robust oversight efforts in this area, with a particular focus on accountability for DHS and CBP officials who have known for years that this situation existed, but chose

not to act. I note that a number of CBP officials central to agency inaction were identified by the whistleblowers but never interviewed in the investigation because CBP dismissed the extent of their involvement." It should also be noted that some of the "CBP officials central to the agency inaction" are in the CBP Office of Chief Counsel (OCC), the same office that is representing CBP in the pending MSPB case. This is a conflict of interest at a minimum, and an inarguable attempt by CBP to shield its continued malfeasance and perpetual Whistleblower persecution from DHS and other external (to CBP) entities.

Our PPP cases against CBP have done nothing to mitigate CBP's aggression. After our lawsuits were filed with the Merit Systems Protection Board (MSPB), two of us were informed of the pending removal of our law enforcement authority and law enforcement retirement coverage. (Memorandum attached.) This was also AFTER the OSC closed our PPP cases and informed CBP OCC that we were still being subjected to ongoing reprisals.

Please consider the additional following transgressions that have occurred since our disclosures in 2018—which began nearly five years ago. This list is far from inclusive regarding documented acts of PPPs that we have been subjected to as defined by the OSC and codified in 5 U.S. Code § 2302 - Prohibited personnel practices. (Not everything applies to all three of us.)

- Eliminated or abolished the positions held by Jones (Director, WMDD) and Taylor (Deputy Director, WMDD).
 - Reversed course on the planned elevation of those positions to GS-15 level.
 - Eliminated WMDD as a Division and re-cast it as a branch of another Division, OFTD. (Before the reprisals began, WMDD had an approved annual budget in excess of \$2M and was set to grow to 25 full-time employees by 2023.)
 - Stripped us of all or nearly all of our duties and job responsibilities, leaving us with little to nothing to do on a daily basis.
 - Repurposed funding dedicated to WMDD to other uses by CBP.
 - Transferred Jones and Taylor involuntarily three times (Twice placed under the direct and second-line supervision of named persecutors as listed in our PPP disclosures. CBP endorsed and approved these personnel actions with impunity.)
 - Our organizational location as Whistleblowers was publicly "outed" and our disclosure was publicly ridiculed by senior CBP management, to include our direct supervisor and then-Acting Commissioner Mark Morgan on multiple occasions.
 - CBP has failed to issue annual performance reviews that include any actual evaluation of our performance for **five** consecutive years, in violation of numerous laws and policies. The performance reviews CBP has issued include no evaluation and are essentially blank. The lack of any non-blank performance reviews effectively holds us as "prisoners" as we were and still are not free to apply for other positions without a meaningful and complete annual performance appraisal. The last such appraisal was issued on October 24, 2022, over four months AFTER we filed an MSPB appeal against CBP.
 - We were called liars with "integrity issues" by recently named CBP Office of
-

Intelligence Assistant Commissioner Ron Ocker who had never met us previously and attributed slanderous statements to another CBP executive in our management chain. We were later told that Ocker's statements were absolutely untrue.

- We were stripped of premium pay, pending promotional opportunities, and annual performance awards.
- As recently as a few months ago, the FBI missed two national security targets due to the specific intentional actions of George Talton IV that were designed to further humiliate the Whistleblowers.

The MSPB proceedings have only produced more foot-dragging and delay by the agency, which claims it cannot respond to discovery until March 2023, at the earliest. Meanwhile, the administrative judge has taken an unreasonably narrow view of his jurisdiction that ignores the fact the agency dismantled and relegated our entire Division (of which we were the only members by that point) and rendered us essentially idle as reprisal for whistleblowing activity. We do not have the resources to support multiple rounds of litigation at the MSPB and, therefore, have sought to challenge the judge's jurisdictional findings, but even in litigation CBP remains brazenly unrepentant.

Need for Investigation

The OSC has cleared the way for the numerous investigating authorities to initiate or resume Whistleblower retaliation investigations as required by law and promulgated by public mission statements (<https://www.oig.dhs.gov/whistleblower-protection>, HSGAC and Senate Judiciary press releases, etc.). Specifically, George M. Talton IV, the former (A) Director of the Operational Field Testing Division (OFTD) in the Planning, Analysis, and Requirements Evaluation (PARE) Directorate, Operations Support, has committed three irrefutable acts of Whistleblower reprisal against us. By CBP and DHS policy and statute, the penalty for two acts of Whistleblower reprisal is dismissal. There are no mitigating provisions in the CBP Table of Offenses (B05 – Whistleblower retaliation by a supervisor). Law and policy demand that he must be removed from federal service.

Additional CBP Management Retaliatory Acts Not Included in the December 2021 OSC Report

- On March 16, 2021, during a U.S. Border Patrol "all-hands meeting" which included the Chief of the Border Patrol (and approximately 1,000 agents and staff), George Talton IV, acting Director of the OFTD, gave a presentation about the division, focused primarily on its mission, objective, and testing methodology. In addition to informing USBP staff about the nature of the group's work, the presentation was intended to encourage eligible USBP staff to consider applying for the permanent OFTD Director position when it was announced, as it could be a useful part of an employee's career ladder. After slides that discussed the history and work of the Division, there was a slide on the screen that included the bullet "Personnel Issues". At this point, Talton informed the audience that there was an issue with "whistleblowers assigned to our office". Given that the agency professes to value the courage and integrity of whistleblowers (as we are reminded annually on National Whistleblower Appreciation Day), how could whistleblowers assigned to OFTD be an "issue"? This was done to "out" the current location of the involuntarily transferred Jones and Taylor, and remind everyone that Jones and Taylor (and Whistleblowers in general) are an "issue". Inexcusable and a clear violation of multiple laws and policies

- On April 25, 2022, Talton, Taylor, and Jones were on a Teams Meeting call to discuss the unclassified particulars of an FBI meeting planned for April 26, 2022. (The Whistleblowers were the senior managers in the WMD Division before CBP illegally dismantled the division in 2018 as punishment for reporting the agency's obstruction and malfeasance.) Talton accepted the meeting invitation from Taylor and confirmed his desire to attend the prior week on April 20, 2022. The discussion became centered upon WMD issues and related efforts exclusive of the upcoming FBI meeting. Jones said that he was recently contacted by a staff member from CENTCOM and was questioned about the lack of CBP engagement in WMD matters and its now-defunct WMD program. Talton stated that Taylor and Jones were as relevant to WMD as the 10-year retired agent was to the current status of the Border Patrol. He articulated that CBP made their position regarding Taylor and Jones crystal clear when both Taylor and Jones were assigned to him in OFTD. They were dead to the agency. Period.

Talton told Jones and Taylor that their career executions were being handled above him and that he had no input. Talton admitted that he was aware of numerous incidents of retaliation against Taylor, Jones and Wynn but his only concern was OFTD. He fervently denied that he was aware of or used any WMD funds that were allegedly (wrongfully) diverted to him. (This is in sharp contrast to his statement on June 21, 2021, (on file with the OSC) when he told the OFTD team on that morning's conference call that the team may have an additional one million dollars in funding that no one can figure out how OFTD may have it other than it is tied to Mark and Mike.) Talton was combative, condescending and patently disingenuous during this call that lasted approximately one hour.

Approximately two hours after the call ended, Talton emailed both Taylor and Jones demanding that they attend administrative training the next day in Lorton, VA both before and after the scheduled FBI meeting in Washington, DC. While there are certainly integrity issues in attending a 6.5 hour course for an hour or two and then falsifying training records, the bigger issue is that Talton knew that Taylor and Jones could not return for the FBI meeting in DC in time and would therefore embarrass themselves horrifically in front of their FBI WMD colleagues when they failed to show up for a meeting that Taylor had arranged. The purpose of the meeting was to ensure that a national security program continued unabated despite CBP's punishment of Jones and Taylor and continued contempt for mandated WMD programs. TALTON EFFECTIVELY ATTEMPTED TO CANCEL A NATIONAL SECURITY PROGRAM MEETING FOR THE SOLE PURPOSE OF HUMILIATING JONES AND TAYLOR. Taylor canceled the meeting unilaterally and immediately upon receiving orders to (partially) attend inconsequential administrative training. The FBI, aware of the circumstances surrounding the Whistleblowers' employment conditions at CBP, later confirmed that at least two national security targets were missed due to Talton's intentional actions to ensure that critical information wasn't passed in order to humiliate Jones and Taylor. Talton made this decision despite the fact that he was never read into the program and had no idea what the classified meeting was about. Not only was this clearly an act of reprisal, but his actions (Whistleblower Retaliation), which directly "jeopardize(d) the agency's mission", as defined in E010 in CBP's Table of Offenses, warrants dismissal, with no mitigating factors.

- On June 23, 2022, Jones and Taylor received notice from Talton informing them that their firearms and LE authority would be removed from them at the end of September and that Taylor will have his law enforcement retirement coverage taken from him. This is by far the most egregious act of reprisal taken thus far and clearly a final act towards the dismantlement of our careers and the ultimate degradation. It will also reduce Taylor's retirement pension significantly after 29 years of federal service. This was done unilaterally and without discussion despite the fact that they are Office of Special Counsel-designated and upheld Whistleblowers that were involuntarily transferred to the OFTD. As stated previously, this message was also sent AFTER litigation was filed (complete with assigned case numbers, etc.) and a litigation hold notice was sent to CBP.

There are no more obstructions or deferments applicable to justify further inaction by any of the investigatory or oversight groups with jurisdiction that are duty-bound to address this on-going matter. We would like to emphasize that there are over a dozen other documented, verifiable transgressions applicable to our cases which we will gladly expound upon when necessary. Thank you for your time and necessary attention to this matter.

VR,

Mike Taylor Fred Wynn Mark Jones

Dec 2 2021 OSC OFTD - Aug 21 2019 Grassley
Letter t...(1).pdf Reassi...(2).pdf OSC L...ent.pdf Letter.pdf

EXHIBIT 5

From: Mark Jones jones.mark [REDACTED]
Subject: Allegations of willful obstruction of the DNA Collection Act of 2005 and subsequent Department of Justice (DOJ) regulations by the leadership of the Department of Homeland Security (DHS) Headquarters, Immigration and Customs Enforcement (ICE), and the continued obstruction by United States Customs and Border Protection (CBP) senior or management in light of the Office of Special Counsel (OSC) Findings dated August 21, 2019.
Date: October 2, 2019 at 12:20 PM
To: joseph.cuffari [REDACTED]
Cc: Mike mjctay [REDACTED], FW [REDACTED], jones.mark [REDACTED], John Young jyoung [REDACTED]

October 2, 2019

Dr. Joseph V. Cuffari, Inspector General
DHS Office of Inspector General/MAIL STOP 0305
Attn: Office of Investigations - Hotline
245 Murray Lane SW
Washington, DC 20528-0305

Via Email - joseph.cuffari [REDACTED]

Re: Allegations of willful obstruction of the DNA Collection Act of 2005 and subsequent Department of Justice (DOJ) regulations by the leadership of the Department of Homeland Security (DHS) Headquarters, Immigration and Customs Enforcement (ICE), and the continued obstruction by United States Customs and Border Protection (CBP) senior management in light of the Office of Special Counsel (OSC) Findings dated August 21, 2019.

Dear Dr. Cuffari:

On August 21, 2019, the Honorable Henry J. Kerner, OSC Special Counsel, sent a letter to President Trump and to the Senate Homeland Security and Governmental Affairs Committee (HSGAC) and the House Committee on Homeland Security regarding the validated contentions of three CBP Whistleblower employees. His letter clearly articulated CBP's malfeasance and the consequences of its deliberate behavior for its willful non-compliance with the DNA law and pertinent DOJ regulations:

- *"The agency's noncompliance with the law has allowed subjects subsequently accused of violent crimes, including homicide and sexual assault, to elude detection even when detained multiple times by CBP or Immigration and Customs Enforcement (ICE). This is an unacceptable dereliction of the agency's law enforcement mandate."*
- *"CBP has failed to fulfill its responsibilities under the law and in so doing has compromised public safety. The failure to collect DNA clearly inhibits law enforcement's ability to solve cold cases and to bring violent criminals to justice."*
- *"I seriously question CBP's conduct in this matter, and I have determined that its findings appear unreasonable."*
- *"I strongly urge Congress to continue its robust oversight efforts in this area, with a particular focus on accountability for DHS and CBP officials who have known for years that this situation existed, but chose not to act. I note that a number of CBP officials central to agency inaction were identified by the whistleblowers but never interviewed in the investigation because CBP dismissed the extent of their involvement."*

OSC reviewed and unequivocally upheld the allegations of the three CBP Whistleblowers regarding CBP's willful non-compliance with the DNA collection law. The authorization to investigate the surreptitious actions of CBP and DHS employees whom we allege actively obstructed the implementation of this law, under the color of law, falls outside the mandate of the OSC Disclosure Unit. We are requesting that the DHS Office of Inspector General (OIG) actively investigate these allegations, in conjunction with the Senate Judiciary Committee and the Senate Committee on Homeland Security and Governmental Affairs (HSGAC). Both entities have initiated investigations into this matter.

Our group was tasked to implement this law in 2016 at the direction of then-CBP Commissioner Gil Kerlikowske. When he departed the agency and it became known that we were close to implementing a DNA collection pilot, our group was eviscerated. We were slandered, orally, and in writing, as "rogue", "self-aggrandizing", and "acting without authorization" in our attempt to implement the DNA collection law. Dozens of programs and initiatives that we were responsible for were removed from our group, and no less than 12 articulable, derogatory, and significant actions were taken against our unit within the next 30 days of the agency's concerted obstruction efforts. Concurrently, multiple employees at Immigration and Customs Enforcement (ICE) and DHS Headquarters were inexplicably and hastily removed from all DNA collection implementation efforts. Some of these employees were also reassigned and/or punished for their participation in any DNA collection initiatives. These employees are and have been willing to be interviewed again and document/articulate the negative repercussions that they have experienced due to their association with the program.

Authorized for public release by Ranking Member Grassley

Oddly, DHS OIG declined investigative interest when presented with these allegations by OSC. Expectedly, CBP's internal investigation into the matter found absolutely no wrongdoing on CBP's behalf. Their "investigation" was publicly cited as farcical by the Special Counsel. Not one of the alleged conspirators/perpetrators was interviewed by the CBP Office of Professional Responsibility (OPR).

Both Senate Committees and the OSC have the documents, witness lists and statements that we believe substantiate our allegations of criminal obstruction of the DNA collection law by public servants at CBP, ICE, and DHS Headquarters. We (OSC, both committees and us) believe that the DHS OIG should be given the opportunity again to exercise its investigative and oversight authority regarding this matter before the issue is referred to the DOJ and the Federal Bureau of Investigation (FBI).

The obstructive acts, false statements, intentional actions and inactions by certain CBP and DHS employees that refuse to implement the DNA collection law have inarguably contributed to the sexual assaults, murders, and other violent crimes perpetrated upon innumerable U.S. citizens and others in our country by criminal illegal aliens. The OSC and the FBI have unequivocally substantiated the harm caused by CBP and DHS not implementing the law as required. These identifiable public servants that choose to selectively not implement the laws passed by Congress, especially those of incredible public safety importance, must be held accountable and meaningfully punished. The victims that were injured or killed due to these individuals' malfeasance deserve no less.

A concurrent Disclosure has also been filed with the OSC addressing this matter. The OSC Disclosure is attached for your reference. Additionally, both Senate Committees have also been provided with copies of this document and the OSC Disclosure.

We look forward to your response and further addressing this matter with your office.

Very Respectfully,

Mark J. Jones, Michael J. Taylor, and Fred A. Wynn

CC: Office of Special Counsel

Senate Homeland Security and Governmental Affairs Committee

Senate Judiciary and Oversight Committee

Attachment(s)

Supplemental Statement

CBP/DHS maintain that they are not in conflict with any applicable laws due to a "waiver" that OSC (and others) contend has not been in effect for almost 10 years. If the Department and agency have been fully compliant with all applicable laws and regulations since 2010, there is no explanation for the following actions and alleged surreptitious behavior:

- In 2012/13, the CBP Tucson Border Patrol Sector committed to the Federal Bureau of Investigation, Federal DNA Database Unit (FBI-FDDU), that their Sector would provide 60,000 DNA CODIS Collection Samples over the year 2012/13. No samples were ever sent to the FBI-FDDU, nor was the FBI ever given an explanation for CBP not doing so. Source: Section Chief, Tina Delgado of the FBI-FDDU. **Why would such a "resource-limited" agency agree to this measure if they were "exempt" due to their "waiver"?**
 - Circa 2013/14, the CBP Commissioner's Office, Office of Policy and Planning (CBP-OC-OPP), developed, circulated, vetted and approved the DNA Collection Directive to implement a DNA Collection plan under the DNA Fingerprint Act of 2005. It was presented to the CBP Commissioner's/Deputy Commissioner's Office. It was never signed or acted upon. **Why was this policy ever developed and circulated for approval if a waiver excusing the agency from compliance existed?**
 - Circa February 2018 - A Staffer for Congressman Scott Perry provided statements to a Senate Judiciary and Oversight Committee Staff Investigator that while the Staffer was previously working at the Department of Homeland Security HQ, **they personally witnessed actions taken against employees/detailees that attempted to advocate or implement the DNA Collections Act of 2005 within DHS.** One example of alleged action taken against a detailee concerns USBP Agent Monique Grame who was detailed to DHS Office of Policy and was allegedly sent back to USBP after she responded to an email from Chad Wood where she states 'In our read, the Napolitano-Holder letter was never intended to be a permanent exemption.....' and this email surfaced. (Email is dated February 8, 2018 2:48 PM from Grame to Wood)
 - Februarv 15 2018 - Chad Wood a DHS employee serving a Joint Duty Assignment (JDA) to the CBP Weapons of Mass
-

Destruction Division (CBP-WMDD), had sent a series of emails to colleagues in the Office of the DHS Secretary, DHS Policy, and Department of Justice Deputy Attorney General's Office regarding his frustration with CBP's non-compliance with and intentional obstruction of the DNA collection law. Allegedly, one or more of these emails were shared directly with then-DHS Secretary Nielsen. Secretary Nielsen contacted then-acting CBP Commissioner Kevin McAleenan recalling him from a west coast trip to discuss the CBP WMDD DNA Collection Pilot on or about February 18-20, 2018. **These emails were factual, polite, and informative regarding the state of the DNA collection program at CBP. They are available for review.**

- February 16, 2018 – Mark J. Jones, receives email from OI Acting Executive Director **instructing the WMDD to reverse course on planned meetings with the DNA Project Partners and to cancel all activities as OI Executives would be handling**
 - February 20, 2018 – Mark J. Jones, receives email from OI Acting Deputy Assistant Commissioner instructing Jones and the WMDD DNA Project Team to continue to coordinate with internal CBP Offices and Immigration and Customs Enforcement but, **to have NO contact with DOJ or DHS regarding the project.**
 - February 21, 2018 - Mark J. Jones was informed that the CBP WMDD DNA Collection Pilot was shut down and that **the DNA Collection Pilot Team was not to have any further contact with the FBI, ICE, DOJ, or anyone, without explicit permission from CBP Leadership.**
 - February 23, 2018 – As a result of Secretary Nielsen recalling then-acting CBP Commissioner Kevin McAleenan from his West coast trip on or about the week of February 15th and the email correspondence by Chad Wood with DHS HQ and DOJ, **McAleenan ordered Wood to be walked out of CBP Headquarters and stripped of his building credentials on February 23, 2018.**
 - April 18, 2018 - Conference Call coordinated by CBP-OC-OPP. The meeting was opened by Ms. Meghann K. Peterlin, Office of the Commissioner, who in her opening statements said "C1 (acting Commissioner McAleenan) is pissed off... does not want to do this (DNA Collection Pilot)...is pushing back on the Secretary (DHS Secretary Nielsen)...will only do the DNA Collection Pilot... if forced to do so". It was during this conference call where participants from CBP OFO, USBP, CBP-OC-OPP, CBP-OCC and others openly conspired to make the discussed DNA Pilot fail through a variety of tactics. **When HSGAC investigators asked for the call roster and any associated material, CBP OCC stated that the call was "deliberative" in nature, exempt from disclosure or discussion, and refused to provide the requested materials or otherwise cooperate.**
 - April 26, 2018 – DHS Secretary Nielsen testifies before the House Committee on Homeland Security - Hearing: "Strengthening the Safety and Security of Our Nation: The President's FY2019 Budget Request for the Department of Homeland Security". Congressman Scott Perry of Pennsylvania asks then-DHS Secretary Nielsen about the status of the DNA Collection Pilot. Secretary Nielsen responds to Congressman Perry that DHS is working on implementing the DNA Collection Pilot. In short, **the commitment by DHS Secretary Nielsen to Congressman Perry was either an intentionally false statement or she misspoke after being misled by others regarding the status of the program.**
 - May 4, 2018 - Meeting notes provided by the CBP-OC-Policy Directorate stated that the CBP Deputy Commissioner had informed DHS Secretary Nielsen that CBP was declining to participate in the possible larger DHS DNA Collection Pilot and that it should be ICE that would pilot the DNA Collection. Purportedly, ICE Leadership agreed to move forward with the DNA Collection Pilot at that meeting. Approximately one week later, **the ICE Project Manager for the DHS DNA Collection Pilot was directed by his supervisor, now acting ICE Director Matt Albence, to "shut the DHS DNA Collection Pilot down" and "to keep his f@#king mouth shut."**
 - Circa May 2018 - DHS OIG declined investigative interest when presented with these allegations by OSC. Therefore, personnel from the CBP Office of Professional Responsibility (OPR) were given complete documentation and several hours of testimony regarding these allegations. Despite the fact that a named person from the CBP Office of Chief Counsel (OCC) was cited by the group as a willful conspirator in obstructing the implementation of the law, that person was never interviewed. More incredulously, CBP OPR later sent their findings to CBP OCC for editing and approval. **The target of the investigation was allowed to edit the agency's "findings" regarding the allegations before releasing them to the OSC.**
 - August 21, 2019 - Office of Special Counsel Letter to the President is made public and there is subsequent reporting by Fox News correspondent Catherine Herridge. Herridge reports that she has received a statement from DHS ascribed to the Acting Secretary that he was directing DHS to begin working with DOJ towards the immediate implementation of a DNA Collection Program that complies with the law from 2005. However, an internal DHS Memo released shortly after the Fox News report directly contradicts the statements provided to Fox News by DHS HQ and attributed to Acting Secretary McAleenan. **The internal document further states that OSC is wrong in its assertions and that CBP is NOT going to implement the law. Furthermore, these talking points were marked as "have been cleared by CBP Counsel".**
 - September 2019 – Acting CBP Commissioner Mark Morgan makes several statements on television and in writing, that CBP has done nothing wrong. "I want to clarify one of the false narratives out there that DHS – because this is really a DHS issue – has violated some law by not doing this. And that's just factually inaccurate and... when we are ready to
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OSC has violated some law by not doing this. And that's just actually inaccurate and ... when we are ready to actually execute it effectively, then that's when we will do it". **The OSC has been clear: "I take serious issue with CBP's conduct in this matter....This is an unacceptable dereliction of the agency's law enforcement mandate."**

The OSC estimates that CBP may have released as many as 950,000 violent, partially identified offenders back into society due to their willful non-compliance with the law. This is an **ongoing matter with grave public safety implications.**
