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CROSSING THE LINE

**Human Rights Abuses Along the U.S. Border with Mexico
Persist Amid Climate of Impunity**

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I. Introduction

U.S. Border Patrol agents are committing serious human rights violations, including unjustified shootings, rape, and beatings, while enjoying virtual impunity for their actions. In its third investigative mission in as many years, Human Rights Watch/Americas found that these violations are continuing despite assurances received from the Immigration and Naturalization Service (INS), following the publication of our May 1993 report, that the agency would address one of the worst police abuse problems in the country. Instead, the INS's efforts have been limited, misguided and ineffective, as evidenced by the alarming number of new shootings and serious beatings documented by Human Rights Watch/Americas during the past year.

As described more fully in Section V, the violations continue because abusive Border Patrol agents are not held accountable. Agents who violate agency policies and the law avoid the consequences of their actions because INS procedures for receipt and review of complaints alleging violations are wholly inadequate.¹ As a result, even if a victim or witness is resolute and able to overcome the many barriers to filing and pursuing a complaint, the structural flaws in the investigatory and disciplinary process virtually guarantee that even the most brutal agents will remain on the force. In fact, when asked by Human Rights Watch/Americas researchers whether any agent had ever been fired for breaking agency rules relating to excessive force or inappropriate use of firearms, only one agent's name was offered repeatedly by INS officials, despite at least a decade of violations well-documented by human rights groups and others.²

The Clinton administration has abdicated its responsibility to correct the ongoing abuse problem by failing to follow through with its pledges of reform and by refusing to consider alternatives, such as independent review of Border Patrol agents. Instead, the INS, a notoriously mismanaged agency,³ is being allowed to continue its mishandling of abuse complaints and investigations. Further, although a small group of concerned members of Congress introduced legislation to create an independent review commission in an attempt to hold abusive agents accountable,⁴ the vast majority of lawmakers were willing to pass a crime bill that would double the number of border patrol agents within four years without requiring any improvements by the INS.⁵ More recently, President Clinton's budget for fiscal year 1996 calls for one billion dollars in new resources for the INS, including the hiring of at least 700 new agents during the year. As with last year's crime bill, the new funding request makes no mention of the agency's abysmal human rights record, nor the need for improvements.⁶

¹ The Border Patrol is the enforcement division of the INS.

² Agent Thomas Watson, who was stationed in Nogales, Arizona, and was agent Michael Elmer's partner, was fired in April 1993, in a case described in our May 1993 report, *Frontier Injustice* and in this report. Among the stated reasons for his dismissal were the late reporting of the June 1992 shooting by Agent Elmer of a Mexican national, the firing of warning shots, as well as other violations of INS policies. Watson contends that he was dismissed for breaking the agency's traditional code of silence about agent misconduct.

³ See Joel Brinkley, "At Immigration, Disarray and Defeat," *The New York Times*, five-part series beginning on September 11, 1994.

⁴ H.R. 2119 was introduced on May 13, 1993, by Rep. Xavier Becerra (D-CA) and six co-sponsors; it was never voted on.

⁵ Sec. 130006 of the Omnibus Anti-Crime Bill (PL 103-322) authorized 675 million dollars for the INS to double its staff by hiring at least 4,000 Border Patrol agents within four fiscal years. On February 7, 1995, President Clinton revised his proposal, by calling for a total of 7,000 agents by the year 2000. (February 7, 1995, White House press statement.)

⁶ Roberto Suro, "Clinton to Propose Fees for Crossing U.S. Borders," *The Washington Post*, February 4, 1995.

This report is based on a July 1994 fact-finding trip to the U.S.-Mexico border, focusing on the western portion of the border adjacent to California and Arizona.⁷ The report also includes information obtained during extensive follow-up activities in Washington after the mission. Information for the report was gathered from Mexican government officials, U.S. and Mexican human rights organizations, press accounts, lawyers representing victims and their families, and victims and witnesses themselves. Human Rights Watch/Americas researchers also made significant efforts, through meetings and correspondence, to obtain information from INS officials (both in Washington and in the border region), Department of Justice officials charged with investigating complaints against Border Patrol agents, and Border Patrol agents in the field.

Human rights monitors in the region documented a disturbing number of abuses that took place following the October 1994 implementation of "Operation Gatekeeper" at the San Ysidro/Tijuana border crossing.⁸ Many of the incidents reported include serious beatings requiring hospitalization or medical attention.⁹ The Mexican consulate in San Diego had submitted several formal complaints, all involving allegations of physical attacks by the Border Patrol.

With the January 1995 financial crisis in Mexico, there was a reported increase in the number of Mexicans seeking to enter the U.S., through legal or illegal means, in order to obtain work and earn U.S. dollars.¹⁰ Human rights advocates in the region expressed concern that the desperation of the Mexican workers -- coupled with intensified efforts by the Border Patrol to prevent illegal entries -- could lead to an increase in violent encounters.¹¹ Local human rights advocates reported an increase in claims of mistreatment in Nogales, Arizona, where there was a dramatic increase in the number of persons crossing after the San Ysidro, California, and El Paso, Texas, crossings were made more difficult by the INS.

II. Background

The problems we describe in our reports are not new. In 1980, the U.S. Commission on Civil Rights issued a report, *The Tarnished Golden Door: Civil Rights Issues in Immigration*, which included an entire section dedicated to the inadequate abuse complaint and investigation procedures of the INS. The report included numerous recommendations to correct the problems it identified, yet fifteen years later, the INS has failed to implement a single one of those recommendations.¹²

⁷ We did not return to the Texas border region because the INS' blockade in El Paso, during which large numbers of INS personnel amassed along the border, deterred undocumented persons from crossing. As a result, there have been fewer apprehensions and reports of violations in that region.

⁸ Operation Gatekeeper is part of the INS' intensified effort to curb illegal entry into the U.S. by increasing the number of Border Patrol agents along the San Ysidro border crossing.

⁹ In addition to accounts of physical abuse during and after apprehensions, an INS inspector stationed in San Ysidro was indicted on November 4 and accused of pressuring at least seven female border-crossers to have sex with him in exchange for returning confiscated documents.

¹⁰ Tod Robberson, "Peso Crisis Spurs Migrants' Quest for Dollars," *The Washington Post*, January 28, 1995.

¹¹ In the San Ysidro area, local monitors report that high-speed chases of van loads of undocumented persons by the Border Patrol have increased, with four reported fatalities in two accidents during the first months of 1995. Furthermore, groups of undocumented persons have reportedly resorted to the dangerous practice of rushing on foot up Interstate 5 at the San Ysidro checkpoint.

¹² Some of the report's recommendations have become irrelevant because they are directed at correcting problems within the agency's Office of Professional Responsibility, which is no longer responsible for investigating abuse complaints.

During the intervening years, changes in U.S. law and policy have led to a climate along the border that contribute to serious abuses of human rights. During the 1980s, the INS was given enhanced arrest authority and increased resources and personnel following the passage of the Immigration Reform and Control Act and the Anti-Drug Abuse Act. The Immigration Act of 1990 incorporate a provision authorizing broader arrest powers for the INS as part of the federal government's efforts to interdict narcotics entering the country. Yet Border Patrol agents engaged in drug interdiction do not receive adequate training or supervision, a problem that has led to needless violent encounters in the border region.

A description of drug interdiction practices in the southern Arizona desert was provided during the January 1994 trial of Border Patrol agent Michael Elmer on federal civil rights charges. (See Section III.) Agents testified that they do not receive drug interdiction training at the Border Patrol Academy. Border Patrol agent Thomas Watson testified: "I use warning shots to spook the mules who were carrying the narcotics and because you'd jump these guys out in the hills like this by yourself or just with another Border Patrol agent, and there would be a bunch of them and the easiest way and the safest way I always did it was jump up and yell, 'Border Patrol, Border Patrol' shoot up in the air and yell and scream and throw rocks and all..."¹³ Not only do these tactics violate the agency's prohibition on firing warning shots, they also endanger agents and bystanders.¹⁴

Testimony from the January 1994 trial, which also included statements about the lack of supervision and the pressure on agents not to report fellow agents who engage in misconduct, is significant because it is rare for agents to speak for the public record. It is alarming because it confirms the worst suspicions of Border Patrol detractors -- that agents engage in "Wild West" behavior entirely inappropriate for a professional, federal law enforcement agency. Worse, recent incidents lead us to believe that nothing prevents the continuation of this type of behavior since interdiction training has not improved and supervision remains lax in many areas, virtually guaranteeing future abuses.

Human Rights Watch/Americas published two previous reports on human rights abuses committed by INS agents along the U.S.-Mexico border in 1992 and 1993. In response to our 1992 report, *Brutality Unchecked*, then-INS Commissioner Gene McNary refused to meet with Human Rights Watch representatives and stated in a letter, "The report you submitted concerning Border Patrol brutality was not a study; it was not thoughtful; and it had no value whatsoever."¹⁵ Following the publication of our May 1993 report, *Frontier Injustice*, the INS response was far more conciliatory. In a September 15, 1993 letter from then-Acting Commissioner Chris Sale, the INS agreed with many of our findings and committed itself to make certain improvements. The agency also sent us a copy of a letter, referencing our report, instructing INS district directors and Border Patrol chiefs to respect the human rights of apprehended individuals. Human Rights Watch representatives were also able to meet with Attorney General Reno and INS Commissioner Doris Meissner to discuss this issue.

This period of dialogue was followed by a March 31, 1994 reply from Commissioner Meissner to Human Rights Watch/Americas' continuing concerns. In that letter, the Commissioner merely re-stated INS policies, failing to acknowledge that existing policies are rarely enforced in practice. The Commissioner disagreed with several recommendations made by Human Rights Watch/Americas, while failing to advance the agency's own solutions to acknowledged problems. The letter also contained several promises for improving complaint procedures and community outreach, pledges that have been made for at least a decade without implementation.

The change in leadership at the INS coincided with increased public attention to abuses committed by Border Patrol agents. One case in particular, the June 1992 murder of a Mexican national and the attempted cover-up by Nogales

¹³ Testimony of Thomas Watson, Trial of Michael Elmer on Federal Civil Rights Charges, Phoenix, AZ CR-93-391-TUC-RMB, January 25, 1994.

¹⁴ INS Firearms Policy states, in part, "Firing a firearm should be done only with the intent of rendering a person at whom the firearm is discharged incapable of continuing the activity that caused the officer to shoot. Therefore, the firing of warning shots is prohibited." INS Administrative Manual Section 4210, p. 5.

¹⁵ Letter from INS Commissioner Gene McNary to Americas Watch, dated June 15, 1992.

Border Patrol agent Michael Elmer, grabbed the attention of the local media and human rights advocates. As described in *Frontier Injustice*, the Elmer case became an embarrassment for the INS not only because of additional violations that the subsequent investigations and murder trials revealed, but because it became obvious that too many agents were not being trained or supervised properly, and that even the most outrageous behavior was tolerated by INS management.

During the past year, independent immigration experts and members of Congress have acknowledged the Border Patrol's abuse problem. The Commission on Immigration Reform (a congressionally-mandated committee tasked to assess U.S. immigration policy) published its first report in September 1994.¹⁶ The commission's report concludes:

INS management must demonstrate clearly and decisively, both in policy and in administrative response to misconduct, that abuse of human and civil rights will not be tolerated. INS officers must receive comprehensive training on human and civil rights. There must be careful screening of job applicants, expanded training on civil rights, human relations, and general arrest authority, and strong managerial support for respect of human rights....The most effective way to monitor the success or failure of policies designed to eliminate human rights abuses is a credible, effective complaint procedure that provides speedy resolution to complaints of misconduct. The credibility of the system requires careful selection of investigators and use of sound investigation procedures. The system must also be open to public monitoring to insure its independence.¹⁷

The commission's acknowledgment of the agency's shortcomings in dealing with complaints is a significant step toward addressing the problems. The commission's recommendations are appropriate and should be monitored closely to evaluate the INS' compliance.

In light of the overwhelming deficiencies described in our reports, HRW/Americas supports the creation of an independent review commission to receive complaints of abuse, review those complaints, hold public hearings when warranted, and pass its findings to the INS for disciplinary action. In a positive development, Rep. Xavier Becerra, a Democrat from California, introduced the Immigration Law Enforcement Review Commission Act (H.R. 2119) in May 1993, which gained twenty-two co-sponsors, yet was never voted on.¹⁸

¹⁶ U.S. Commission on Immigration Reform, "U.S. Immigration Policy: Restoring Credibility," September 30, 1994.

¹⁷ *Ibid.*

¹⁸ In another acknowledgment of the problem of abuse by the INS and the lack of an adequate complaints procedure, Senator Barbara Boxer, a Democrat from California, introduced a bill recognizing the shortcomings of the current complaints procedures and calling for the creation of an Immigration Enforcement Complaint Commissioner within the Justice Department to investigate complaints of unlawful immigration enforcement practice (defined as "excessive use of force, or demonstrated difficulty in dealing appropriately with members of the public..."). Title III of the Immigration Enforcement Reform Act of 1994, S. 1987, introduced on March 25, 1994.

The INS has steadfastly opposed the creation of an independent review commission, despite the use of independent review for police agencies in most major cities. Instead, the INS supports a weak substitute for real change, the Citizens' Advisory Panel.¹⁹ The panel will meet irregularly, may not hold public hearings, does not have a budget for investigators, and will not look into individual cases. Panel members will not be provided access to internal INS documents unless they sign a privacy waiver that would prohibit disclosure. Thus, the panel would perpetuate the veil of secrecy surrounding much of the operations of the INS and would not help in building confidence among members of the border communities and others affected by the violent actions of INS agents.

III. Update on Cases Highlighted in *Frontier Injustice*

Frontier Injustice, Human Rights Watch/America's May 1993 report, described dozens of cases of abuse, and highlighted the violations committed by two Border Patrol agents as indications of the type of conduct that appeared to be tolerated by Border Patrol management. One of the agents was Calexico Border Patrol agent Luis Santiago Esteves, and the other was Nogales Border Patrol agent Michael Elmer, mentioned above. Since that report, new developments have allowed both agents to avoid serious penalties for their actions.

In October 1989, a woman was stopped by Agent Esteves, who had followed her after he questioned her at a checkpoint north of Calexico. She and her boyfriend complained to Esteves's supervisor that Esteves made sexually explicit, harassing phone calls to the woman. The agent was not punished, but was instead transferred to the Calexico border crossing. There, he was twice arrested for allegedly raping two women he met while on duty during a two-year period. He was suspended after his arrest in the first reported rape, in December 1989, but was reinstated after the alleged victim failed to appear in court for the agent's preliminary hearing. In July 1991, after the second alleged attack, Esteves was arrested and the following year was tried on twenty-three felony offenses against both women.²⁰ He was found guilty on three counts of felonious sexual misconduct, and sentenced to twenty-four years in prison.

Since reporting on this case in the last Human Rights Watch/Americas report, Esteves appealed his conviction and was re-tried and acquitted on all charges in December 1994. His attorneys argued successfully that the conviction had to be reversed due to "prejudicial admission of improper rebuttal evidence."²¹

The other case highlighted in *Frontier Injustice* was that of Border Patrol agent Michael Elmer, who shot and killed Dario Miranda Valenzuela, left him in the desert, and tried to cover up the shooting. Elmer was acquitted on state murder charges in December 1992. In January 1994, Elmer was tried in Phoenix, Arizona, on federal civil rights charges for the Miranda shooting.²² Despite the best efforts of federal prosecutors, the jury found Elmer not guilty as charged, apparently persuaded by the defense that shooting a fleeing man in the back was an act of self-defense. The verdict mystified the prosecutors and outraged human rights advocates. It also reinforced the belief in border communities that the Border Patrol can get away with anything, including murder.

¹⁹ The Panel was "established" a year ago, on February 11, 1994; after a long delay in appointing the members of the panel, the first meeting is now scheduled for April 12-13, 1995, in Washington, D.C.

²⁰ *People v. Esteves* (Case No. 14866, Imperial County, California, 1992).

²¹ *The People v. Luis Santiago Esteves*, D017689, Super. Ct. No. 14866, Fourth Appellate District, Division One, State of California, February 22, 1994.

²² Elmer was charged under 18 U.S.C. Sec. 242, which applies to, "[w]hoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States...."

The investigation into the June 1992 Miranda case revealed other incidents involving Agent Elmer and other Nogales agents. In one case, Agent Elmer was charged with shooting at a group of undocumented persons on March 18, 1992, wounding Francisco Salgado-Munoz.²³ On June 21, 1994, Elmer reached a plea agreement, pleading no contest to a charge of reckless endangerment. Because Elmer served six months after the June 1992 shooting of Dario Miranda, it is possible that he will spend little, if any, additional time in custody. The agreement stipulated that Elmer would enjoy immunity from any charges "based on facts that are currently known to representatives of the United States or the State of Arizona." The agreement also requires that Elmer be allowed to maintain his job while in jail, and requires him to pay \$100 to the Victim Compensation Fund.

IV. Abuses Continue

When we returned to the border region, we found no changes in the complaints, review or disciplinary procedures that would help to prevent another case like Elmer's, despite assurances from INS officials to the contrary. In fact, new cases illustrate the lack of a systematic effort on the part of the INS to improve its abysmal track record in dealing with agents who repeatedly break INS rules and the law.

An indication that the INS is making progress in correcting systemic problems with the complaints, review, and disciplinary procedures would be a decrease in violations by agents who believe that they will be held accountable for their actions. Unfortunately, we collected information about many serious cases while we were in the region, and since our return have learned of additional cases of concern. Disturbingly, the new cases are not being handled with any more thoroughness or vigor than cases we documented in the past.

During our fact-finding trip, we focused on abuses along the western portion of the U.S.-Mexico border. It is important to note, however, that abuses are continuing in other border regions as well.²⁴ In south Texas, a border-monitoring project was created in the latter part of 1994.²⁵ The group collected complaints from eighteen individuals (residents and undocumented persons), alleging thirty-three types of abuse committed by immigration law enforcement agents. The cases included eight incidents of physical abuse allegedly committed by the Border Patrol or INS agents; other complaints included allegations of unjustified searches and confiscations, and verbal abuse.

The cases described below are not an exhaustive compilation of abuses since our last report. Instead, they represent the incidents that Human Rights Watch/Americas representatives were able to document during their recent fact-finding trip and follow-up efforts. As we explain in Section V, there are many reasons why cases are systematically under-reported to both governmental and non-governmental sources. For those reasons, Human Rights Watch/Americas suspects that the cases described in this section represent only a portion of the total number of abuses committed during the period examined.

Excessive Use of Force

The Border Patrol's assigned duty of detaining undocumented persons is undoubtedly a difficult task. And because many of those detained and returned to Mexico often re-enter the United States, the work of the Border Patrol can often seem futile. Unfortunately, the frustration that this apparent futility causes is often taken out on the persons apprehended. No matter how great the tensions of the job, the abusive treatment that some agents confer on undocumented persons and others is inexcusable, particularly when one considers that the vast majority of individuals apprehended are not suspects in violent crimes but simply people looking for work.

²³ For a description of this incident, see *Frontier Injustice*, p. 6.

²⁴ At the time of our mission, reported incidents of abuse had decreased in the El Paso/Juarez area, largely due to Operation Blockade/Hold the Line, which curtailed the flow of undocumented persons into El Paso by increasing the number of agents stationed along the border.

²⁵ The group is part of the American Friends Service Committee's Immigration Law Enforcement Monitoring Project.

Shootings

Martín García Martínez.²⁶ In the early morning hours of May 28, 1994, Martín García Martínez, age 30, and four relatives were crossing the border near the San Ysidro port of entry, when a Border Patrol agent approached and began apprehending them. Witnesses report that the agent, a very tall African-American who the witnesses claim was acting "drunk" or "crazy," emerged from his vehicle with his gun drawn and with a dark colored bottle in his other hand that he threw to the ground.²⁷ The agent, without calling for assistance, attempted to arrest the group.

He ordered them to kneel as he began to handcuff them; all complied except for García's sister-in-law, Teresa Moreno Azpeitia, who had undergone surgery and was unable to kneel without pain. Her husband, Ignacio García, told her to sit down. According to family members, the agent then began beating Ignacio, hitting his head against the agent's vehicle and kneeling him in the back. Although accounts differ, Moreno may have picked up a rock or gravel at this point and shouted at the agent to stop beating her husband.²⁸ The agent then reportedly pointed his gun at Moreno, instructing her to drop the rock, and she complied.²⁹ He then began placing handcuffs on her while reportedly pulling her hair and forcing her against the vehicle.

Martín García, whose hands were on his head as instructed, urged Moreno to stop resisting, and she told him she was not putting up a fight but that the agent was beating her anyway. The agent then turned to Martín, and asked him, "what are you going to do about it?" and Martín replied, "nothing." The agent then reportedly pointed his gun at Martín's head, then slowly lowered the gun to his stomach and shot him. Ignacio reports that the agent moved the gun so slowly that Ignacio repeatedly told him not to shoot. Lupe, one of Ignacio and Moreno's two sons present during the incident, tried to catch Martín as he fell, but the agent reportedly took Lupe by the hair and threw him down.

Martín was taken by ambulance to University of California - San Diego Medical Hospital and the others were taken to San Diego, where Ignacio received medical attention and all the family members were interrogated several times by agents from the local police, the INS and the Federal Bureau of Investigation (FBI). Moreno was initially held as a material witness, and later charged with assaulting a federal officer. She was detained at several facilities, including the Imperial Beach Border Patrol Station where she claims agents harassed her. Ignacio agreed to take a lie detector test after he was questioned about whether Martín had picked up a rock, but claims no test was ever administered. He was placed in custody as a material witness for twenty days before posting bail.

On July 3, Martín died as a result of his injuries. (He had been hit with a hollow-point bullet, which expanded on impact.) After he died, the assault charges against Moreno were dropped, and the family was allowed to return voluntarily to Mexico. An attorney for the García family has reportedly initiated a civil suit against the Border Patrol.

The Mexican consulate in San Diego, at the request of the García family, sent letters to the relevant INS and Department of Justice officials on June 6, protesting the shooting. The Office of Internal Audit of the INS wrote back on July 8, stating that, "Although my office has no investigative jurisdiction...agent's actions were in accordance with INS regulations." The agent involved in the incident was initially placed on administrative leave without pay, but is believed to have been returned to the field. All official investigations into the case have been terminated.

²⁶ This account is based on information collected from interviews with members of the Garcia family, court records, attorneys representing the Garcia family, press reports, Office of Inspector General and INS descriptions.

²⁷ The agent has reportedly been identified by investigators, but his name has not been made public.

²⁸ Statements from the witnesses have varied on this point. Moreno told the attorney defending her on assault charges and an attorney representing her family in a civil suit against the Border Patrol that she had picked up gravel or small rocks, but in a telephone interview with HRW/Americas researchers on August 31, 1994, she denied she ever picked up a rock.

²⁹ In our August interview, Ignacio García claimed that the agent threatened to kill Moreno at this point. This account differs from that provided previously to their attorneys.

Jorge Manuel Salazar Arrellano:³⁰ On the afternoon of July 3, 1994, Jorge Manuel Salazar Arrellano, age twenty-six, crossed the border near the San Ysidro port of entry. Salazar, who was intoxicated, heard a voice tell him to slow down, in English. He states that he put his hands up, walked parallel with one of the fences he had jumped, and then turned back toward the U.S. He was shot twice, with at least one bullet apparently passing through his hand before hitting his chest. He reportedly ran back toward Mexico, jumping over one fence as he yelled for help.

Border Patrol agents claim they first encountered Salazar after a Border Patrol agent's wife called to tell her husband that a man with a head wound was hitting a water heater with his belt; there was no report that Salazar had attempted to harm any person. Salazar, who was unarmed, contends he never had a head wound and that he was wearing a cloth belt that he never used to threaten anyone, but later used as a tourniquet for his hand following the shooting.

Paramedics transported Salazar by helicopter from the site to Mercy Hospital, where he regained consciousness two days later. He was hospitalized for ten days and required additional surgery to repair the serious damage done to his left hand.

The FBI is reportedly investigating this case. There were reportedly several agents in the area, but no other agent witnessed shooting. The gun of the agent who reportedly shot Salazar inexplicably had fired only once. Salazar attempted to file a civil suit, but the lack of eyewitnesses has reportedly discouraged attorneys from taking on his case.

Tautimes Rubén Edgardo:³¹ On the evening of May 8, 1994, Tautimes Rubén Edgardo, age twenty-nine, crossed illegally into the U.S. near Douglas, Arizona, with a friend. He claims he was hired by someone near the border to help smuggle some bags of marijuana through a sewer tunnel. When they were spotted by two Border Patrol agents, they fled on foot, each pursued by one agent. The agent pursuing Edgardo subsequently shot him.

The facts surrounding the shooting are disputed. Edgardo reports that, while he was running, he heard a shot and lost consciousness. The Border Patrol, which provided several versions of the incident, contends that Edgardo picked up a six-foot-long branch, four to six inches in diameter, and started to swing it at the agent. The agent claims he shot at Edgardo, then wrestled him to the ground and handcuffed him.

Edgardo was hospitalized for a few hours. According to the doctor who examined and treated him in a Douglas hospital, the bullet grazed his head above and behind his left ear.³² The doctor described his wound as consistent with either the agent's account or with a shot fired at Edgardo from behind.³³ The doctor reported that Edgardo kept asking why the agent had hit him. When he was told he had been shot, he asked, "do you shoot everyone who comes over the border?" and the agent guarding him stated, "only if you throw things at them."

There are several puzzling components to this case including: whether the large, unwieldy, branch could be swung quickly enough to threaten the agent's life or well-being and necessitate the shooting; why the victim did not know he had been shot if he was facing the agent, as the Border Patrol contends; why the agent shot at the suspect's head (instead of his torso, as agency rules require), or missed wildly from a short distance; and why the victim thought he had been hit and had a lump on his head consistent with being struck, according to paramedics. Further, it is unclear why the suspect was not charged with assault initially, but only after his lawyer requested a preliminary hearing on drug charges. Nonetheless, the Border Patrol and the Office of the Inspector General determined that the agent had acted

³⁰ This account is based on an interview with Salazar, medical records, and information provided by the Mexican Consulate, the Office of the Inspector General, and press reports.

³¹ This account is based on interviews with the Mexican consulate, OIG, Border Patrol officials and the public defenders office.

³² Human Rights Watch/Americas interview on July 25, 1994, with Victoria Brambell, federal public defender.

³³ Ibid.

appropriately, and the Civil Rights Division declined to prosecute the case. In exchange for a guilty plea on drug charges, assault charges against Edgardo were dismissed, and he was sent to the Federal Correctional Institution in Tucson.

Beatings and Sexual Assaults

On April 11, 1994, Commissioner Meissner signed the revised INS Non-Deadly Force Policy. The new policy states that Non-Deadly Force may be used only when a designated immigration officer:

...is in the performance of official duties and has reasonable grounds to believe that such force is necessary to:
(a) protect the immigration officer or other persons from bodily harm; or (b) restrain or subdue a resistant prisoner or suspect; or (c) effect an arrest; or (d) prevent the escape of a prisoner.

While the parameters for the use of non-deadly force may seem reasonable, they are broad enough to cover almost any incident of mistreatment if an agent merely suggests that a suspect was attempting to flee or that the agent deemed force was necessary to effect an arrest.

The policy also explicitly forbids the use of intentional strikes with a baton to the head, face, groin, solar plexus, neck, kidneys, or spinal column. Apparently, it is acceptable to strike suspects in areas not mentioned, such as the stomach, legs, arms, and parts of the back. The Commissioner failed to incorporate one of the recommendations made in our past reports -- to prohibit explicitly the use of flashlights and hand-held radios as weapons.

As documented below, the policies have done little to stem the pattern of excessive force meted out by Border Patrol agents, particularly when a suspect attempts to flee or is not sufficiently compliant. Unless adequate enforcement of the agency's policies is implemented in a consistent way, with appropriate penalties applied when an agent disregards the policies, abuses will certainly continue.

Mario Ramón Fernández Martínez.³⁴ On the morning of April 8, 1994, thirty-seven-year-old Mario Ramón Fernández Martínez jumped a fence and crossed into Calexico, California. A Border Patrol agent spotted him and asked Fernández where he was from. Fernández stated he was from Fresno, California, but the agent saw his "Mexicali" tattoo and called him a liar.

Fernández's hands were handcuffed behind his back and his feet were cuffed together as he was placed in the back of the agent's vehicle. As they drove east, Fernández was tossed about in the back of the empty Bronco as the agent sped up and then stopped suddenly. The agent parked, then came around to the back of the jeep and laughed while he pulled Fernández out by his shirt. Fernández was then lying flat on his back -- on his handcuffed hands -- on the dirt road. Fernández claims that the agent then kicked him hard in the jaw, and he lost consciousness for a short time. When he awoke, he was in the back of the Bronco again.

The agent took Fernández to the Calexico Border Patrol station. His ribs hurt and his jaw was visibly injured, but agents at the station ignored his repeated pleas for medical attention. The agents did remove his leg cuffs, but his hands remained cuffed as he was processed. After about an hour, another agent took him to El Centro, where agents ignored his request for medical attention. Two days later agents moved him to the Imperial Beach station, and a day later agents transferred him to the Metropolitan Correctional Center (M.C.C.) in San Diego. M.C.C. officials took X-rays soon after he arrived, but they did not admit him to a hospital for another week, on April 19. In addition to ignoring his requests for medical assistance, no Border Patrol agent ever advised the injured man that he could file a complaint.

Fernández underwent three operations to repair his badly damaged jaw; in one operation, a piece of his hip was transferred to his jaw. Doctors told him that the injuries were exacerbated by the long period without medical treatment, which led to serious infections. Fernández told Human Rights Watch/Americas that some of his jaw will

³⁴ This account is based on interviews with Fernández, Office of the Inspector General and INS personnel, and Mexican consulate staff.

always be wired. He reports that eating and speaking is still difficult, and the bottom row of his teeth are missing. Human Rights Watch/Americas investigators could see the damage to his mouth, which clearly made it difficult for him to speak.

The INS reportedly attempted to deport Fernández while he was hospitalized, but the Mexican consulate intervened and he was allowed to receive adequate treatment. Fernández states that the FBI has not interviewed him, and that only the Mexican consulate has taken his statement. As of January 1995, nine months after the incident, the OIG reports that the FBI is investigating the case and that this case might be strong enough for the civil rights division to pursue. The Office of the Inspector General reports that lawyers representing Fernández filed a one million dollar civil lawsuit.

Humberto Castro Benítez.³⁵ On the evening of June 24, 1993, thirty-year-old Humberto Castro Benítez was crossing into the U.S. near the Otay Mesa, California, port of entry with a group of people when a Border Patrol agent arrived. The group scattered, but Castro complied with the agent's orders to lie on the ground. The agent found bags of marijuana nearby, and attempted to apprehend the other members of the group. According to the victim, the agent stepped on Castro's back as he was lying on the ground, face down. He was then handcuffed with metal cuffs and kicked several more times in the back. The agent then reportedly picked Castro up by his hair and threw him into the patrol car, cutting his head on the vehicle's wire-mesh partition.

The agent left Castro alone in the vehicle, while he pursued additional suspects. When the agent returned, he allegedly punched Castro on the left side of his face while cursing at him. Other agents then arrived, and the arresting agent told them he was going to kill Castro.

Castro was driven to the Otay Mesa Border Patrol station with the arresting agent and another agent who drove the vehicle. During the drive, Castro alleges that the arresting agent said to the driver, "[l]et's pull over somewhere and shoot him." Castro told Human Rights Watch/Americas that he believed the threat because the arresting agent was very agitated.

Although Castro was bleeding from his wounds, he received no medical attention at the Border Patrol station and was advised by the agent processing him not to file a complaint. He was taken to the Metropolitan Correctional Center (M.C.C.) in San Diego early the next morning, but did not receive medical attention until after he was held for three days there. He lost two teeth, required stitches and two operations for his jaw and tooth injuries; his jaw was wired shut for two months. He remained in the hospital for two months, and was then sent back to M.C.C. and county jail for another five months. He served seven months on drug charges.

While Castro was in the M.C.C., staff there suggested he contact the Mexican consulate, explaining that they could do nothing about his complaint against the Border Patrol. (Earlier, when Castro asked an M.C.C. employee how to file a complaint, they allegedly told him to keep quiet about it or he would be in danger.) While he was in jail, he was visited by FBI and Drug Enforcement Administration agents who told him that the Border Patrol agent denied hitting him and claimed he was hurt when he was picked up and must have fallen down.

As he was being processed for return to Mexico at the Otay Mesa station, Castro spotted the agent who allegedly beat him, and heard other agents call him Garvey. Castro claims Garvey asked him whether he wanted to go back to the hospital.

Castro's case was referred to the Civil Rights Division at the Justice Department, which declined to pursue it, and the Office of the Inspector General subsequently closed the case. Although the investigation by the OIG allegedly continued for months after Castro had seen and identified his assailant, the OIG did not have further contact with the victim, and the victim apparently failed to pass the agent's name to the OIG. When Human Rights Watch/Americas named the agent suspected of the beating, the OIG was unaware of the identification, and the case subsequently

³⁵ This account is based on interviews with the victim, INS officials and the Mexican consulate.

remained closed. The OIG reports that the current "theory" on how Castro was injured is that he was already hurt before the arrest -- a familiar scenario that has been used in other cases of alleged abuse. While it is certainly possible that Castro was already injured, failure to note this in any agent's incident report renders such allegations doubtful.

Juanita Gómez: On September 3, 1993, twenty-two-year-old Juanita Gómez was reportedly raped by a uniformed Border Patrol agent in a remote area near Nogales, Arizona.³⁶ She had crossed through a hole in the border fence between Nogales, Sonora, and Nogales, Arizona, with her cousin Ana to shop on the U.S. side. The two women went to a McDonalds restaurant, then to a nearby restaurant where they met two male friends. They all left the restaurant together and were crossing a street when they were stopped by Border Patrol agent Larry Dean Selders, who was driving a Border Patrol Chevrolet Blazer, all-terrain vehicle. Although Selders stopped all four people, he only detained the two women, but did not ask to see their identification. According to Juanita, she and her cousin had been spotted by Selders when they crossed through the fence into the U.S., but he had not said anything to them or attempted to detain them at that time.

Selders put both women into the Blazer. According to the women, the agent asked them if they had papers, and they replied they did not. He then propositioned them, saying that if one of them had sex with him he would let them both go without taking them to the Border Patrol station for processing and return to Mexico; they told him they would rather be processed at the station.

Selders then instructed Ana to get out of the truck, and he drove away with Juanita as Ana tried to run after the vehicle. Juanita reports that once Selders had her alone he raped her. "He was stronger than me," Juanita told Human Rights Watch/Americas. Afterward, Selders told Juanita not to say anything to anybody and that he would not do anything else to her. He drove her back into Nogales, Arizona, and dropped her off in a parking lot. Juanita went to the Mexican consulate in Nogales, Arizona, after she learned that Ana had gone there to report the abduction.³⁷

Ana had already reported the kidnapping to the Mexican authorities when Juanita arrived at the consulate. Juanita, who was very upset, then described the abduction and rape to a consulate official who contacted both the Nogales Police Department and the Nogales Border Patrol station. Several police officers arrived quickly, as did two agents from the Border Patrol.

Both Juanita and Ana identified Selders from a photo line-up, and Juanita provided authorities with an approximation of Selders' name. One of the Nogales detectives reportedly told her that he didn't believe her statements or Ana's, and asked, "Isn't it true you're a prostitute?" He told her that if they were prostitutes, they would be in big trouble. He also told them that they would be given a lie detector test and that if they failed, they could be sent to jail. "They treated me as if I were guilty of something, not a victim," said Juanita. "It seemed like they did not ever believe me." After several hours at the police station and the hospital, where samples were taken of her hair, nails, and pubic hair, INS agents took Juanita to the Nogales port of entry, and she returned home.

From the beginning, the handling and investigation of the case indicated incompetence and bias. Selders was not picked up for questioning until after 6 P.M., more than three hours after Juanita reported her rape to the police. By that time, he had finished work and changed his clothes -- clothing that reportedly was never searched by the police. Police reportedly seized the wrong Border Patrol vehicle, and held it for a week and a half before they realized their mistake, thereby ensuring that all meaningful evidence was destroyed.

³⁶ At the victim's request, her real identity is being withheld. "Juanita Gómez" is a pseudonym. This account is based on interviews with the victim, her lawyer, the OIG, and press reports.

³⁷ In border towns, the Mexican consulate is often the only source of assistance considered safe by Mexican nationals. As indicated throughout this report, Mexican consulates in southern Arizona and southern California play a quiet yet crucial role in protecting the rights of Mexican nationals, including obtaining medical care for those injured by U.S. authorities, documenting instances of abuse, and offering some moral and logistical support to Mexican victims and their families. The consulates frequently receive reports of mistreatment committed by Border Patrol agents and INS inspectors.

When the Santa Cruz County Attorney requested that Juanita, her boyfriend, and Selders submit blood samples, Selders refused (Juanita and her boyfriend complied).³⁸ A federal judge later ordered Selders to submit a blood test, but he never obeyed the order.

Selders was originally charged with rape and kidnapping. The County Attorney offered to drop these charges in exchange for a "no contest" plea to "attempted transporting of persons for immoral purposes...while he was married," a crime which is the lowest class of felony available. The County Attorney justified this plea bargain -- which Selders readily accepted -- by reference to the Elmer acquittals, stating, "I would rather have a secure conviction that makes sure this defendant won't have the opportunity to commit a similar offense against anybody, rather than have him walk like Elmer did."³⁹

On July 25, 1994, Selders's no contest plea on the reduced charge was accepted, and on October 7, he was sentenced to one year in prison. He will be eligible for parole after six months. From the time he was charged with rape and kidnapping until the plea was accepted, Selders was on paid administrative leave from the Border Patrol; he resigned in August 1994.

In negotiating his plea agreement with the county attorney, Selders sought immunity from prosecution on federal charges as well. The U.S. Attorney for Arizona refused to agree to the request after investigators met with Juanita and reviewed the evidence, finding her story credible.⁴⁰ As of December 1994, the Selders case continued to be under investigation by the U.S. Attorney's office for possible civil rights violations. Attorneys for Gómez have filed a civil suit against the Border Patrol for injury and damages.

As frequently happens once a Border Patrol agent commits a serious abuse that attracts attention, information about prior misconduct begins to emerge. In this case, an attorney familiar with Juanita Gómez's case recalled a sexual assault incident reported to her years ago in which the assailant used a similar *modus operandi*. In January 1995, she was able to locate the alleged victim who identified Selders as her assailant.

In that case, dating back to August 1988, María Rodríguez and her two children were with another woman and her three children in Nogales, Arizona, when they were approached by a man in civilian clothes who demanded their immigration documents. Rodríguez and her children had proper documentation, but the family with them did not. The man, who was carrying a gun and had what appeared to be a police radio in his car, told Rodríguez that she would have to give him something to prevent him from reporting her for smuggling the family lacking documents. He took her documents and instructed her to follow him in her car, which she did because she needed her papers back.

Once they were on an isolated dirt road, he pointed his gun at her and instructed her to get into his car. He then told her he wanted to have sex with her, and began to fondle her. She warned him that she had just gotten out of the hospital and that if she suffered complications as a result of his attack, she would hold him responsible. The man then suggested they meet later in Tucson. She returned to her car, where her children were crying after hearing much of the encounter, and took down the car's description and license plate number. Rodríguez alleges the man made obscene calls to her home the following day and came to her apartment complex looking for her, forcing her to move.

³⁸ A blood sample would have enabled investigators to compare Selders' DNA with that found in semen samples recovered from Juanita's clothes and from a tissue found at the scene of the crime.

³⁹ Pamela Hartman, "Border agent plea: no contest," *Tucson Citizen*, July 26, 1994. Agent Elmer was acquitted earlier in the year in the shooting death of a Mexican national.

⁴⁰ Human Rights Watch/Americas phone interview with Dan Knauss, Assistant U.S. Attorney, July 28, 1994.

Haime Flores:⁴¹ On the morning of October 18, 1993, Haime Flores's van was stopped at the San Clemente checkpoint. She was the only passenger and was ordered out of the vehicle. A Border Patrol agent examined her documents (she had a valid temporary visa) and determined they were invalid. She was taken into the station, where a supervisor determined her documents were valid.

The agents decided she needed to be searched, however, and summoned a female agent. In front of three male agents, the female agent allegedly examined Flores's bra and inserted a finger into Flores's vagina; no contraband was found. The male officers reportedly laughed and joked as they watched the search. Flores reports that when she retrieved her purse from the agents after being detained for six hours, cash, jewelry and documents were missing.

On September 26, 1994, an attorney filed a two million dollar civil lawsuit on Flores's behalf against the U.S. and five unnamed Border Patrol agents, alleging sexual assault and battery, false imprisonment, infliction of emotional distress, and violation of her civil rights.

José Rodríguez:⁴² On the morning of July 8, 1994, eighteen-year-old José Rodríguez was crossing into the U.S. near San Ysidro in the "El Bordo" area with another man. When he got to the U.S. side, he waited for the agents' shift to change at 7 A.M. He heard a vehicle come up the dirt road near where he was lying down. He sat up to see what was happening, and was hit in the face by a Border Patrol agent, who cursed at Rodríguez and sprayed some sort of gas. The agent then returned to his vehicle, which had an identification number of "1521."

The man Rodríguez was travelling with helped him back to Mexico, where Rodríguez reported the incident to Grupo Beta (an elite Mexican force that patrols the Mexico side of portions of the border). Grupo Beta filled out a complaint form, which was submitted to U.S. officials via diplomatic channels. Grupo Beta also summoned paramedics who provided medical attention. At the time of our interview, four days after the incident, Rodríguez had a wound below his left eye and a bandage over the same eye.

Manuel Luna:⁴³ On the evening of July 28, 1993, Manuel Luna was crossing into the U.S. near the San Ysidro port of entry with three other men when they were spotted by Border Patrol agents. The men fled, and Luna was caught. Luna reports that the agent threw him to the ground and punched and kicked him, even after he was handcuffed. The agent reportedly threw Luna into the back of a Border Patrol van, injuring his nose.

The agent later claimed that Luna was being uncooperative, but the other men who were detained at the same time and witnessed the beating claimed that the agent was the only one acting in a violent manner. Luna was charged and found guilty of assaulting a federal officer; the witnesses did not appear in court because they had already been returned to Mexico.

While working on Luna's case, the public defender found that the accused agent had been the subject of prior complaints of abuse. She reports that this information was not found in the agent's file, but in a special file on "allegations" of physical abuse. In the prior case, the agent was accused of seriously injuring a man who was turned over to Grupo Beta for assistance. The agent filed a report stating that the man had suffered "a small cut" on his nose, the same language he used in describing Luna's injury. In the former case, the man suffered a "multiple nose fracture," according to the physician who treated him.

⁴¹ This account is based on information collected by the American Friends Service Committee's U.S.-Mexico Border Program and information included in the alleged victim's lawsuit.

⁴² At the victim's request, his name is being withheld. José Rodríguez is a pseudonym. This account is based on interviews with Rodríguez and with Grupo Beta, an elite Mexican police unit that patrols the Mexican side of portions of the U.S.-Mexico border.

⁴³ This account is based on information collected by the American Friends Service Committee's U.S.-Mexico Border Program and the San Diego Public Defenders office.

Marco Antonio González:⁴⁴ On October 2, 1994, Marco Antonio González was crossing into the U.S. near the San Ysidro port of entry when he was apprehended by Border Patrol agents on horseback. According to witnesses, González was handcuffed and lying on the ground when agents told him to run, then knocked him down with one of their horses, knocking him against a fence. He was hospitalized and underwent surgery for a fractured skull.

Press reports stated that the INS was concerned about the allegations, but was unable to investigate until the Mexican consulate filed a formal complaint. The consulate did submit a complaint to the INS on October 6, and received a response on October 11, stating that the case was being investigated by the Office of the Inspector General. In late January 1995, the Border Patrol reported that the investigation was pending.

Pedro Hernández López:⁴⁵ On October 2, 1994, twenty-four-year-old Pedro Hernández López was walking near the border when he was reportedly intercepted by Border Patrol agents. Hernández reported to Grupo Beta that agents had hit him on the head with their flashlights. On October 4, the Mexican consulate filed a complaint with the INS on behalf of Hernández. The consulate received a response from the INS on October 14, stating that the Office of the Inspector General was investigating the matter. In late January 1995, the Border Patrol reported that the investigation was pending.

José Godina:⁴⁶ On December 10, 1993, José Godina was crossing into the U.S. near the Otay Mesa port of entry, carrying a backpack containing marijuana. He and his companion were spotted by the Border Patrol and tried to flee, but Godina was apprehended. Godina reports that an agent threw him to the ground and hit him on the back of the head and on his hand with a rock. The agent also reportedly fired a shot near Godina's head. Godina, who was unarmed, contends he was not resisting arrest but that he has a speech impediment that may have aggravated the agent.

When last contacted in May 1994, Godina was having problems with his hand following the rock injury and still had a lump on his head. A complaint was filed with the INS and the Office of the Inspector General. In late January 1995, the Border Patrol reported that the investigation was pending.

⁴⁴ This account is based on press reports and information provided by human rights advocates in the region.

⁴⁵ This account is based on information provided by the Mexican consulate and press reports.

⁴⁶ This account is based on information provided by the American Friends Service Committee's U.S.-Mexico Border Program.

Francisco Fitch Lara:⁴⁷ On the morning of March 8, 1994, Francisco Fitch Lara was detained by the Border Patrol near the San Ysidro port of entry and transported to the Chula Vista detention center. The agent accompanying Fitch insulted him, and Fitch requested that he not insult him again. Fitch contends the agent then pushed him into a rugged wall, resulting in a cut over his eyebrow. (The agent's incident report contends that Fitch bumped himself against the wall.)

The agent reportedly offered to return Fitch to Mexico if he would agree not to file a complaint. He insisted on pursuing his case. He subsequently received a six-month jail sentence for falsely representing himself as a U.S. citizen.

Luis Jiménez:⁴⁸ Early on the morning of April 29, 1994, sixteen-year-old Luis Jiménez attempted to cross the border at "El Arroyo" near the San Ysidro port of entry. He was quickly apprehended by a Border Patrol agent, who reportedly began beating and kicking him. The agent allegedly dragged Jiménez on the ground and then kicked him behind his knees as he left him with a group of detainees nearby. Other detainees complained that the agent had kicked them as well.

Later that morning, Jiménez was returned to Tijuana. He was in pain and suffered from shortness of breath, but only visited a doctor a week after his return. He was eventually taken to a lung specialist who diagnosed left lung edema due to trauma. The doctor extracted about a quart of fluid from the lung, and advised Jiménez that he would need treatment for a month. Jiménez's mother reported the incident, but Luis did not want to file a formal complaint.

Ronaldo Rodríguez:⁴⁹ On the morning of July 16, 1994, Ronaldo Rodríguez and two friends were driving in El Cajon, California, when they noticed they were being followed by a Border Patrol vehicle. Rodríguez, who was driving, became nervous and crashed into a fence. He fled into an apartment complex's laundry room, where he was followed by an agent. The agent then reportedly grabbed him, hit his head against a wall, pushed him to the floor and slammed his head on the floor.

Rodríguez's sister reportedly witnessed the beating and complained to a Border Patrol supervisor on the scene. The supervisor defended the agent and told her it would be difficult to prove what she alleged. The car passengers were held at gunpoint until it was verified that they were all legal residents. Rodríguez was given voluntary departure to Mexico. Human rights advocates called the El Cajon Border Patrol station about the incident, and were told that the case was being investigated.

Abuses Committed by INS Inspectors

Although our July 1994 fact-finding mission was to investigate cases of alleged abuse by Border Patrol agents, alleged abuses by INS inspectors came to our attention as well. Some of them are described below. Inspectors are stationed primarily at ports of entry, checkpoints, and in detention facilities, while Border Patrol agents patrol the border and interior regions searching for individuals who have entered illegally. While their enforcement duties should be less confrontational, some of the INS inspectors' abuses are just as serious as those allegedly committed by Border Patrol agents.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

Juan Gamboa:⁵⁰ On February 7, 1994, seventeen-year-old Juan Gamboa, a U.S. citizen and Tucson high school student, crossed on foot into Mexico at the Sasabe, Arizona, port of entry and went to visit his uncle. When he attempted to return to the U.S. later that night, he was stopped by INS inspector Walter LeCroy, who asked for identification proving that Gamboa was a U.S. citizen. Although he had crossed at the Sasabe point of entry several times before, this was the first time he had crossed by himself. He showed LeCroy his Arizona driver's license, which included his social security number, and his high school identification card. LeCroy said that he needed to see a birth certificate, insisting that a driver's license and social security number were insufficient.⁵¹

After Gamboa and LeCroy argued for several minutes in the inspection office, Gamboa went outside. LeCroy emerged from the station with two Customs agents, and he tried to give Gamboa a document; Gamboa said he didn't want it and refused to take it. When LeCroy attempted to stuff the paper into Gamboa's jacket pocket, Gamboa yanked his jacket away. At this point, according to Gamboa, the two other officers grabbed his arms, pushed him down onto his back on the cement bench, and held him there while LeCroy punched him a few times in the face. The agents then threw Gamboa face-down onto the ground and handcuffed his hands behind his back. Their actions were so rough that they succeeded in breaking Gamboa's neck chains and knocking his glasses off. One of the agents yanked him to his feet by the handcuffs, and the two Customs officers walked him back to Mexico, where they turned him over to Mexican border officials.

Seeing Gamboa's bloody face and broken teeth, the Mexican officials asked what had happened. One of the Customs agents replied that Gamboa had fallen down.

Gamboa eventually returned home and was treated at the Tucson Medical Center later that night. He had cuts on his face requiring stitches, two broken lower teeth and one front upper tooth that was lost entirely. The injuries to his mouth required him to undergo two subsequent root canal operations.

After receiving medical treatment, he reported the incident to the Tucson police department, accompanied by his mother and a sister. The police told Gamboa to go to the INS office the following morning. Within the next few days, Gamboa reported the incident to the Mexican consulate, secured an attorney, and gave a statement to the Pima County Sheriff's office. His attorney reported the incident to the INS and to Customs officials, and was interviewed by an FBI agent in early March, who told him the case had been referred to the Office of the Inspector General. When Human Rights Watch/Americas representatives met with Gamboa and his attorney in July, both claimed they had not been contacted by the OIG.

When Human Rights Watch met with OIG officials of the Tucson OIG office, they provided a remarkably different account of Gamboa's case. An investigator who claimed to have handled the OIG portion of a joint OIG/sheriff investigation into the incident described Gamboa as very aggressive and LeCroy as the victim. Further, she stated that Gamboa's bloodied and bruised face and three broken teeth were due to the scuffle, during which a Customs agent, not LeCroy, may have struck Gamboa in the mouth with his handcuffs. The OIG determined that LeCroy had acted appropriately, thus ending their involvement in the case.⁵²

⁵⁰ This account is based on interviews with the alleged victim, his attorney, Office of the Inspector General staff, the Assistant US Attorney assigned to the case, and press accounts.

⁵¹ INS Inspectors may request documentation that proves beyond a reasonable doubt that the individual attempting to enter the U.S. has legal status. While the documents Gamboa presented would usually be considered sufficient, agents are known to apply standards arbitrarily, often to intimidate or harass certain border crossers.

⁵² The Justice Department's Office of the Inspector General does not have jurisdiction over Customs officials, who work for the Treasury Department.

LeCroy had been the subject of several complaints prior to Gamboa's. A month before the Gamboa incident, LeCroy was charged with aggravated assault with a deadly weapon and two counts of reckless endangerment. LeCroy continued on active duty until he chose to retire in May 1994. An Assistant U.S. Attorney was assigned to the Gamboa case, but as of mid-January 1995 was waiting for a decision by the Civil Rights Division on whether to pursue the case.

Sabas Basurto Galvez.⁵³ On June 8, 1994, twenty-seven-year-old Sabas Basurto Galvez was driving in Tucson when he noticed he was being followed by an unmarked white Bronco. Basurto later told Mexican consulate investigators that he had witnessed a shooting and feared that he was being followed by individuals involved in the altercation. (The INS reported that Basurto was under surveillance and was a suspect in an armed robbery.) The vehicle pulled up beside him, and both men in the Bronco (later identified as INS and FBI agents who were not in uniform) reportedly pointed guns at Basurto, swore at him and told him to pull over. Basurto put his hands up, and the driver of the Bronco approached his vehicle and pulled him out by his hair.

The driver then reportedly put a gun to Basurto's head and pulled his hands behind his back as he pushed him to the ground. The second agent then kicked Basurto in the back of his neck, pushing his face and nose into the ground, and pulled him to his feet by his cuffed hands, injuring his wrists. Basurto was placed in the back of the Bronco and taken to an INS office in downtown Tucson.

Once at the office, Basurto requested medical attention for his injuries. One of the agents who had apprehended him told him to shut up and cursed at him. A third officer asked him what happened and asked one of the agent's who had apprehended Basurto why he had been injured. The officer responded that Basurto had tried to flee, and cursed at Basurto again. The third officer told the arresting officer to take photos of Basurto's wounds, and the arresting agent complied. The arresting agent asked Basurto if he wanted to return to Mexico, he stated that he did and signed what he thought was a voluntary return form.

He was then transported to the INS's Florence facility, whose staff were upset by Basurto's injuries and took photos of him. He was taken to a hospital for treatment, and then returned to the Florence facility. Consulate officials had learned of the case through an anonymous telephone call; when they interviewed Basurto six days after the incident they reported his injuries were still visible. He told the consulate officials that he would be willing to testify about the alleged beating. Despite allegations that Basurto was involved in an armed robbery that led to his arrest, he was voluntarily returned to Mexico.

Tucson INS agents filled out a report on the incident, stating that Basurto had resisted arrest and that they forced him to the ground during arrest. Agents also made vague allegations stating that Basurto had been in a fight with other, unidentified persons at some point. Investigators from the Office of the Inspector General (OIG) later claimed that Basurto did not want to pursue the complaint when he was interviewed at Florence. When he subsequently spoke with Mexican consulate officials, he denied changing his mind about pursuing a complaint. Nonetheless, once he returned to Mexico, the OIG claims Basurto could not be located for interviews. His case was forwarded to the Civil Rights Division, which declined it.

Fred Regalado.⁵⁴ In a case that resembles several incidents Human Rights Watch/Americas has learned about -- during which individuals with proper documentation are arbitrarily harassed if they are not compliant -- Fred Regalado, a U.S. citizen, was detained by an INS inspector at the Falfurrias, Texas, checkpoint, apparently because the inspector did not like Regalado's attitude. Regalado approached the checkpoint on the morning of April 27, 1994. The INS inspector began lecturing Regalado, asking him if he was blind and accusing him of ignoring a traffic sign. Regalado replied that he had done nothing wrong, and was told to proceed to secondary inspection.

⁵³ This account is based on information provided by the Mexican consulate in Tucson and the Office of the Inspector General.

⁵⁴ As described in a May 3, 1994 complaint by Mr. Regalado to the INS in Washington, D.C.

He was detained for approximately thirty minutes, when the INS inspector told him to take a telephone call from an INS supervisor who told him about the need for speed limits; Regalado replied he had not broken any speed limits. He told the INS inspector that he had an important court matter, but the inspector told Regalado he had to wait for a Texas trooper to arrive. The inspector then asked Regalado again if he was a U.S. citizen, and he replied he was, but the inspector told him that he could not confirm his citizenship so was arresting him for falsely claiming to be a U.S. citizen. Regalado was searched, placed in a cell, referred to as a "doper;" he requested a phone call to an attorney, but was denied. A short time later he was told to leave and was not cited for any infraction. The brief detention and questioning appears to have been an attempt by the inspector to aggravate Regalado after he disagreed with the inspector over traffic signs.

Oscar Basso:⁵⁵ On July 6, 1994, Oscar Basso, age thirty-six, was driving on the main street of downtown Chula Vista. Basso realized that a vehicle was following him, and when it pulled alongside his car, he saw that the driver was pointing a gun at him. Basso stopped his car, got out on the passenger side and walked into a nearby store. He told the owner to call the police because someone with a gun was chasing him.

The man following Basso entered the store, pointed the gun at the storeowner and asked where Basso was (without using Basso's name). He also threatened to kill the owner. The police arrived, and the armed man (who was in uniform) identified himself as Border Patrol agent Robin Hutchens, and told them that Basso and the storeowner were drug dealers. (Basso states that he was heading to the appliance store to make a payment on an appliance.) When the police approached the agent, they smelled alcohol and arrested him. Hutchens was tried in early February 1995 on six charges; he was acquitted on four felony charges (including assault with a firearm and brandishing a weapon), convicted on a misdemeanor charge of drunk driving, and deadlocked on a misdemeanor assault charge.⁵⁶ Hutchens, who admitted to having more than a dozen drinks hours before the incident, testified that Basso had pointed a weapon at him, yet no weapon was ever found. When explaining their verdict, one juror stated, "Hutchens must have seen something to do what he did."⁵⁷ Hutchens remains on duty.

Failure to Provide Timely Medical Attention

The April 11, 1994, Revised Non-Deadly Force policy explicitly states:

8(c): Any person who claims injury or appears to be injured must receive proper and timely medical attention prior to executing the reporting requirements of this section.

Yet, as described above in the cases of Mario Ramón Fernández and Humberto Castro Benítez, Border Patrol agents failed to provide medical attention, despite repeated requests for assistance and obvious injuries. In the case of Fernández, he was held in three different Border Patrol stations yet never provided with medical assistance, despite a visibly injured jaw. In the case of Humberto Castro, he spent several days in custody with a serious jaw injury without receiving medical assistance. In other cases, agents witness attacks and must know that detainees are injured, yet there are no reports of medical assistance being offered without repeated pleadings by victims. Other dramatic examples of this negligence follow:

⁵⁵ This account is based on interviews with Oscar Basso, Mexican Consulate staff and press reports.

⁵⁶ Leslie Wolf, "Jurors absolve Border Patrol officer of felonies, convict him of misdemeanor," *San Diego Union-Tribune*, February 8, 1995.

⁵⁷ *Ibid.*

Juan Carlos Segura Camarena:⁵⁸ On May 10, 1994, Juan Carlos Segura Camarena and his brother and cousin were picked up by the Border Patrol in Gorman, California. They were placed on a bus for transport to the border with Mexico -- approximately a seven-hour drive. The conditions on the bus were uncomfortable, with the windows sealed and the temperature very hot. When the detainees complained about the heat, the agents reportedly laughed and ignored them. Segura explained to the agents that he suffered from a heart condition and needed his medication (which was in his bag that had been taken from him by the agents). There is a dispute over whether agents gave Segura his medication or ignored his request.

Upon arriving in Calexico, all of the bus's passengers were reportedly hot and exhausted from the ride. Immediately after disembarking from the bus, Segura collapsed. He was pronounced dead, with doctors reporting the cause of death as secondary pulmonary edema and heat exhaustion.

Gerardo Hernández Martínez:⁵⁹ In another case, fifteen-year-old Gerardo Hernández Martínez was crossing the border with two friends near the San Ysidro port of entry at dawn on July 7, 1994. They were apprehended by two Border Patrol agents who had told the young men to lie down on their backs, then used plastic handcuffs to tie them together with two men they did not know.

One of the boys complained that the cuffs were too tight, and an agent began cutting off the handcuffs with a knife. When the agent went to cut off Hernández's cuffs, he reportedly looked away and accidentally inflicted an inch-long cut near Hernández's left eye. (The cut was clearly visible during Human Rights Watch/Americas' interview with Hernández.) When one of the men cuffed with the group told the agent, in English, that he needed to call an ambulance for Hernández, the second agent became angry and kicked the kneeling man in the chest. Medical help did not arrive for thirty to forty-five minutes.

Border Patrol agents have a responsibility to care for individuals in their custody, regardless of how the detainees received their injuries. By failing to provide minimal medical attention, and by attacking those who suggest medical attention is required, the Border Patrol is violating its own rules and generally accepted rules followed by all law enforcement agencies.

V. Failure of the Existing Complaint and Review Procedures

As we have described in past reports, serious abuses continue because complaint, review, and disciplinary procedures that should serve as a deterrent and hold abusive agents accountable do not exist for Border Patrol agents. Following the publication of our May 1993 report, which described in detail the problems in the existing procedures, the INS claimed that it would make serious efforts to improve the complaints process, particularly in providing information to victims and witnesses about how to file complaints. The agency has not yet agreed to address the other serious shortcomings we have identified, which are summarized below.

During our most recent mission, we found that only a few of the minimal improvements promised by the INS have materialized. The changes that have taken place should not be entirely discounted, but the pace of change -- particularly when considering that some recommendations were made by the U.S. Commission on Civil Rights fourteen years ago and would be fairly simple to implement -- is glacial.

⁵⁸ This account is based on information provided by the American Friends Service Committee's U.S.-Mexico Border Program and press reports.

⁵⁹ This account is based on an interview with the victim and information provided by Grupo Beta.

Most disturbing are the attitudes of individual agents with whom we spoke who continue to believe that reports of abuses are greatly exaggerated. Furthermore, many agents contend that anyone who believes the Border Patrol commits abuses has an ulterior motive. Such persistent attitudes demonstrate that small procedural changes alone will not be sufficient to improve the behavior of agents in the field. Independent, transparent review of allegations of misconduct, followed-up with criminal prosecutions or discipline by the agency, when appropriate, is required to begin to reduce the deep distrust that permeates the relationship between the Border Patrol and border communities.

Complaints

Since 1989, the INS has boasted that there is only one registered complaint for every 17,000 arrests, an unusually low complaints-to-arrest ratio.⁶⁰ Presumably, this low ratio should be understood as an indication that INS agents rarely commit abuses. Human Rights Watch/Americas believes the figure is an indictment of the existing complaint process, as well as the result of efforts by INS agents to dissuade victims from complaining.

There are many reasons for underreporting of abuses, among them: ignorance about complaint procedures; fear of reprisals; frustration with procedures and the apparent futility of filing complaints; agents' attempts to dissuade victims from reporting abuses; and agents' attempts to dissuade fellow agents from reporting abuses.

Ignorance about the proper procedures for filing a complaint is widespread throughout the border region. According to a study published in May 1994, which randomly surveyed residents of South Tucson and South Texas, victims of abuse almost never filed a formal complaint.⁶¹ The report notes that the greatest obstacle to filing complaints about alleged mistreatment is the absence of information about the existence of a complaint procedure. The investigators found that of households surveyed, fifty individuals reported that they had been subjected to at least one type of abuse by U.S. immigration authorities. Yet, of those fifty individuals, only three individuals attempted (unsuccessfully) to file a formal complaint.⁶²

Victims of abuses committed by the Border Patrol fear reprisals if they attempt to file a complaint. Since many victims or witnesses are in the country illegally when subjected to abuse, they are reluctant to pursue a complaint that may call attention to their undocumented status. Depending upon their country of origin, victims or witnesses may also fear persecution by U.S. authorities similar to persecution by government forces in parts of Mexico and Central America.

The apparent futility of filing a grievance is not lost on victims or witnesses. When interviewing victims or witnesses, Human Rights Watch/Americas researchers always inquired about whether a complaint was filed. In most cases where respondents were aware that they could file a complaint, they contended that the procedures are ineffective and the INS is not interested in controlling agents, so why bother? In this regard, the effect of the Elmer acquittals on border communities cannot be overstated. In that well-publicized case, where a serious investigation and two attempts at prosecution still failed to send to jail a Border Patrol agent who shot and killed an unarmed man, individuals who were beaten or mistreated while in custody questioned whether filing complaints will make any difference at all.⁶³

⁶⁰ This statistic does not withstand scrutiny. In the San Ysidro area alone, there were approximately ninety complaints received by the Office of the Inspector General during each of the past several years. With 1.1 million apprehensions border-wide during 1993, at the INS's ratio of one in 17,000, there should have been just sixty-five complaints received along the border. With ninety-one acknowledged complaints in the San Ysidro area alone, the ratio is clearly much higher than one in 17,000. Nonetheless, the public affairs office of the INS continues to repeat this statistic to callers inquiring about reports of abuses by Border Patrol agents.

⁶¹ Robert Koulisch, Manuel Escobedo, Raquel Rubio-Goldsmith, John Robert Warren, "Final Report of the Border Interaction Project: A Comparative Study of U.S. Immigration Authorities and Border Communities in South Tucson, Arizona and South Texas," May 23, 1994.

⁶² *Ibid.*, p. 14.

⁶³ While the jury in the Elmer case is responsible for its verdict, the fact that so few complaints are acknowledged, investigated or prosecuted by the INS or Justice Department makes actions like Elmer's seem an

This sense of futility is reinforced by the refusal of the INS and the Justice Department's Office of the Inspector General (OIG) to inform complainants about the status of investigations. The recently published "final rule" to implement the Immigration Act of 1990 displays the agency's disinterest in providing information to complainants.⁶⁴ The rule requires that, "the employee or officer against whom the allegation was made shall be informed in writing that the matter has been closed as soon as practicable," but makes no mention of informing the complainant.⁶⁵ Victims and witnesses have told Human Rights Watch/Americas researchers that the only way they find out what became of their grievance is when they see the agent on duty -- or if the agent's name appears in the press, connected to another abuse case. OIG and INS officials tasked with investigating complaints acknowledge that they do not notify complainants about the status of investigations.⁶⁶

In addition to agency-wide problems leading to underreporting of violations, individual agents use a variety of methods to dissuade witnesses and victims from reporting abuses, ranging from withholding information about the complaint procedures to threatening to bring counter-charges against complainants. As we have described in previous reports, and confirmed during our recent mission, victims and witnesses who request information about filing a complaint are often ignored or persuaded by agents not to pursue a case.

Among examples of these practices described in Section III, Mario Ramón Fernández, who alleged he was kicked in the mouth by a Calexico Border Patrol agent, was repeatedly ignored when he complained about his injuries. When Ronaldo Rodríguez was reportedly beaten by an El Cajon Border Patrol agent, his sister complained to a Border Patrol supervisor who defended the agent and told her that it would be difficult to prove what she alleged. In another case, Francisco Fitch Lara was reportedly told by a Border Patrol agent that if Fitch did not file a complaint, he would be allowed to return voluntarily to Mexico.

Even high-level INS officials fail to understand that victims may be reluctant or fearful to complain at a Border Patrol station where an agent they suspect of abuse is stationed or where the incident took place. In a March 31, 1994 letter to Human Rights Watch/Americas, the Commissioner writes, "They [complainants] may, of course, make complaints to any INS employee. That channel is normally the one which is most convenient for the majority of complainants; INS offices are nearby and are staffed with personnel who speak the predominant language of the population they serve. As a rule, complaints submitted through that channel get to the proper authorities." Of course, there is no way to know if complaints are passed on, and the Commissioner must be aware that this is not the best way to submit complaints. Nonetheless, the Border Patrol is drafting a poster for individuals to make complaints directly to the Border Patrol, posters that would replace Office of the Inspector General (OIG) posters that agents have been instructed to post in all stations.

⁶⁴ Department of Justice, Immigration and Naturalization, 8 CFR Parts 242 and 287, Enhancing the Enforcement Authority of Immigration Officers, Final Rule, *Federal Register*, August 17, 1994, Vol. 59, No. 158.

⁶⁵ Ibid.

⁶⁶ The Deputy U.S. Attorney for San Diego, who is responsible for prosecuting civil rights cases, underscored the priority given to informing Border Patrol agents accused of misconduct about the status of their cases. She told Human Rights Watch/Americas that investigations should be expedited because agents have a "cloud" over them while investigations are ongoing. She told us that the agents should not be left in the dark, but did not mention, until prompted, how the lack of notification about the status of investigations affects alleged victims.

During our most recent trip, we found that Border Patrol management refuses to display informational materials explaining how to file a complaint. For example, the agency had not displayed OIG posters (describing how to file a complaint) in INS detention centers where apprehended border-crossers are held, even though they were instructed to do so by the OIG. In late July, we visited the three busiest detention facilities near the San Ysidro/Tijuana crossing. Previously, Human Rights Watch/Americas investigators had been assured by Border Patrol officials in Washington and in field offices that the posters had been displayed in each of the detention centers for several months. In fact, the only facility with the sign posted was the least busy center, and that poster was behind a counter in a processing area where detainees spend little time.⁶⁷ During interviews with Border Patrol management in the field and in Washington, we were repeatedly told that few complaints had been made to the OIG even though the posters were up throughout the region. The fact that no Border Patrol or OIG officials had checked to find out if the signs had even been posted displays an evident disinterest in improving the complaints procedures.

In Tucson and Nogales, the OIG posters were displayed prominently in cells where detainees are seldom held, since we were informed that, at that time, undocumented persons are processed in the field and returned to Mexico, without being detained at INS facilities. On the poster displayed at the Nogales station that we viewed in July 1994, someone had written "1-800-EAT SHIT" in the space for the telephone number to call with complaints. At that time, Human Rights Watch/Americas representatives noted to agents that the poster had been defaced; in November 1994, a reporter visiting the same station told Human Rights Watch/Americas that the poster remained the same.⁶⁸

After observing the attitudes of the agents in charge of the detention facilities, Human Rights Watch/Americas representatives were not reassured that complaints would be accepted and passed to investigators. At the Imperial Beach station, we were informed by a supervisor that you could tell the difference between the troublemakers and the workers because the troublemakers look you in the eye while the workers look at the ground. With this attitude, a detainee who speaks up to make a complaint would certainly be considered an agitator by the station's agents. In another example, an agent in charge of the Tucson detention center told us that he was very skeptical of people who claim to have been abused during apprehension.

One of the most common dissuasion tactics employed by agents is the filing of criminal misdemeanor or felony charges against victims or witnesses. If an individual is allegedly mistreated by an agent, and has visible injuries, the accused agent will claim there was fight -- even if the agent has not been hurt. While agents are sometimes forced to contend with violent resistance to arrest, in many cases agents resort to excessive force, particularly when they are required to chase a fleeing suspect. INS agents are aware that most undocumented persons who are abused will not defend themselves against trumped up charges and instead will accept voluntary return to Mexico or plea bargains.

Another disincentive for an undocumented person who wishes to bring a complaint or serve as a witness is the possibility that he or she might be detained as a material witness in jail or at an INS facility. In cases where the FBI or the OIG investigate an allegation of criminal wrongdoing, an undocumented immigrant who cooperates with that investigation may be detained for several months.

⁶⁷ In a meeting with INS officials in Washington, D.C., following our mission, we were informed that it was now an offense for Border Patrol agents to take down OIG posters at INS facilities. The fact that such conduct had to be defined as unacceptable before the agency would insist on compliance with this minimal effort to educate victims about complaint procedures is troublesome.

⁶⁸ OIG staff in Tucson also told us that the Border Patrol was supposed to post OIG signs around town, but when we told him they weren't up anywhere we looked, OIG staff told us that they hated to think the Border Patrol was tearing them down.

In a recent, odd twist to such detentions, eighteen-year-old Mexican national José López Hernández was detained as a witness in a county jail near Brownsville, Texas, even though he did not witness the alleged beating of an undocumented man by two Border Patrol agents in March 1994.⁶⁹ Instead, he was reportedly being held because the lawyer for the Border Patrol agents believed that López could provide negative information about the alleged victim's character. The Border Patrol spokesperson stated that the agency would not release any information about López, adding that, "we want what is fair for our agents."⁷⁰

Yet another obstruction to complete reporting of abuses is the strict code of silence exercised by Border Patrol agents. The January 1994 Elmer trial dramatically exposed the unwillingness of agents to report human rights violations or infractions of INS rules. One agent testified that if an agent learns about or witnesses an abuse, he or she is not obligated to report it.⁷¹ Another agent testified that if you reported violations, "people would blackball you as a snitch or a rat."⁷² He was asked if it was more important "to lie for your buddies than it is to apply -- to live under the law?" and replied that it was more important to lie for fellow agents.

Failure of the Existing System to Process Complaints Adequately

Even if a victim manages to file a complaint, and the complaint is forwarded to the proper authorities, there is no guarantee that the case will be investigated thoroughly or properly. As we described in detail in our May 1993 report, the internal mechanisms for examining complaints against agents are seriously flawed, often allowing abusive agents to escape punishment for misconduct. Nonetheless, the INS has steadfastly refused to change these procedures, ensuring that its agents continue to enjoy virtual impunity for human rights violations.

Investigation and Review

In the relatively few cases where complaints are successfully lodged against INS agents, there begins a complicated process of review and investigation. The process is marked by several flaws, one of the most significant being the overlapping jurisdiction and unclear lines of authority between the Office of the Inspector General (OIG), the Criminal Section of the Civil Rights Division of the Department of Justice (CRD), and Border Patrol station chiefs. This mix of authorities (setting aside other agencies that may be involved, including county sheriffs and city police, the FBI, and county or district attorneys) creates confusion and unpredictability regarding the handling of cases. It also makes it difficult for victims and their advocates to trace the progress of cases or to determine ultimate responsibility for their resolution.⁷³

During three weeks of meeting with OIG, CRD, and INS officials, Human Rights Watch/Americas representatives received complicated and sometimes conflicting descriptions of the route a complaint takes once it reaches the stage of investigation and review; in fact, some of the U.S. government officials we spoke with seemed to be themselves unclear about the paths of this process. Overall, the impression is one of an ad hoc system, as described below.

⁶⁹ Dane Schiller, "Witness from Mexico held without charges," *Brownsville Herald*, January 14, 1995.

⁷⁰ *Ibid.* The agents are charged with felony assault of an invalid, which carries a penalty of up to ten years, because the alleged victim has only one foot.

⁷¹ Testimony of Ramon Sandoval, Trial of Michael Elmer on Federal Civil Rights Charges [hereinafter Elmer Trial], Phoenix, Arizona CR-93-391-TUC-RMB, January 20, 1994.

⁷² Testimony of Thomas Watson, Elmer Trial.

⁷³ In a March 31, 1994 letter from INS Commissioner Meissner to HRW/Americas, she states in part: "You are correct in saying there have been overlaps of, and gaps in, jurisdictions in respect to employee misconduct matters....Some jurisdictional overlaps are unavoidable and some actually enhance the system's protections."

The Office of the Inspector General (OIG): Lack of Resources and Independence

The Office of the Inspector General for the Department of Justice was established by Congress in 1988 and began operations in 1989. The OIG is responsible for investigations and audits within the Justice Department.⁷⁴ It is not statutorily authorized to propose disciplinary action in the event that wrongdoing by a Border Patrol or other INS agent is established.

Although the OIG is authorized to investigate allegations of wrongdoing, the extent to which it actually does so appears to vary considerably between local field offices. According to OIG headquarters in Washington, D.C., the agency "rarely does investigations."⁷⁵ The San Diego field office reported that it conducts mainly preliminary investigations, with the bulk of investigatory work done by the FBI.⁷⁶ The Tucson office, on the other hand, stated that it has aggressively pursued arrangements with the CRD and FBI under which it is able to carry primary responsibility for certain high profile civil rights cases, including the Elmer and Juan Gamboa cases. Technically, according to the Special Agent in Charge of the Tucson OIG office, the OIG and the FBI carry concurrent jurisdiction for investigations.⁷⁷

When the OIG does conduct investigations, it is severely hampered by a lack of resources. As of September 1994, the total staff for the OIG numbered 389, down from a high of 447, and recent budget cuts forced the OIG to implement a hiring freeze. The number of Border Patrol agents, meanwhile, was doubled by Congress, indicating that the already-overwhelmed Inspector's office would be stretched further. The Tucson office, for example, has a staff of six investigators; all but one speak no or very poor Spanish. The overwhelming majority of their work involves Mexican nationals who do not speak English.

The OIG's ability to conduct independent and thorough investigations is furthered hampered by its close relationship with the Border Patrol itself. Many OIG investigators are former Border Patrol or INS agents. Of the six OIG Tucson investigators, four worked previously for the INS or the Border Patrol; of the eleven OIG investigators in San Diego, four are former INS agents. Tucson OIG staff told Human Rights Watch/Americas that their relationship with the Border Patrol -- described as "very close" -- enhances their ability to conduct investigations.⁷⁸

In practice, the predominant role of the OIG is that of a clearinghouse for complaints. All Border Patrol personnel, and particularly station chiefs, are supposed to report complaints they have received to the OIG. The OIG also receives reports of abuse from Mexican consulates and victims' advocates or attorneys. Theoretically, the OIG should also receive complaints directly from victims themselves, through an 800 number, a mail-in form, or by direct calls to a local OIG field office. As discussed above, this rarely occurs.

⁷⁴ Investigations of alleged human rights violations by INS personnel are a very small portion of the OIG's work. The OIG's March 1994 semiannual report to Congress states, "The OIG enforces Federal bribery, fraud, waste, abuse and integrity laws and regulations within the Department..." In its "Investigations" section, highlighting important cases, there is no section for civil rights.

⁷⁵ HRW/Americas interview with Inspector General Michael Bromwich and staff members Jim Meeker and Bob Ashbaugh, September 14, 1994.

⁷⁶ HRW/Americas interview with Ralph Paige and Joe Artes, San Diego, July 15, 1994.

⁷⁷ HRW/Americas interview with Bill King, July 19, 1994.

⁷⁸ July 26, 1994 interview.

There is a puzzling inconsistency in the number of complaints the OIG claims to receive and the number of complaints that the Border Patrol claims occur, particularly in Tucson. According to the OIG, they receive about one civil rights complaint a day, and the vast majority of their complaints are relayed to them by the Border Patrol. This contrasts sharply with statements by Tucson Border Patrol officials, who told us they receive approximately one complaint every two months.⁷⁹ Generally, the Border Patrol repeats its statistic of only one complaint for every 17,000 apprehensions, yet in the San Diego sector alone, the OIG reported receiving eighty-eight civil rights complaints in 1992 and ninety-one in 1993. Given the number of total apprehensions along the border, the complaints in San Diego alone would exceed the one in 17,000 ratio alleged by the agency.

As described in the following section, the OIG forwards all complaints of abuse to the Civil Rights Division of the Department of Justice for review. Eventually, roughly 98 percent of these complaints are returned to the OIG (or, in the case of San Diego, sometimes directly back to the Border Patrol) after CRD declines to prosecute. The majority of cases returned to the OIG have not been fully investigated by the FBI (which has investigative responsibilities in cases referred to the CRD), but rather are returned based on an initial determination (within twenty-four hours of receipt) by CRD that the complaint does not allege a prosecutable criminal violation of civil rights. A smaller percentage are returned after an FBI investigation, again because CRD does not judge prosecution to be warranted. In either case, a return to the OIG means that CRD considers there to be insufficient evidence to prove beyond a reasonable doubt that the agent intentionally violated the victim's civil rights.

When the OIG receives a case back from CRD, it can either conduct its own investigation or return the case to the Border Patrol for internal investigation and discipline. In roughly 90 percent of the cases, the complaints are returned to the Border Patrol for internal action.⁸⁰ (Border Patrol handling of these cases is discussed below.) Usually, the cases are sent back without any guidance: the Border Patrol chief or his deputy can direct an internal investigation (or do nothing with the allegation) and decide what disciplinary action to take, if any, without reporting back to the OIG.

In rare cases, the OIG will send a complaint back to the Border Patrol as a "referral." A referral requires the Border Patrol to report back to the OIG within sixty days, informing it of the results of the investigation and any action taken. Even in these cases, however, the OIG has no authority to urge the Border Patrol to mete out more vigorous punishment, even when the OIG believes it is warranted. OIG staff told Human Rights Watch/Americas that the Border Patrol rarely informs the OIG of the outcome of referral cases.

The OIG keeps cases rejected by the CRD when it believes that some criminal activity may have taken place, but may not meet the CRD's standards. The OIG acknowledges it is very rare for it to double guess the CRD's decision, which is often, wrongly, treated as an official exoneration by OIG and INS investigators.

The Civil Rights Division of the Department of Justice: High Threshold for Prosecution

As noted above, the Office of the Inspector General (OIG) passes complaints to the Criminal Section of the Civil Rights Division of the Department of Justice (CRD). The CRD then determines whether to investigate and prosecute the alleged civil rights violation. Prosecutions are undertaken in collaboration with local U.S. Attorneys' offices, with investigations conducted by the FBI.⁸¹

⁷⁹ HRW/Americas interview with OIG's Tucson Special Agent in Charge Bill King, July 19, 1994, and interview with Tucson Border Patrol Deputy Chief Scott Coffen and Public Relations Officer Steve McDonald, July 22, 1994. In a subsequent interview with King on July 26, he showed an HRW/Americas representative figures of complaints received from January to July 1994 -- 302 allegations of wrongdoing. Although this number includes both the Tucson and the neighboring Yuma sector, and although only about 80 percent of this figure reflects INS-related allegations, it is nonetheless approximately thirty times higher than the number of complaints reported by the Tucson Border Patrol.

⁸⁰ Interview with OIG's Ralph Paige and Joe Artes, July 15, 1994.

⁸¹ HRW/Americas interviews with Amalia Meza, Deputy U.S. Attorney in San Diego, July 14, 1994, and with Linda Davis, Chief, Criminal Section of the Civil Rights Division, Department of Justice, September 14, 1994.

While the CRD's goal ostensibly is to prosecute vigorously civil rights violations, in practice their standards are so high that the vast majority of cases referred to the CRD are not investigated or prosecuted. As described more fully below, 1,322 civil rights complaints against INS personnel (including Border Patrol agents) were referred to the CRD between October 1988 and September 1994. Of those, only 16 were presented by the CRD to a grand jury to obtain an indictment.

The CRD's goal is to decide within twenty-four hours of receiving a complaint whether or not it warrants a criminal investigation by the FBI.⁸² In order to be retained for further federal investigation, the complaint must allege a prosecutable criminal civil rights violation. The absence of certain types of evidence--for example, physical injuries requiring hospitalization or the presence of eyewitnesses--virtually guarantees that prosecution, and therefore investigation, will not proceed.⁸³ Furthermore, the main criminal provisions of the Civil Rights Act require a high level of intentionality on the part of the law enforcement defendant.⁸⁴ According to federal officials in the U.S. Attorney's office, CRD, the FBI, and OIG, between sixty-six percent and ninety percent of reported complaints do not pass this threshold determination, and are returned to the OIG or to the INS.⁸⁵

Those cases which are retained for further inquiry by CRD are sent to the FBI for a preliminary investigation. The FBI has twenty-one days to conduct this initial investigation and report back to both CRD and the local Assistant U.S. Attorney. The report is jointly reviewed by CRD and the Assistant U.S. Attorney, who then decide whether to pursue prosecution. If they do, a more exhaustive investigation follows, involving the CRD, Assistant U.S. Attorney, and FBI. Of the dozens of cases investigated by the FBI each year, only a few are taken before a grand jury for indictments.

⁸² Interview with Davis, September 14, 1994.

⁸³ Ibid.

⁸⁴ 18 U.S.C. § 242 requires a "willful" deprivation of the victim's civil rights; 18 U.S.C. § 241 requires a showing of conspiracy.

⁸⁵ Bill King of the Tucson OIG office estimated that 90 percent of all civil rights cases against INS personnel are not investigated by the FBI. Others estimated the percentage to be 80 percent. (Amalia Meza, Deputy U.S. Attorney) or 66 percent (Linda Davis, Chief, Criminal Section, Civil Rights Division and Ralph Paige and Joe Artes, San Diego OIG).

According to the Department of Justice, the number of INS cases referred to the Civil Rights Division, the number of investigations, the number brought to the grand jury, and the number of cases filed during fiscal years 1989-94 are as follows:

**INS Referrals
To Civil Rights Division**

(October 1988 - September 30, 1994)*

Fiscal Year	Number of Referrals	Number of Investigations	Number of Matters Presented to Grand Jury	Number of Cases Filed
1989	178	54	4	1 [1 P]
1990	213	61	2	1 [1 P]
1991	280	84	2	2 [1 C/1 P]
1992	266	69	3	2 [1 P/1 A]
1993	206	62	3	2 [1 A/1 P]
1994	179	36	2	1 [1 P]
TOTAL	1322	366	16	9

* Information provided by the Criminal Section, Civil Rights Division, Department of Justice. Footnotes accompanying the statistics explain: "Because referral information does not denote whether a border patrol agent, as opposed to another INS employee [eg., detention officer, special agent, etc.], was the subject of a complaint, the figures above reflect all INS-related incidents. These numbers show the resulting activity in each column that it occurred in each fiscal year, regardless of when the referral was received. Not all matters taken to grand jury were indicted. The outcome of the case is shown in brackets: C - conviction; P - guilty plea; A - acquittal."

The remarkably small number of cases brought to a grand jury is striking, even taking into account the high standard of proof demanded in federal criminal prosecutions.

In prosecuting a civil rights case against a Border Patrol or other INS agent, the CRD and the Assistant U.S. Attorney face certain predictable obstacles. Tom Perez, the CRD attorney who prosecuted Agent Michael Elmer, underlined the danger of jury nullification when the victim is an undocumented Mexican. "Every Border Patrol case contains this element," he said, referring to the tendency of juries, when faced with an unsympathetic victim, to ignore the facts and law and acquit the defendant agent, regardless of the evidence.⁸⁶ (On the same day as the Elmer acquittal, an agent prosecuted by the CRD in Texas was acquitted, also despite strong evidence against him; he remains on the force.)⁸⁷

⁸⁶ Interview with Tom Perez, September 14, 1994.

⁸⁷ In *United States v. Sims*, a Border Patrol agent was accused of assaulting a young Mexican national who was allegedly thrown to the ground and kicked several times.

Another hurdle is the frequent refusal of law enforcement witnesses to cooperate. Lying by fellow agents in the Elmer prosecution, for example, was so blatant that the U.S. Attorney for Arizona, Janet Napolitano, informed the Border Patrol that her office would no longer work with some of the agents who lied during testimony.⁸⁸ (Several months later, the Border Patrol, at the U.S. Attorney's insistence, initiated termination actions against two of these agents. See below.) According to CRD Deputy Chief Al Moscowitz, who oversaw the federal prosecution of Elmer, this refusal to cooperate "is not unique to Elmer."⁸⁹

Other obstacles include jury deference to federal law enforcement agents and a general lack of understanding regarding the nature of Border Patrol work, the dangers involved, who the undocumented are, and what the "war on drugs" is.⁹⁰ As Perez put it, "[t]here is a wide gulf between reality and perception." The prosecution of Agent Michael Elmer showcased virtually all of these negative factors.

In defending their high standards for seeking indictments, federal prosecutors point not only to these hurdles, but to the negative consequences of an acquittal as well. "There are costs to bringing cases that result in 'not guilty' verdicts," said Davis. "One of these costs is the message it sends that the defendant got away with it; this resonates throughout the community in unfortunate ways." Losses in court harm more than the public's perception of injustice at the hands of federal law enforcement, in that they add to the atmosphere of impunity in which abuses tend to occur. Referring to a recent acquittal of a Border Patrol agent in San Diego, for example, Davis said, "[t]here is a feeling, even among the Border Patrol, that this loss hurt their ability to discipline their troops."⁹¹

Because of these obstacles and practical considerations, CRD and AUSAs are reluctant to prosecute all but the strongest cases. This reluctance is evident in the low number of prosecutions sought against INS agents, including the Border Patrol: in 1989, four; in 1990, two; in 1991, two; in 1992, 3; in 1993, 3; and in 1994, 2.

⁸⁸ Ann-Eve Pederson, "Two border agents to be fired," *Arizona Daily Star*, November 30, 1994.

⁸⁹ Interview with Al Moscowitz, Deputy Chief, Criminal Section, CRD, September 14, 1994.

⁹⁰ Dangers to Border Patrol agents exist. Nonetheless, these dangers tend to be exaggerated. According to Linda Davis, not one agent has been shot in the last fifteen years, and of the three deaths in that time period, none were caused by attacks by undocumented people. (Two agents died in a helicopter crash; another crashed his car while driving home after work.) Interview, September 14, 1994.

⁹¹ Interview with Davis, September 14, 1994.

Of the twelve Border Patrol agents indicted on federal civil rights charges since September 1983, only two have been convicted. In January 1984, two Border Patrol agents from El Paso were found guilty of beating a twelve-year-old U.S. citizen. Four agents have pled guilty to civil rights-related charges. In November 1984, a Border Patrol agent pled guilty to sexually assaulting undocumented persons entering the U.S. near Eagle Pass, Texas. In March 1995, three New Orleans Border Patrol agents pled guilty to obstruction of justice charges after filing false incident reports and workers compensation claims regarding an alleged assault committed by one of the agents (the assault charges were dismissed).⁹² The other six agents were either acquitted or the federal charges against them were dismissed.

Deputy U.S. Attorney Amalia Meza holds a unique position created in December 1993 for the San Diego sector only. She is responsible for special prosecutions, including civil rights prosecutions. To our knowledge, since her position was formed, she has sought no indictments for criminal civil rights violations against Border Patrol agents.⁹³ She described to Human Rights Watch/Americas the tendency of juries to hold a bias against poor Mexican nationals apprehended in the U.S. while automatically sympathizing with law enforcement officials. Meza implied that a prosecutable case requires some additional extraordinary wrongdoing; examples she gave included agency cover-ups, obstruction of justice, or threats against witnesses. She also told Human Rights Watch/Americas representatives that there is no reason to second-guess law enforcement agencies and that she has faith that the Border Patrol knows what it's doing.

Border Patrol Review and Discipline

In each of the cases described above, we are unaware of any disciplinary actions taken by the Border Patrol against any of the agents accused of serious misconduct. The INS seems exceedingly willing to believe agents when they report detainees "fall down" or when they give inconsistent accounts about how an injured suspect was hurt. Border Patrol management takes the path of least resistance with its unquestioning loyalty to its own agents, even those with a long history of complaints or a well-known reputation for brutality. This lackadaisical management style is made possible by the weak position of the victims in these cases.

Approximately 98 percent of INS abuse cases eventually are handled by the INS itself, but the outcome of such referrals is not known to anyone outside the agency. Except in rare cases, the agency is not asked to report back to the OIG or any other outside department to describe what action may or may not have been taken against an agent whose actions may not have warranted criminal prosecution but who broke INS rules. While the agency claims that privacy issues prevent the naming of agents allegedly involved in misconduct, it also refuses to publish reports on

⁹² In March 1995, three Border Patrol agents from the New Orleans, Louisiana Border Patrol Station: William R. Collette (who was patrol agent in charge at the time of the incident), Otis Timothy Snider, and Orlando R. Martinez, pled guilty to assault and conspiracy charges.

As described in their indictment, on December 1, 1992, Agent Martinez allegedly struck Jorge Vidales-Sanchez, who was seated and handcuffed in the border patrol station, without justification. Agent Martinez broke a finger as a result of the powerful blow, which was witnessed by Agents Collette and Snider, among others. The agents then reportedly agreed to cover up the attack, and reported that Agent Martinez had injured his finger while chasing and apprehending the detainee. Agent in Charge Collette reportedly stated that, unless a false report was submitted to supervisors, an investigation would result. In his incident report, Agent Collette also recommended that no disciplinary action be taken against Agents Martinez or Snider. All three agents signed a workers' compensation pay form, falsely stating the cause of Martinez' injury. According to the Civil Rights Division attorney trying the case, the incident was not reported by fellow agents, but by the victim's attorney. (*U.S. v. William R. Collette, Otis Timothy Snider, Orlando R. Martinez, Superseding Indictment for Deprivation of Rights Under Color of Law, Conspiracy, and Obstruction of Justice, Criminal Docket 94-352, January 19, 1995, U.S. District Court, Eastern District of Louisiana.*)

⁹³ There have been two recent indictments in the southern district of California against INS officers. In September 1994, an INS inspector was indicted, and subsequently pled guilty to striking a handcuffed victim in the face with a pair of handcuffs (*U.S. v. Atienza*). Charges are now pending against a Special Cases Officer stationed in San Ysidro, California, who is charged with sexually assaulting a woman after her border crossing card was confiscated (*U.S. v. Toothman*).

administrative sanctions imposed for misconduct, even without naming the agents involved. In fact, the only way the public learns about disciplinary procedures is by seeing agents on the job after complaints have been filed. Otherwise, the secrecy surrounding internal operations at the agency prevent complainants or others from learning whether an allegedly abusive agent received any penalty whatsoever.

Too often, the Civil Rights Division's decision not to pursue a case has the effect of exonerating an agent accused of misconduct. As described above, the Civil Rights Division's standards for prosecution are extraordinarily high, resulting in only a small number that are actually pursued. For this reason, the CRD's decision should have no effect on disciplinary sanctions meted out for misconduct and non-compliance with INS rules.

Border Patrol officials interviewed by Human Rights Watch/Americas displayed a disturbing preference for allowing an agent to leave the agency, rather than pursuing dismissals of problem agents.⁹⁴ Agents accused of misconduct, whom the agency may want to dismiss, are assisted because they are civil servants and enjoy protections that make their dismissals difficult, but not impossible. They are also aided by an active union that provides able legal assistance for agents whose jobs are in jeopardy.

In serious cases of alleged abuse, dismissals are made more difficult by prosecutors who do not want agents who witness or take part in misconduct to be fired, so that they are easy to contact and their statements are not contaminated. For example, in the Elmer case, several agents were allowed to stay on the job for more than two years because prosecutors did not want them dismissed while Elmer was being tried. According to INS officials, two of the agents who have dismissals pending can appeal the dismissals before the Merit Systems Protection Board, and correctly state that a great deal of time has elapsed since the alleged incident, making the agency's case more difficult. From a human rights perspective, the retention of agents who either committed or witnessed serious abuses without reporting them or reacting properly puts the public at unnecessary risk. At the very least, such agents should be placed on indefinite desk duty.⁹⁵

The Office of the Inspector General has testified in congressional hearings, and its staff has made clear in interviews with Human Rights Watch/Americas that the INS does not let them know how disciplinary procedures are applied. In March 1993, for example, then-Inspector General Richard Hankinson testified that, "[w]e do not have very useful data at this point on how the INS disciplines its employees in response to our investigations or those of others....INS' treatment of misconduct is spotty. Whether action is taken, and the severity of punishment, if any, seems to be uneven and sometimes happenstance."⁹⁶ In more recent interviews with the Inspector General and others from the OIG, this impression was repeated.

⁹⁴ In the course of many interviews, Border Patrol officials never clearly described how they track problem agents. While the OIG maintains a database containing allegations of misconduct against INS and Border Patrol agents, the Border Patrol does not have access to that database. The Office of Internal Audit, a relatively recent addition to the INS tasked with overseeing such cases, is not receiving essential information, according to almost every official from the INS and OIG with whom we spoke in the field.

⁹⁵ The INS only began procedures for the dismissal of the two agents after the U.S. Attorney, in a highly unusual move, insisted that the agents be dismissed because they reportedly lied during Elmer's trial and could not be trusted in future cases. The U.S. Attorney stated she would not work with them in bringing cases against suspected smugglers or others. The agents were reportedly contesting the dismissals, and, as of mid-January 1995, the OIG did not know if they were still on the job. See Ann-Eve Pedersen, "2 border agents to be fired," *Arizona Daily Star*, November 30, 1994.

⁹⁶ Statement of Richard J. Hankinson, Inspector General, Department of Justice, before the Subcommittee on Information, Justice, Transportation and Agriculture of the Committee on Government Operations, U.S. House of Representatives, March 30, 1993, p. 22.

During our 1994 fact-finding trip, we asked Border Patrol chiefs, deputy chiefs, and rank and file agents if they were aware of any agent who had been fired for breaking INS rules relating to human rights violations.⁹⁷ The only case mentioned was that of Nogales Border Patrol agent Tom Watson, Agent Michael Elmer's partner who in June 1992 reported Elmer's shooting of a Mexican national. Watson was reportedly fired for failing to report the incident in a timely manner, firing warning shots and other violations. Elmer was not fired, but resigned.

Some agents are transferred after allegations of wrongdoing, a response that can not be considered discipline and that frustrates efforts of human rights organizations, and OIG personnel, to track problem agents. In August 1994, the Cochise County Sheriff's Department of Douglas, Arizona, investigated a Border Patrol agent as a suspect in the execution-style murders of two men. Although the county attorney declined to prosecute, he referred the case to the Arizona attorney general for further investigation. The agent was initially placed on administrative leave, then allowed to return to work. The agent was soon reassigned to another state, reportedly at his own request because he feared for his safety. A Border Patrol spokesman claimed not to know the state to which the agent had been transferred, saying only that it is a border state.

⁹⁷ There does not appear to be a set rule requiring the dismissal of agents when they have been indicted on criminal charges.

Not only are transfers of this sort an inadequate response, but, according to the OIG, because the Border Patrol does not have access to the OIG's database on allegations against agents, the Border Patrol station chief who receives the transferred agent probably does not know his background or the allegations against him.⁹⁸ The INS only updates its background data on agents every five years.⁹⁹ Furthermore, when agents resign to avoid discipline or prosecution, there is nothing to prevent them from reapplying at a later date.¹⁰⁰

As we have reported in the past, disciplinary actions meted out to a particular agent often depend more on that agent's relationship with his or her supervisor than on the seriousness of the abuse committed. A seven-year veteran of the Border Patrol stated, "In about seventy percent of the offense categories, the punishments can range from verbal reprimand to dismissal. And there's certainly cronyism in how it's handled."¹⁰¹

In a positive move, the INS told us that it supported narrowing the broad range of punishments available for the same infraction "to achieve greater consistency."¹⁰² Nonetheless, the INS appears to endorse broad discretion in the same letter, stating that, "[a] deliberate failure to provide proper and timely medical assistance is a punishable offense....penalties can range from a verbal reprimand to termination of employment." It is precisely this type of discretion that is objectionable; there is no reason why an agent who fails to provide medical attention should be retained as an immigration law enforcement agent.

The Office of Internal Audit

In an apparent acknowledgment of the shortcomings of the complaints, review, and disciplinary procedures in place, the INS created the Office of Internal Audit in mid-1993. According to a March 31, 1994 letter from Commissioner Meissner to Human Rights Watch/Americas, the Office of Internal Audit (OIA) was established to ensure that "allegations are fairly and thoroughly investigated; ensuring that prompt, equitable and effective corrective actions are taken....and identifying patterns in and underlying causes of employee conduct problems." While these are laudable goals, the creation of yet another inaccessible department within the INS or Justice Department to deal with abuse problems is not the solution to the problems we and others have identified. External, transparent, independent oversight is what is needed.

It is difficult to evaluate fully the role of the OIA, mainly because it is not clear how it is operating. According to INS and OIG officials in the field, the OIA is, at best, irrelevant. When we discussed the routing of complaints within the INS and Justice Department generally, only the Tucson Border Patrol Deputy Chief included the OIA as part of the process. After we asked about the OIA's role, San Diego's Border Patrol Chief Gus de la Viña stated, "I don't say much about them because they don't do much." The Deputy U.S. Attorney for San Diego assigned civil rights cases told us, "I couldn't even hazard a guess as to what they do," and the Office of the Inspector General's office in Tucson told us, "the OIA is not part of our chain." If the Commissioner is relying on the OIA to solve problems regarding the complaints, review, and disciplinary procedures, the office is clearly not part of the solution so far.

⁹⁸ HRW/Americas interview with Ralph Paige and Joe Artes of the San Diego office of the OIG, July 15, 1994.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Paul Salopek, "La Migra: The Border Patrol's Wall of Silence," *Texas Observer*, March 12, 1993.

¹⁰² Letter from INS Commissioner Meissner to HRW/Americas, March 31, 1994.

The OIA has no access to OIG's database on problem agents, has no investigatory function, and admits it does not hear back from Border Patrol managers about actions taken against agents. While the Commissioner states that the OIA reports, "directly to the Commissioner and, as such, demonstrates top-level management's commitment to improving the INS systems,"¹⁰³ it is unclear what the OIA could be reporting with any authority.

Problem of Secrecy

Internal review of INS agents accused of committing abuses is shrouded in secrecy, with the public uninformed about the procedures the INS claims it uses to identify and punish abusive agents. As described throughout this report, the rare glimpses attained through trials display a review system that is uniquely ineffective. The agency's insistence on fiercely guarding any information about the internal review of agents only intensifies the public's perception that agents are getting away with misconduct.

After Attorney General Reno requested from Human Rights Watch/Americas a list of well-known "problem" agents, we submitted a list of twenty-two agents, with information on the alleged abuses. We were told that information about the agents' current status would be provided. Unfortunately, our request was denied in the March 1994 communiqué, and when we inquired from several INS and Justice Department officials why the list was requested and what was done with it, no answer was provided. The March 1994 communique stated bluntly, "With regard to copies of information about investigations and disciplinary actions, rules and regulations prohibit disclosure." Nonetheless, Human Rights Watch/Americas plans to submit a new list of names of agents implicated in the human rights abuses described in this report.

VI. Inadequate Drug Interdiction Training

A description of drug interdiction practices in the southern Arizona desert was provided during the January 1994 trial of Border Patrol agent Michael Elmer on federal civil rights charges (See Section III). Agents testified that they do not receive drug interdiction training at the Border Patrol Academy. Border Patrol agent Thomas Watson testified: "I use warning shots to spook the mules who were carrying the narcotics and because you'd jump these guys out in the hills like this by yourself or just with another Border Patrol agent, and there would be a bunch of them and the easiest way and the safest way I always did it was jump up and yell, 'Border Patrol, Border Patrol' shoot up in the air and yell and scream and throw rocks and all...."

Testimony from the January 1994 trial is significant because it is rare for agents to speak on the record in public. It is alarming because it confirms the worst suspicions of Border Patrol detractors -- that agents engage in "Wild West" behavior entirely inappropriate for a professional, federal law enforcement agency. Worse, recent incidents lead us to believe that nothing prevents the continuation of this type of behavior since interdiction training has not improved and supervision remains lax in many areas, virtually guaranteeing future abuses.

¹⁰³ Letter from Commissioner Meissner to Human Rights Watch/Americas, March 31, 1994.

VII. Recommendations

It is disappointing that many of the recommendations made by Human Rights Watch/Americas in its past two reports must be repeated now because, although there have been some changes in INS policies, there has been no discernible change in practices. As we have noted in the past, many of the problems we have documented can be remedied by enforcing policies and attitudinal changes on the part of the INS and its agents. In our opinion, other improvements, particularly in receiving complaints and vigorously and thoroughly investigating abuses, will only be possible if independent review of the INS is established with the full support of the INS.

The changes suggested below are imperative if the rights of undocumented persons, legal residents, and U.S. citizens are to be respected in the border region. In particular, Human Rights Watch/Americas calls upon the INS to implement immediately the following recommendations. Furthermore, we call upon the Clinton administration and Congress to withhold all unspent assistance directed to the Border Patrol until the INS enforces its own policies, holds abusive agents accountable, and supports the creation of an independent review commission.

I. All individuals within the United States, regardless of their immigration status, are entitled to respect for their basic human rights. The INS needs to redirect its mission to emphasize the promotion and protection of human rights in the fulfillment of its responsibility to enforce U.S. immigration laws. It must make clear to its personnel, by its words and actions, that failure to respect the legally protected human rights of any person will be punished.

II. INS agents should, as far as possible, apply non-violent means before resorting to the use of force or firearms. Whenever the lawful use of force or firearms is unavoidable, agents should:

A. Employ force only as necessary to attain a legitimate objective and only in proportion to the importance of that objective.

B. Minimize damage and injury, and respect and preserve human life.

C. Ensure that assistance and medical aid are rendered to any injured persons at the earliest possible moment.

III. Firearms should be reserved only for the protection of agents or third persons from imminent threat of death or serious injury.

A. Agents should not brandish their firearms in the course of everyday enforcement.

B. Agents should never shoot a fleeing suspect unless absolutely necessary to preserve the lives of others.

C. Agents should never fire warning shots.

D. A program for inspecting agents' weapons should be implemented so that the agency is not dependent solely upon agents' reports regarding firearms incidents. The INS has rejected our calls for regular or random inspection of weapons, stating that, "[t]he danger caused by frequently checking weapons far outweighs any benefit gained. Immigration officers who improperly discharge their weapon can easily hide that fact by cleaning and reloading it before the end of their shift."¹⁰⁴ (Barring our recommendations, one suggestion by an OIG investigator might be pursued. He suggested a special "shrink wrap" on the muzzles of weapons, so that it would be readily apparent if a weapon had been fired during an agent's shift.)

E. Agents should be strictly prohibited from carrying non-issue weapons when they are on duty. The use of personal weapons is unnecessary and hinders accountability and oversight efforts.

¹⁰⁴ Letter from Commissioner Meissner to HRW/Americas, March 31, 1994.

F. Agents involved in any shooting should be put on desk duty until the circumstances of the shooting are investigated and it is found that the agent acted properly.

IV. Nonlethal devices should be developed and used by agents in preference to firearms and other lethal weapons. Agents patrolling in areas prone to rock attacks should wear protective gear so they are not forced to apply lethal force to defend themselves.

V. All equipment carried by INS agents should be used only for its intended purposes (e.g. flashlights and hand-held radios should not be used as weapons). Some agents in the San Ysidro area have switched to small flashlights because they are easier to carry. They are also unlikely to be used as weapons and should be distributed to all agents in place of large flashlights that have frequently been used improperly.

VI. When injury or death is caused by the use of force or firearms, INS agents should report the incident immediately to their supervisors, who should immediately report the incident to the Office of the Inspector General.

VII. Unconvincing explanations put forward by agents accused of mistreatment must be examined closely, not accepted on their face. For example, agents often claim an injured detainee "fell down" even when there was no chase or any reason for the detainee to lose his or her balance. In other cases, agents state that an injured detainee "had a rock," an allegation that is nearly impossible to disprove with the abundance of rocks in the border region. Agents who do not note an injury at the time of apprehension, but who later claim a detainee was already injured when they arrested him or her should be questioned vigorously to explain the alleged incident. These types of explanations, so often repeated when abuse is alleged, should set off warning bells among investigators or supervisors responsible for investigating these cases.

VIII. INS agents should never use force, threats of force, or arbitrary detentions as forms of extrajudicial punishment.

IX. Procedures should be established to enable undocumented persons, legal residents, and others to file complaints against INS agents without fear of reprisal.

A. The public should be effectively informed of its right to file complaints against INS agents. All INS personnel should be fully familiar with the complaint process. Easy-to-understand complaint forms, including an explanation of the complaint procedures, should be supplied and displayed prominently in all INS offices and detention centers in the languages of the community. Those forms and information about filing complaints of abuse should also be made available in transport vans and other vehicles where detainees are not held in detention centers.

B. OIG posters, while imperfect, should be posted as intended throughout INS offices, detention centers, and the community affected. It should be the duty of high-level Border Patrol and INS officials to check frequently to make sure the posters are displayed and not defaced; any agents who deface, tear down, or fail to display the posters should be punished appropriately. OIG posters should not be replaced by Border Patrol signs now under consideration.

C. All persons who file complaints should be informed when their complaints are received, given periodic status reports, and provided access to an appeal process. An appeal process is required in light of the long history of mishandling of abuse complaints and the costs associated with bringing a lawsuit if a complainant is dissatisfied with a process over which he or she has no control.

D. Under no circumstances should reprisals be taken against persons who file complaints, nor against agents who denounce violations. Any attempt at such reprisals by INS agents or managers should be treated as a punishable offense. INS management must make clear, through its practices, that agents who report other agents' misconduct are supporting the agency by making it a safer, more professional place to work.

E. No information obtained regarding the immigration status of victims or witnesses of alleged violations should be used in immigration proceedings.

X. The INS should publish, at least quarterly, a report on disciplinary actions taken against agents found responsible for misconduct or abuse. If necessary, the reports can omit the names of agents, but should include dates, locations, relevant details about the reported incidents, and type of punishment applied.

XI. All INS agents who are in contact with the public should be in uniform and clearly identifiable by name tags.

XII. All INS vehicles should bear large, fluorescent, reflective two- or three-digit identification numbers. (Commissioner Meissner wrote to Human Rights Watch/Americas in March 1994 and stated that this recommendation would be acted upon and completed by October 1994. Nonetheless, this effort so far has focused only on new vehicles.)

XIII. The INS should eliminate all strip and body cavity searches unless there is probable cause to suspect that a person possesses contraband. Strip and body cavity searches should never be used to intimidate, harass, or humiliate the person being searched. Whenever possible, searches should be conducted by agents other than the arresting agent.

XIV. All agents should be required to undergo human rights training to increase their understanding of the basic rights of individuals with whom they are in contact daily. This training should include the topics of sexual assault and harassment and should be supplemented by periodic review and reinforcement by management of those protections and rights. Human rights training must include instructions and support for reporting fellow agents.

XV. All agents should be provided with drug interdiction training before they are sent into the field. The lack of such training has, in the past, led to unnecessary, serious human rights violations.

XVI. Independent Review Board

A fully empowered and independent Review Commission (hereafter Commission) should be created to investigate all complaints of abuse directed at INS agents.

A. Commission staff should be experienced in investigating abuses by law enforcement personnel.

B. All shootings and non-frivolous instances of abuse should be reported immediately to the Commission. The failure to report an incident to the Commission should be a sanctionable offense.

C. The Commission should develop a system whereby the records of agents who have been the subject of repeated complaints are reviewed by the appropriate authorities.

D. The Commission should make public the names of all agents alleged to have been involved in cases of serious abuse, unless there is specific evidence that doing so would jeopardize the safety of the agents involved or hinder the investigation. If these special circumstances are temporary, the names should be released when the circumstances no longer exist.

E. Agents involved in shootings or other incidents that result in death or serious injury should be assigned to restrictive duty or suspended until the circumstances are clarified and the Commission completes its investigation; no agent involved in such an incident should be reinstated without first receiving stress counseling.

F. All cases in which the Commission finds that an agent committed an offense which is prosecutable should be turned over to the relevant authorities for prosecution. Such referral, however, should not serve as an excuse for

inaction by the Commission. Neither should the decision by a prosecutorial agency not to prosecute a case be treated by the Commission as an exoneration of the agent or agents involved.

G. All cases in which the Commission finds that an agent violated INS or Customs regulations should be forwarded to appropriate supervisory personnel with a recommendation for sanctions. Commission recommendations should be implemented by supervisory personnel; where these personnel refuse to implement a Commission recommendation, they should be required to justify promptly and in writing their reasons for failing to do so.

XVII. Improvements in the screening procedures for applicants for INS positions have been made, according to the INS' Office of Security. Background checks must now be completed before agents are sent into the field, unlike in past years when it often took years before checks were completed, making it very difficult to fire agents who had been on the job for several years when their misconduct is discovered. Agents have told us that they are concerned that the current hiring push could lead to screening problems.¹⁰⁵ We urge the INS, the OIG, or the relevant oversight committee in the Congress, to monitor closely the new screening arrangement agreed to in early 1995.¹⁰⁶ As the INS is under increasing pressure to hire new agents, inquiries into recruits' backgrounds and suitability should not be sacrificed.

* * *

This report was written by Allyson Collins, Human Rights Watch/Americas Advocacy Director, and Lee Tucker, Human Rights Watch Staff Attorney, based on a fact-finding mission to the border region in July 1994. It was edited by Anne Manuel, Human Right Watch/Americas Deputy Director. Vanessa Jimenez provided production assistance. Mike Farrell, vice-chair of Human Rights Watch's California Advisory Committee, participated in the fact-finding mission. We would like to thank local human rights advocates, particularly the American Friends Service Committee, for their assistance.

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Human Rights Watch/Americas

Human Rights Watch is a nongovernmental organization established in 1978 to monitor and promote the observance of internationally recognized human rights in Africa, the Americas, Asia, the Middle East and among the signatories of the Helsinki accords. It is supported by contributions from private individuals and foundations worldwide. It accepts no government funds, directly or indirectly. Kenneth Roth is the executive director; Cynthia Brown is the program director; Holly J. Burkhalter is the advocacy director; Ann S. Johnson is the development director; Gara LaMarche is the associate director; Juan E. Méndez is general counsel; Susan Osnos is the communications director; and Derrick Wong is the finance and administration director. Robert L. Bernstein is the chair of the board and Adrian W. DeWind is vice chair. Its Americas division was established in 1981 to monitor human rights in Latin America and the Caribbean. José Miguel Vivanco is executive director; Anne Manuel is deputy director; Allyson Collins is advocacy director, James Cavallaro is Brazil director, Sebastian Brett, Sarah DeCosse, Robin Kirk, and Gretta Tovar Siebentritt are research associates; Joanne Mariner is the Orville Schell Fellow; Vanessa Jiménez and Paul Paz y Miño are associates. Peter D. Bell is the chair of the advisory committee and Stephen L. Kass and Marina Pinto Kaufman are vice chairs.

¹⁰⁵ See also Leigh Rivenbark, "Border Patrol Buildup a Mixed Blessing," *Federal Times*, February 13, 1995.

¹⁰⁶ The new arrangement calls for the Office of Personnel Management to conduct a background check within thirty days of their provisional acceptance into the Border Patrol. The old arrangement called for a background check within 120 days, but the checks often stretched into years. The thirty-day background checks were always available to the INS, but the quicker checks are more costly to the agency.