

116TH CONGRESS }  
*1st Session* }

SENATE

{ REPORT  
116-99

ANTI-BORDER CORRUPTION  
IMPROVEMENT ACT

—  
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND  
GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

S. 731

TO AMEND THE ANTI-BORDER CORRUPTION ACT OF 2010 TO  
AUTHORIZE CERTAIN POLYGRAPH WAIVER AUTHORITY, AND FOR  
OTHER PURPOSES



SEPTEMBER 10, 2019.—Ordered to be printed

—  
U.S. GOVERNMENT PUBLISHING OFFICE

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**ANTI-BORDER CORRUPTION IMPROVEMENT ACT**

SEPTEMBER 10, 2019.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and Governmental Affairs, submitted the following

**R E P O R T**

[To accompany S. 731]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 731) to amend the Anti-Border Corruption Act of 2010 to authorize certain polygraph waiver authority, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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**I. PURPOSE AND SUMMARY**

The purpose of S. 731, the Anti-Border Corruption Improvement Act, is to ensure the U.S. Customs and Border Protection (CBP) is able to exercise limited flexibilities in its hiring process to offset staff shortages amongst its cadre of law enforcement officer positions. S. 731 expands the CBP Commissioner’s authority to waive the polygraph examination requirements for three categories of individuals seeking to hold law enforcement positions with CBP. Specifically, this bill allows CBP to waive the polygraph examination requirement for current law enforcement officers, who meet certain requirements and are employed full-time by Federal, state and

local law enforcement agencies, and active members or veterans of the Armed Forces. The CBP Commissioner may use the polygraph examination to resolve any questions or concerns that arise as part of the background investigation for an applicant eligible for or current employee receiving a waiver to determine whether the individual meets the suitable requirements for employment with CBP. CBP is required to provide a report to Congress on the use of this polygraph waiver within one year after the bill's enactment. The authorities provided in this bill will sunset five years after enactment.<sup>1</sup>

## II. BACKGROUND AND THE NEED FOR LEGISLATION

With responsibilities that include facilitating legitimate trade and travel to securing our nation's borders, CBP is one of the nation's largest and most important law enforcement organizations.<sup>2</sup> CBP's workforce includes more than 60,000 law enforcement officers and mission support staff.<sup>3</sup> Every day, the women and men of CBP screen over one million international travelers, interdict thousands of counterfeit goods, arrest thousands of immigration law violators, seize thousands of pounds of illegal drugs, prevent agricultural pests from damaging U.S. crops, disrupt terrorist and criminal travel, and provide emergency services at and between ports of entry.<sup>4</sup>

CBP is struggling to fill thousands of law enforcement vacancies. As of July 2019, CBP is approximately 4,500 below its congressionally-approved staffing numbers and requirements in its workforce staffing models across its law enforcement components, including Air and Marine Operations, Border Patrol, and Office of Field Operations (OFO).<sup>5</sup> These staffing shortages have adverse effects on CBP's ability to efficiently and effectively carry out its mission, and contribute to low workforce morale. At a March 2017 hearing before the Committee, OFO and Border Patrol union representatives testified about the impacts of staffing shortages on the components' workforce morale and ability to fulfill key responsibilities.<sup>6</sup> Anthony M. Reardon, National Treasury Employees Union President, asserted that OFO officers are required to frequently work overtime and are routinely sent on involuntary Temporary Duty (TDY) assignments.<sup>7</sup> This practice has lowered the morale of officers as they are away from their families for long periods of time.<sup>8</sup>

Recent surges in apprehensions on the southern border and increases in traveler volume have also placed strain on CBP. In January 2017, the Trump Administration issued Executive Order

<sup>1</sup>On July 24, 2017, the Committee approved S. 595, Ant-Border Corruption Reauthorization Act. That bill is similar to S. 731. Accordingly, this committee report is in part a reproduction of Chairman Johnson's committee report for S. 595, S. Rep. No. 115-133.

<sup>2</sup>*About CBP*, <https://www.cbp.gov/about> (last visited July 30, 2019).

<sup>3</sup>*Id.*

<sup>4</sup>U.S. Customs & Border Protection, *Performance and Accountability Report Fiscal Year 2016* 8 (2016), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Mar/FY-2016-CBP-PAR-508C.pdf>.

<sup>5</sup>Email from Dep't of Homeland Sec. to Comm. Staff (July 23, 2019) (on file with Committee staff).

<sup>6</sup>*Perspectives from the DHS Frontline: Evaluating Staffing Resources and Requirements: Hearing on S. 595 Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 115th Cong. (2017) (statement of Anthony M. Reardon, National President, National Treasury Employees Union).

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

13767 entitled, *Border Security and Immigration Enforcement Improvements* (hereinafter Executive Order 13767), to address, among other things, the surge in illegal immigration and ensure the Border Patrol has the ability to respond with operational efficiency to the changing nature of threats.<sup>9</sup> Specifically, Executive Order 13767 directs the Commissioner of CBP to “take all appropriate actions to hire 5,000 additional [Border Patrol Agents], and to ensure that such agents enter duty and are assigned to duty stations as soon as practicable.”<sup>10</sup> However, due in part to its polygraph examination process, CBP, and most notably the Border Patrol, faces challenges hiring law enforcement personnel.

According to the former CBP Commissioner, Gil Kerlikowske, the administration of the polygraph requirement mandated by Congress in 2010 to mitigate corruption and abuse allegations has impacted CBP’s ability to hire new officers for all three of its components.<sup>11</sup> In July 2017, the Department of Homeland Security’s Office of Inspector General (DHS OIG) found that CBP’s hiring requirements, including the polygraph examination, “make recruitment and hiring inherently challenging and complicated,”<sup>12</sup> though these requirements are “important to securing well-qualified individuals.”<sup>13</sup> Additionally, the DHS OIG suggested that CBP collaborate with the Department of Defense to “expedite the hiring of veterans by waiving the pre-employment polygraph examination for those who left military services with security clearances in good standing” in order to meet the hiring goals outlined in Executive Order 13767.<sup>14</sup>

Approximately 65 percent of all applicants fail the CBP polygraph examination.<sup>15</sup> During a February 2017 hearing before the Committee, then Acting Commissioner of CBP, Kevin McAleenan, described the agency’s polygraph examination as “both a significant deterrent and point of failure for CBP law enforcement applicants.”<sup>16</sup> In comparison, a former CBP internal affairs official stated that the Federal Bureau of Investigation and U.S. Secret Service have had polygraph failure rates of less than 35 percent.<sup>17</sup> Additionally, data provided to the Associated Press shows that the Drug Enforcement Administration had a failure rate of 36 percent for two consecutive years beginning in 2015.<sup>18</sup> According to the Amer-

<sup>9</sup> Exec. Order. No. 13768, 82 FR 8799 (2017).

<sup>10</sup> U.S. Customs and Border Protection, Dep’t of Homeland Sec., *Budget Overview 24* (2019), <https://www.dhs.gov/sites/default/files/publications/U.S.%20Customs%20and%20Border%20Protection.pdf>.

<sup>11</sup> Associated Press, *Two out of three Border Patrol job applicants fail polygraph test, making hiring difficult*, Los Angeles Times (Jan. 13, 2017), <http://www.latimes.com/local/lanow/la-me-border-patrol-lies-20170113-story.html>.

<sup>12</sup> Office of Inspector Gen., U.S. Dep’t of Homeland Sec., OIG–17–98–SR, *Special Report: Challenges Facing DHS in Its Attempt to Hire 15,000 Border Patrol Agents and Immigration Officers 13* (2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-98-SR-Jul17.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Perspectives from the DHS Frontline: Evaluating Staffing Resources and Requirements*, *supra* note 5, at 19.

<sup>16</sup> Memorandum from Kevin K. McAleenan, Acting Commissioner, U.S. Customs and Border Protection, to Deputy Sec’y of U.S. Customs and Border Patrol (Feb. 17, 2017), <https://www.aila.org/infonet/cbp-memo-executive-order-hiring-surge-plan>.

<sup>17</sup> Associated Press, *Two out of three Border Patrol job applicants fail polygraph test, making hiring difficult*, L.A. Times (Jan. 13, 2017), <https://www.latimes.com/local/lanow/la-me-border-patrol-lies-20170113-story.html>.

<sup>18</sup> *Id.*

ican Polygraph Association, failure rates of roughly 30 percent are normal for law enforcement hiring.<sup>19</sup>

Commenting on the agency's challenges with the administration of its polygraph examination, former CBP Commissioner Kerlikowske said, "the failure rate is too high, but that is largely because the agency has not attracted the applicants it wants. . . ." <sup>20</sup> During a hearing before the Subcommittee on Border and Maritime Security, House Committee on Homeland Security, then-Chairwoman Martha McSally commented on the need to take legislative action to resolve some of CBP's hiring challenges by waiving polygraph requirements for current state and local law enforcement officers who have already passed a polygraph examination, Federal law enforcement officers who have already passed a stringent background investigation, and veterans with at least three consecutive years in the military who have held a security clearance and passed a background check.<sup>21</sup>

These small changes will provide CBP with immediate relief so that they are able to quickly, yet judiciously, hire officers and agents from a pool of qualified applicants that already maintain the public's trust and put their lives on the line for our security and safety on a daily basis.<sup>22</sup>

S. 731 amends the Anti-Border Corruption Act of 2010 and authorizes the expansion of authority of the CBP Commissioner to waive the polygraph requirement for applicants that are current law enforcement officers. The bill outlines guidelines for the execution of waivers for law enforcement officers if they have three years of continuous service, are in good standing, and completed a background investigation at the level required to be a CBP officer. For active military or veterans, they must have served for three years, hold or have held a clearance, and undergone a background investigation to the level required to be a CBP officer.

### III. LEGISLATIVE HISTORY

Senator McSally (R-AZ) introduced S. 731, the Anti-Border Corruption Improvement Act, on March 7, 2019. The bill was referred to the Committee on Homeland Security and Governmental Affairs. Senator Braun (R-IN) joined as a cosponsor on March 13, 2019.

The Committee considered S. 731 at a business meeting on June 19, 2019. During the business meeting, Chairman Ron Johnson filed an amendment to clarify the necessary qualifications of a member or veteran of the Armed Forces who seeks a polygraph examination waiver. Chairman Johnson's amendment was adopted by voice vote with Senators Johnson, Portman, Paul, Lankford, Romney, Scott, Enzi, Hawley, Peters, Hassan, Sinema, and Rosen present.

Senator Maggie Hassan offered an amendment to only allow waivers for those members of the Armed Forces, veterans, or Federal law enforcement applicants who hold a Top Secret or TS-SCI clearance and for state and local law enforcement applicants that

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*On the Line: Border Security from an Agent and Officer Perspective: Hearing before the Subcomm. on Border and Maritime Sec. of the H. Comm. on Homeland Sec.*, 115th Cong. 3-4 (2018) (statement of Rep. Martha McSally, Chairwoman, H. Comm. on Homeland Sec.).

<sup>22</sup>*Id.* at 4.

have been polygraphed within the last three years, rather than ten years. The amendment also required the Commissioner of CBP to certify to Congress for each applicant that the applicant is not a threat to national security or public safety. Senator Hassan's amendment was not adopted by a roll call vote of 7–7. Senators Romney, Peters, Hassan, Sinema, and Rosen voted “yea”. Senators Carper and Harris voted “yea” by proxy. Senators Johnson, Portman, Paul, Lankford, Scott, Enzi, and Hawley voted “nay”.

The bill, as amended by the Johnson amendment, was ordered reported favorably by voice vote. Senators present for the vote were Johnson, Portman, Paul, Lankford, Romney, Scott, Enzi, Hawley, Peters, Hassan, Sinema, and Rosen. Senator Hassan asked to be recorded “no” for the record.

#### IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

##### *Section 1. Short title*

This section provides the bill's short title, the “Anti-Border Corruption Improvement Act.”

##### *Section 2. Hiring flexibility*

This section amends the Anti-Border Corruption Act of 2010 to provide the Commissioner of CBP the discretion to waive the pre-employment polygraph examination for any current full-time state or local law enforcement officer who has served continuously for at least three years, is currently in good standing, and has, within the last ten years, completed a polygraph. The polygraph waiver may also apply to a Federal law enforcement officer who has served continuously for at least three years, is currently in good standing, and holds a current background investigation level required to work with CBP. As for members of the military, including reserve branches and veterans, the Commissioner of CBP may waive the polygraph requirement if they have served for at least three years, are in good standing, eligible for or have received an honorable discharge, have held a clearance of Secret, Top Secret, or Top Secret/Sensitive Compartmented Information, have not received a waiver to obtain such a clearance, and holds a current background investigations required by CBP.

The waiver authority provided in this bill will sunset five years after enactment.

##### *Section 3. Supplemental commissioner authority; reporting; definitions*

This section eliminates section 4 of the Anti-Border Corruption Act of 2010 and inserts a new section 4, 5, and 6 as follows:

New section 4 states that the applicant who receives the waiver may not be exempt from other requirements in the CBP hiring process. Applicants receiving a waiver may also be subject to a further background investigation. Additionally, the bill would authorize Commissioner of CBP to administer a polygraph examination for eligible applicants and current employees who receive a waiver if it is determined that a polygraph examination is necessary to make a final determination for suitability for employment or continuous employment with CBP.

New section 5 states that each year for four years following the enactment of this bill, CBP is required to provide an annual report to Congress on the use of the waiver authorities provided in this bill. The annual report must include: the number of waivers requested, granted, and denied; justification for waiver denials; the results of each application for employment; number of times a polygraph was used when a background check determined one was necessary; the result of such polygraph exams; and the results of each application for employment from those that the supplemental polygraph is applied to.

New section 6 defines the terms “law enforcement officer”, “serious military or civil offense”, and “veteran”.

*Section 4. Technical and conforming amendment*

This section strikes out “section 3(1) of” from Section 411(c)(15) in the Homeland Security Act of 2002 where the job of the Commissioner of CBP is to now conduct polygraph exams, allowing flexibility for the waiver process.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 23, 2019.*

Hon. RON JOHNSON,  
*Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 731, the Anti-Border Corruption Improvement Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

PHILLIP L. SWAGEL,  
*Director.*

Enclosure.

<b>S. 731, Anti-Border Corruption Improvement Act</b>			
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on June 19, 2019			
By Fiscal Year, Millions of Dollars	2019	2019-2024	2019-2029
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Deficit Effect	0	0	0
Spending Subject to Appropriation (Outlays)	0	*	n.e.
Statutory pay-as-you-go procedures apply?	No	<b>Mandate Effects</b>	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
n.e. = not estimated; * = between -\$500,000 and \$500,000.			

Current law requires Customs and Border Protection (CBP) to administer polygraph examinations to nearly all applicants for law enforcement positions. S. 731 would broaden the criteria for waiving that requirement for certain applicants. Using information from CBP, CBO estimates that implementing the bill would have no significant effect on the agency's spending to vet applicants for law enforcement positions because the expanded exemption would probably not affect very many people.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

#### VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

### UNITED STATES CODE

\* \* \* \* \*

### TITLE 6—DOMESTIC SECURITY

\* \* \* \* \*

### CHAPTER 1—HOMELAND SECURITY ORGANIZATION

\* \* \* \* \*

### Subchapter IV—Border, Maritime, and Transportation Security

\* \* \* \* \*

**Part B—U.S. Customs and Border Protection**

\* \* \* \* \*

**SEC. 221. REQUIREMENTS WITH RESPECT TO ADMINISTERING POLYGRAPH EXAMINATIONS**

(a) \* \* \*

**[(b)]**

(b) *WAIVER AUTHORITY.—The Commissioner of U.S. Customs and Border Protection may waive the application of subsection (a)(1)—*  
*(1) with respect to any current, full-time, law enforcement officer employed by a State or local law enforcement agency who—*

*(A) has served as a law enforcement officer for at least 3 years with no break in service;*

*(B) is authorized by law to engage in, or supervise, the prevention, detection, investigation, prosecution, or incarceration of any person for any violation of law, and has statutory powers for arrest or apprehension;*

*(C) is not currently under investigation, has not been found to have engaged in criminal activity or serious misconduct, has not resigned from a law enforcement officer position under investigation or in lieu of termination, and has not been dismissed from a law enforcement officer position; and*

*(D) has, during the most recent 10-year period, successfully completed a polygraph examination that satisfies requirements established by the Secretary of Homeland Security, in consultation with the Director of National Intelligence, as a condition of employment with such officer's current law enforcement agency;*

*(2) with respect to any current, full-time, law enforcement officer employed by a Federal law enforcement agency who—*

*(A) has served as a law enforcement officer for at least 3 years with no break in service;*

*(B) has authority to make arrests, conduct investigations, conduct searches, make seizures, carry firearms, and serve orders, warrants, and other processes;*

*(C) is not currently under investigation, has not been found to have engaged in criminal activity or serious misconduct, has not resigned from a law enforcement officer position under investigation or in lieu of termination, and has not been dismissed from a law enforcement officer position; and*

*(D) holds a current background investigation to the level required for service as a law enforcement officer with U.S. Customs and Border Protection; and*

*(3) with respect to any individual who is a member of the Armed Forces (or a reserve component thereof) or a veteran who—*

*(A) has served in the Armed Forces for at least 3 years;*

*(B) holds, or has held during the most recent 5-year period, a Secret, Top Secret, or Top Secret/Sensitive Compartmented Information clearance;*

*(C) holds a current, in-scope background investigation to the level required for services as a law enforcement officer with U.S. Customs and Border Protection;*

*(D) received, or is eligible to receive, an honorable discharge from service in the Armed Forces and has not engaged in criminal activity or committed a serious military or civil offense under the Uniform Code of Military Justice; and*

*(E) was not granted any waivers to obtain the clearance referred to subparagraph (B).*

\* \* \* \* \*

## ANTI-BORDER CORRUPTION ACT OF 2010

### **[SEC. 4. PROGRESS REPORT**

Not later than 180 days after the date of the enactment of this Act, and every 180 days thereafter through the date that is 2 years after such date of enactment, the Secretary of Homeland Security shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives a report on the progress made by U.S. Customs and Border Protection toward complying with section 3.]

### **SEC. 4. SUPPLEMENTAL COMMISSIONER AUTHORITY**

*(a) NONEXEMPTION.—An individual who receives a waiver under section 3(b) shall not be exempt from other hiring requirements relating to suitability for employment and eligibility to hold a national security designated position, as determined by the Commissioner of U.S. Customs and Border Protection.*

*(b) BACKGROUND INVESTIGATIONS.—Any individual who receives a waiver under section 3(b) and holds a current background investigation may be subject to further background investigation to the level required for service as a law enforcement officer with U.S. Customs and Border Protection.*

*(c) CONTINUOUS EVALUATION.—Any individual who receives a waiver under section 3(b) shall not be exempt from any requirement relating to continuous evaluation established by the Commissioner of U.S. Customs and Border Protection.*

*(d) ADMINISTRATION OF POLYGRAPH EXAMINATION.—The Commissioner of U.S. Customs and Border Protection is authorized to administer a polygraph examination to an applicant or employee who is eligible for or receives a waiver under section 3(b) if information is discovered before the completion of a background investigation that results in a determination that a polygraph examination is necessary to make a final determination regarding suitability for employment or continued employment.*

### **SEC. 5. REPORTING**

Not later than 1 year after the date of the enactment of the Anti-Border Corruption Improvement Act and annually thereafter for the following 4 years, the Commissioner of U.S. Customs and Border Protection shall submit a report to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Homeland Security of the House of Representatives that identifies—

- (1)
  - (A) the number of waivers requested, granted, or denied, disaggregated with respect to each of paragraphs (1), (2), and (3) of section 3(b);
  - (B) the reasons for any denial referred to in subparagraph (A); and
  - (C) the final outcome of the application for employment at issue; and
- (2)
  - (A) the number of instances a polygraph examination was administered under the conditions described in section 4(d);
  - (B) the result of each examination referred to in subparagraph (A); and
  - (C) the final outcome of the application for employment at issue.

**SEC. 6. DEFINITIONS**

*In this Act:*

- (1) **LAW ENFORCEMENT OFFICER.**—The term “law enforcement officer” means any law enforcement officer described in section 8331(20) or 8401(17) of title 5, United States Code.
- (2) **SERIOUS MILITARY OR CIVIL OFFENSE.**—The term “serious military or civil offense” means an offense for which—
  - (A) a member of the Armed Forces may be discharged or separated from service in the Armed Forces; and
  - (B) a punitive discharge is, or would be, authorized for the same or a closely related offense under the Manual for Courts-Martial, pursuant to chapter 14–12 of Army Regulation 635–200.
- (3) **VETERAN.**—The term “veteran” has the meaning given such term in section 101(2) of title 38, United States Code.

\* \* \* \* \*

**HOMELAND SECURITY ACT OF 2002**

\* \* \* \* \*

**SEC. 411. ESTABLISHMENT OF U.S. CUSTOMS AND BORDER PROTECTION; COMMISSIONER, DEPUTY COMMISSIONER, AND OPERATIONAL OFFICES**

- (a) \* \* \*
- (b) \* \* \*
- (c) \* \* \*
  - (1) \* \* \*

\* \* \* \* \*

(15) conduct polygraph examinations in accordance with [section 3(1) of] the Anti-Border Corruption Act of 2010 (Public Law 111–376; 124 Stat. 4105);

\* \* \* \* \*