

The Department of Homeland Security, 20 Years On

A Blueprint for Civil Liberties Reform



ACLU

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Introduction

Twenty years ago today, the Department of Homeland Security (DHS) was born. President George W. Bush signed into law the Homeland Security Act of 2002, spawning the largest reorganization of the federal government in more than half a century.¹ It brought together 22 offices from five federal departments, through legislation the president and Congress framed as a response to the September 11, 2001, attacks. Even at its creation, the ACLU warned that this mammoth agency, with its sprawling and politically driven mandate, “would reach into every nook and cranny of our lives and liberty.”²

And in many ways, our fears have been realized. “DHS’s overbroad mandate and unchecked powers have turned it into a tinderbox, now ignited by a president willing to trample on the constitutional limits of presidential powers,” ACLU Executive Director Anthony Romero wrote in 2020.³ This came after the Trump administration sent DHS personnel to racial justice protests across the country, resulting in reports that DHS agents beat demonstrators, grabbed individuals and forced them into unmarked vans, and unlawfully arrested dozens.⁴

We all have to act on the lesson we learned. “If there is one thing we have learned from the authoritarianism on display in Portland, it’s that we have to remove the loaded weapon that sits on the proverbial coffee table in the Oval Office,” we warned. The ACLU called for the dismantling of the department into its component parts and for a reduction of its budget to “allow for more effective oversight, accountability and public transparency ... [and ensure] the spun-off agencies will have clearer missions and more limited functions.”⁵

The ACLU was not alone in sounding the alarm. “I can’t get my vote back, but Congress can both condemn this gross tyranny and then restructure the department,” wrote former Sen. Barbara Boxer, who voted for the bill authorizing creation of DHS.⁶ For many observers, DHS’s attacks on protestors were the tip of the iceberg. “From the implementation of the travel ban, to the enactment of the family separation policy, to the aggressive deployment of tactical units to Portland, Oregon, DHS has, unfortunately, revealed itself as an institution that is not capable of withstanding inappropriate political pressure,” according to the Center for a New American Security.⁷

¹ Homeland Security Act of 2002, Pub. L. No. 107-296, § 841(a)(2), 116 Stat. 2135, 2229-33.

² ACLU, “ACLU Cautions Congress on New Bush Homeland Security Proposal; Says Oversight Needed to Maintain Safety and Liberty,” June 7, 2002, <https://www.aclu.org/press-releases/aclu-cautions-congress-new-bush-homeland-security-proposal-says-oversight-needed>.

³ Anthony Romero, “Dismantle the Department of Homeland Security,” USA Today, August 9, 2020, <https://www.usatoday.com/story/opinion/2020/08/09/dhs-portland-civil-liberties-abuses-black-lives-matter-homeland-column/3319009001/>.

⁴ Ibid; NPR, “Federal Officers Use Unmarked Vehicles to Grab People in Portland, DHS Confirms,” July 17, 2020, <https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland>.

⁵ Romero, “Dismantle the Department of Homeland Security.”

⁶ Barbara Boxer, “DHS Was a Mistake. I Regret Voting for It,” Washington Post, July 25, 2020, <https://www.washingtonpost.com/outlook/2020/07/25/barbara-boxer-regret-dhs/>.

⁷ Prepared Statement of Carrie Cordero before the House Committee on Homeland Security, “Securing the Homeland: Reforming DHS To Meet Today’s Threats,” 117th Congress, Serial No. 117-22, July 15, 2021, <https://www.congress.gov/117/chrg/CHRG-117hhrg45751/CHRG-117hhrg45751.pdf>.

Today, DHS oversees more than 62,000 federal law enforcement officers, by far the largest of any single federal agency.⁸ It is the third largest Cabinet department. In many respects, the agency is too big to succeed. Its sprawling nature and entrenched systems, practices, and culture make meaningful oversight increasingly difficult. Just two components, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), received 86 percent more in federal funding than the Federal Bureau of Investigation; Bureau of Alcohol, Tobacco, Firearms and Explosives; and Drug Enforcement Agency combined last year.⁹ “They keep making the case for more money from Congress by continually saying that they’re failing at their mission,” the former head of the Immigration and Naturalization Service Doris Meissner has said. “And Congress keeps pouring more and more money in.”¹⁰

The Biden administration has shifted away from the Trump administration’s use of DHS to police protests and abandoned several abusive programs. But in too many ways, DHS remains on course to continue imperiling civil liberties.

Back in 2002, we at the ACLU called the initial blueprints for the behemoth bureaucracy “constitutionally bankrupt.”¹¹ In 2020, we came to the conclusion that “Department of Homeland Security isn’t capable of acting consistently with the Constitution, and should no longer exist in its current state.”¹² And we still believe that. In this paper, we outline 15 areas of reform for DHS Secretary Mayorkas and Congress to consider. These fixes are not enough, as the problems causing the DHS threats to civil liberties are both pervasive and deeply ingrained — but they are an important start:

1. Limit Immigration Enforcement Operations in U.S. Communities

The creation of DHS brought components of the Immigration and Naturalization Service into the fold of a national security-driven agency, explicitly linking immigration enforcement with countering terrorism. Subsequently, [funding for immigration enforcement soared](#) — driven by a misplaced security mandate, rather than documented need. In 2003, the newly created DHS

⁸ U.S. Department of Justice (DOJ), Bureau of Justice Statistics, Office of Justice Programs, “Federal Law Enforcement Officers, 2016 - Statistical Tables,” October 2019, <https://bjs.ojp.gov/content/pub/pdf/fleo16st.pdf>.

⁹ Library of Congress, Congressional Research Service (CRS), “Department of Homeland Security Appropriations: FY2022,” March 24, 2022, <https://crsreports.congress.gov/product/pdf/R/R47005> (reporting a combined 27.4 billion in enacted funding for these agencies); CRS, “Overview of FY2022 Appropriations for Commerce, Justice, Science, and Related Agencies (CJS),” May 11, 2022, <https://crsreports.congress.gov/product/pdf/R/R46868> (reporting a combined \$14.7 billion in enacted funding for these agencies).

¹⁰ Jonathan Blitzer, “Is it Time to Defund the Department of Homeland Security?,” *New Yorker*, July 24, 2020, <https://perma.cc/VZ8V-5LX3>.

¹¹ ACLU press release, “ACLU Says Homeland Security Bill Step Backward; Demands Senate Include Civil Liberties Protections,” September 24, 2002, <https://www.aclu.org/press-releases/aclu-says-homeland-security-bill-step-backward-demands-senate-include-civil-liberties>.

¹² Anthony D. Romero, “Dismantle the Department of Homeland Security. It’s Tactics are Fearsome,” ACLU, August 11, 2020, <https://www.aclu.org/news/immigrants-rights/dismantle-the-department-of-homeland-security-its-tactics-are-fearsome>.

announced [Operation Endgame](#): a plan to deport every deportable immigrant by 2012, requiring the development of new, expansive enforcement and detention infrastructure.¹³ Over the subsequent decade, driven by this new excess funding, ICE developed the capacity to reach into communities across the nation.

As a result, for the last two decades, millions of people across the nation have lived in heightened fear of encountering ICE agents in their communities, knowing it could lead to their deportation or the deportation of loved ones and the separation of their families. Afraid of ICE, people avoid any law enforcement agent who could be an ICE agent in disguise, or who could be collaborating with ICE. As [law enforcement leaders](#) have pointed out, this perversely has undermined public safety — fewer people are willing to seek police protection, provide tips about serious crimes, and come forward as witnesses.¹⁴

After the September 11, 2001, attacks, ICE cultivated relationships with local law enforcement agencies across the nation — using them to help identify, detain, and deport immigrants with whom they come in contact. These programs were initially justified on national security grounds. In fact, they were vehicles for racist law enforcement agencies to engage in harassment and abuse of immigrant communities.¹⁵

Rather than providing any proven law enforcement benefit, these ICE-law enforcement collaboration programs have resulted in [racial profiling](#): Local police are emboldened to stop, arrest, and bring low-level charges against people who “look” like immigrants, with the actual aim of helping ICE deport them.¹⁶ The Trump administration massively expanded ICE’s notorious 287(g) program — recruiting some of the most xenophobic and racist sheriffs in the country to partner in its deportation agenda and deputizing them to do federal immigration enforcement.¹⁷ Despite President Biden’s [campaign promise](#) to roll the 287(g) program back, it remains mostly intact. The ACLU has urged DHS to [end the 287\(g\) program](#), starting with [54 law enforcement agencies](#) with egregious civil rights records.¹⁸

¹³ U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), “ENDGAME Office of Detention and Removal Strategic Plan 2003-2012: Detention and Removal Strategy for a Secure Homeland,” June 27, 2003, <https://irp.fas.org/agency/dhs/endgame.pdf>; ACLU, “Briefing Materials Submitted to the U.N. Special Rapporteur on the Human Rights of Migrants, Detention and Deportation Working Group,”

https://www.aclu.org/sites/default/files/pdfs/humanrights/detention_deportation_briefing.pdf.

¹⁴ Pia Orrenius and Madeline Zavodny, “Do Immigrants Threaten US Public Safety?,” *Journal on Migration and Human Security* 7, no. 3 (September 2019): 52-61,

<https://journals.sagepub.com/doi/pdf/10.1177/2331502419857083>; Reva Dhingra, Mitchell Kilborn, and Olivia Woldemikael, “Immigration Policies and Access to the Justice System: The Effect of Enforcement Escalations on Undocumented Immigrants and Their Communities,” *Political Behavior* (2021), <https://doi.org/10.1007/s11109-020-09663-w>; DOJ, Office of Community Oriented Policing Services, President’s Task Force on 21st Century Policing, “Final Report of the President’s Task Force on 21st Century Policing,” May 2015, https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

¹⁵ ACLU, “License to Abuse: How ICE’s 287(g) Program Empowers Racist Sheriffs and Civil Rights Violations,” April 2022, 18 <https://www.aclu.org/report/license-abuse-how-ices-287g-program-empowers-racist-sheriffs?redirect=sheriffs-report>.

¹⁶ *Ibid.*

¹⁷ Huyen Pham, “287(g) Agreements in the Trump Era,” *Washington and Lee Law Review* (July 2018), <https://scholarship.law.tamu.edu/facscholar/1299/>.

¹⁸ ACLU, “Letter from the ACLU to DHS Secretary Mayorkas, Re: Terminating 287(g) Agreements,” August 9, 2022, <https://www.aclu.org/letter/letter-mayorkas-287g>.

The ACLU has also urged DHS to prohibit ICE’s practice of impersonating police. For years, ICE agents have [posed as police officers](#) investigating crimes and [public safety threats](#) when [knocking on the doors of people’s homes](#) in order to gain entry to their homes without a warrant — a practice we have [challenged in court](#) as a violation of the Fourth Amendment. In the same vein, ICE agents have used unmarked vehicles to create the false impression that they are engaged in routine traffic stops. During the Trump administration, ICE targeted routes heavily used by farm workers on their way to work.¹⁹ In one tragic case, a couple died in a car accident after initially stopping for ICE agents in an unmarked car, leaving behind five orphaned children.²⁰ The ACLU has also received complaints of ICE agents blocking cars with multiple unmarked vehicles, approaching immigrants with rifles pointed and threatening to shoot unless they roll down their windows, and conducting such operations while wearing tactical gear emblazoned with “police.”

DHS should prohibit ICE from impersonating police in its civil immigration enforcement operations. And DHS should require ICE agents secure supervisory approval prior to any civil immigration enforcement operation taking place on American streets, in light of the potential harms to public safety.

2. End ICE’s For-Profit Immigrant Detention

Since the 1990s, the detention of immigrants has [exploded](#)— from an average of 7,000 individuals detained on any given day in 1994, to 19,000 in 2001, and 57,000 at its peak during the Trump administration.²¹ It’s been a boon to for-profit private prison giants CoreCivic and Geo Group, which received a combined \$4.2 billion in revenue in 2022.²² These companies

¹⁹ Rosana Xia, “At Least Two Dozen Kern County Farmworkers Arrested in Latest Immigration Sweep Across California,” Los Angeles Times, March 4, 2018, <https://www.latimes.com/local/lanow/la-me-kern-county-farmer-ice-arrests-20180304-story.html>; Harold Pierce, “Immigration Agents Conducting Operation in Kern County Detain at Least 24 Undocumented Farmworkers,” Bakersfield Californian, March 1, 2018, https://www.bakersfield.com/news/immigration-agents-conducting-operation-in-kern-county-detain-at-least-24-undocumented-farmworkers/article_82ad03be-1db6-11e8-b3c9-1b53b406b402.html; Taylor Schaub, “Grandmother Arrested by ICE”, January 8, 2020, KGET, <https://www.kget.com/news/local-news/grandmother-arrested-by-ice/>.

²⁰ Don Sweeney, “Fleeing Immigration Agents, Couple Dies in Car Crash in Rural California,” Sacramento Bee, March 14, 2018, <https://www.sacbee.com/news/california/article205187524.html>.

²¹ ACLU, “Justice Free Zones: U.S. Immigration Detention Under the Trump Administration,” 2020, 14, <https://www.aclu.org/report/justice-free-zones-us-immigration-detention-under-trump-administration>; <https://www.detentionwatchnetwork.org/issues/detention-101#:~:text=The%20average%20daily%20population%20of,held%20more%20than%20500%2C000%20immigrants.>

²² Geo Group’s reported revenue in 2022 was \$2.35 billion; CoreCivic’s was 1.85 billion. Market Beat, “The GEO Group – GEO Stock Forecast, Price & News,” [https://www.marketbeat.com/instant-alerts/nyse-geo-earnings-guidance-2022-10/#:~:text=The%20GEO%20Group%20\(NYSE%3AGEO%20%2D%20Get%20Rating\)%20updated,venue%20estimate%20of%20%242.35%20billion](https://www.marketbeat.com/instant-alerts/nyse-geo-earnings-guidance-2022-10/#:~:text=The%20GEO%20Group%20(NYSE%3AGEO%20%2D%20Get%20Rating)%20updated,venue%20estimate%20of%20%242.35%20billion;);

continue to pocket hundreds of millions in taxpayer dollars from ICE, enabling them to [project growth to their investors](#) despite President Biden’s 2021 executive order phasing out private prison contracts with the Justice Department.²³ Indeed, much of the \$3 billion for immigrant detention that Congress allocated last year went to private companies, which hold four out of five detained immigrants.²⁴

And the money is wasted. Private prison companies have sweetheart deals with ICE — “guaranteed minimums” obligating the government to pay out even if detention beds are empty.²⁵ During the height of the pandemic, ICE was paying more than \$1 million a day for empty beds.

Mass immigrant detention is harmful and deprives people of liberty — and it is unnecessary. Most individuals in ICE detention are locked up pending adjudication of their civil immigration cases, which means they have not been ordered deported and in fact very well may have the legal right to remain in the United States. Many languish in detention for months and years for no reason, only to win their cases. Even people who have won their cases sometimes continue to be detained pending appeals by DHS, during proceedings that can last for years.

In detention, people suffer medical neglect, sexual assault, dangerously unsanitary conditions, beatings, and retaliation when they protest.²⁶ Detention site operators, including the private prison giants, often enjoy impunity for these abuses.²⁷

In summer 2022, as ICE was poised to [spend more taxpayer funds than ever](#), the agency had a budget deficit of \$345 million for the fiscal year.²⁸ With its coffers running dry, ICE should be ending private prison contracts, shuttering abusive detention sites, and supporting community-based alternatives to detention that enable immigrants to navigate the immigration system and fairly make their case for protection from deportation.

[https://companiesmarketcap.com/corecivic/revenue/#:~:text=Revenue%20in%202022%20\(TTM\)%3A,tat%20were%20of%20%241.90%20B.](https://companiesmarketcap.com/corecivic/revenue/#:~:text=Revenue%20in%202022%20(TTM)%3A,tat%20were%20of%20%241.90%20B.)

²³ Chris Geldner, “A Year after Biden’s Executive Order on Private Prisons, Business Is Booming,” Grid, January 26, 2022, <https://www.grid.news/story/politics/2022/01/26/a-year-after-bidens-executive-order-on-private-prisons-business-is-still-booming/>.

²⁴ ACLU, “More of the Same: Private Prison Corporations and Immigration Detention Centers under the Biden Administration,” by Eunice Cho, October 5, 2021, <https://www.aclu.org/news/immigrants-rights/more-of-the-same-private-prison-corporations-and-immigration-detention-under-the-biden-administration>.

²⁵ U.S. Government Accountability Office, “Immigration Detention: Actions Needed to Improve Planning, Documentation, and Oversight of Detention Facility Contracts,” GAO-21-149, February 12, 2021, <https://www.gao.gov/products/gao-21-149>.

²⁶ ACLU, “September 2022 Letter to DHS Secretary Mayorkas on ICE Detention,” September 6, 2022, <https://www.aclu.org/letter/september-2022-aclu-letter-dhs-secretary-mayorkas-ice-detention>.

²⁷ National Immigrant Justice Center, “Policy Brief: Cut the Contracts: It’s Time to End ICE’s Corrupt Detention Management System,” March 16, 2021, <https://immigrantjustice.org/research-items/policy-brief-cut-contracts-its-time-end-ices-corrupt-detention-management-system>.

²⁸ Stef W. Kight, “Scoop: ICE Is Short \$345 Million, Poised to Spend More Than Ever,” Axios, July 13, 2022, <https://www.axios.com/2022/07/14/ice-immigration-spending-border-budget>.

3. Prevent DHS From Acting as an Unaccountable, General Police Force

In an example of [extreme mission creep](#) and [politicization](#), in summer 2020, Trump administration officials sent DHS personnel to respond to 2020 racial justice protests, including New York, Washington, D.C., and Portland, Oregon.²⁹ They were roundly [criticized](#) for their aggressive behavior, refusal to identify themselves, specious arrests, and [attacks](#) on medics, legal observers, and journalists.³⁰ One former DHS official [told](#) The New Yorker that the decision to utilize DHS to curtail protests amounted to “the political use of law enforcement in an election year.”³¹ Indeed, DHS officials at the time seemed keen on wading into domestic political debates and mirroring Trump’s demagoguery, with acting CBP Director Mark Morgan [calling](#) protesters “criminal thugs with an agenda” and Deputy DHS Secretary Ken Cuccinelli [accusing](#) some protesters of “terrorism.”³²

CBP aircraft were also used to surveil protests in over a dozen cities, a move [denounced](#) by several members of the House Oversight Committee as “a gross abuse of authority and is particularly chilling when used against Americans who are protesting law enforcement brutality.”³³ “A secretive, nationwide police force — created without congressional input or authorization, formed from highly politicized agencies, tasked with rooting out vague threats and answerable only to the president — is a nightmare out of the fever dreams of the founding generation,” wrote columnist Jamelle Bouie. Then-candidate Biden spoke out, urging that while federal law enforcement has a “duty to protect federal property,” this can be done “without trying to stoke the fires of division in this country.”³⁴

No president should ever again be able to use ICE and CBP agents as a politicized, national police force, especially one used to monitor, strong-arm, or arrest their perceived political

²⁹ Mary Harris, “How DHS Went to War With the American People,” Slate, July 28, 2020, <https://slate.com/news-and-politics/2020/07/dhs-portland-protests-violence-ice.html>; Nick Miroff, “DHS’s Changing Mission Leaves Its Founders Dismayed As Critics Call for a Breakup,” Washington Post, August 13, 2020, https://www.washingtonpost.com/national/dhs-mission-creep-protests/2020/08/13/44a287ce-dc8b-11ea-b4af-72895e22941d_story.html.

³⁰ U.S. Senate, Office of Sen. Patrick Leahy, “Harris, 17 Senators Demand Answers on Federal Law Enforcement Presence in American Cities,” July 22, 2020, <https://www.leahy.senate.gov/press/harris-17-senators-demand-answers-on-federal-law-enforcement-presence-in-american-cities>; ACLU, “Chad Wolf’s Desperate Attempt to Rewrite History,” by Abdullah Hasan, August 17, 2020, <https://www.aclu.org/news/free-speech/chad-wolfs-desperate-attempt-to-rewrite-history>.

³¹ Blitzer, “Is It Time To Defund.”

³² Fox 12 staff, “Portland among Three US Cities with CBP Agents Guarding Federal Property over Holiday Weekend,” Fox 12, July 6, 2020, <https://www.kptv.com/2020/07/06/portland-among-three-us-cities-with-cbp-agents-guarding-federal-property-over-holiday-weekend/>; Evan Goodenow, “Cuccinelli: Some Protesters Are Terrorists,” Winchester Star, August 10, 2020, https://www.winchesterstar.com/winchester_star/cuccinelli-some-protesters-are-terrorists/article_2df2f174-527a-51ae-8055-807768b26916.html.

³³ U.S. Congress, House Committee on Oversight and Reform, “Letter to Chad Wolf,” June 5, 2020, https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-06-05.CBM%20et.%20al%20to%20Wolf-%20DHS%20re%20Peaceful%20Protestors_o.pdf.

³⁴ Democratic National Committee, “Statement from Joe Biden on the Department of Homeland Security Presence in Portland,” July 7, 2020, <https://joebiden.com/2020/07/21/statement-from-vp-biden-on-the-department-of-homeland-security-presence-in-portland/#>.

opponents. While members of Congress have [spoken out](#) against the politicization of the department and have made headway to [ensure](#) that agents identify themselves, Congress still needs to use the appropriations process to prevent DHS, especially ICE and CBP, from using taxpayer money for political ends. At the same time, DHS itself must undertake reform including issuing a directive requiring that agents uniformly comply with full Fourth Amendment standards throughout the United States, invasive technologies must be rolled back and come under independent oversight, and the large-scale suspicionless collection of personal information should be prohibited.

4. **Abandon the Failed and Illegal “Deterrence” Approach to Asylum and Border Management**

Under U.S. law far predating the formation of DHS, people fleeing persecution and seeking safety in the United States have a legal right — under domestic and international humanitarian laws — to do so at the border or in the United States, no matter how they enter. Yet DHS has promulgated and remains committed to policies purely aimed at limiting the number of people seeking asylum, particularly at the U.S.-Mexico border. These policies find their foundation in a “prevention through deterrence” model of border enforcement first adopted by CBP prior to its formation under DHS in 2003. This deterrence model has never resulted in a reduction in the number of people seeking safety at the border, and it has fostered an abusive culture within CBP aimed at punishing people in its custody so they will never again return.

The Trump administration took the deterrence approach farthest — seeking to weaponize, and ultimately end, asylum access at the border through the so-called “Migration Protection Protocols” and the “Prompt Asylum Claim Review” and “Humanitarian Asylum Review Process” ([PACR/HARP](#))³⁵ policy, among other policies. Trump’s DHS achieved a nearly complete end to asylum access at the border by co-opting the COVID-19 pandemic to falsely justify summary expulsions, under a policy known as Title 42. President Biden kept the Title 42 policy in place and has unlawfully expelled more people under the policy than the Trump administration, failing to fulfill his promise to “restore asylum laws” and “recommit to building a more inclusive and welcoming America.”³⁶

Beyond abusive asylum laws aimed at cutting off the legal right to seek asylum, the “prevention through deterrence” approach inculcated a culture of abuse at CBP. Numerous examples of this culture exist, from a private Facebook group filled with CBP personnel posting racist and sexually violent anti-immigrant images, to the lawyer for one Border Patrol agent who hit a Guatemalan man with his Border Patrol vehicle arguing in court that the agent’s dehumanizing

³⁵ Kate Huddleston, “Ending PACR/An Urgent Step Toward Restoring Humane Asylum,” Just Security, <https://www.justsecurity.org/74678/ending-pacr-harp-an-urgent-step-toward-restoring-humane-asylum-policy/>

³⁶ President Joe Biden (@POTUS), “My Statement on World Refugee Day,” Twitter, June 20, 2020, <https://medium.com/@JoeBiden/my-statement-on-world-refugee-day-fddb4abddfd5>

and violent text messages were “commonplace” and “part of the agency’s culture.” That culture has translated into violence against migrants in custody, where reports of sleep deprivation, lack of medical attention, lack of food and water, and verbal abuse and threats by agents are rampant. DHS should disavow prevention through deterrence as a policy approach. A commitment to humane treatment and due process should guide CBP’s approach to their work at the border. The agency should limit CBP’s role to initial arrest and processing and eliminate its role in accessing the asylum system. Arriving migrants should spend only the minimum amount of time in CBP custody needed for initial processing. The agency should take further steps to end and prevent the use of policies aimed at blocking asylum access and continue steps to eliminating Title 42 expulsions.

5. Reform CBP’s Role in Border Communities

Since being absorbed into the newly formed DHS in 2003, CBP has received unprecedented funding from Congress and is now the largest law enforcement agency in the United States — without proportionate limitations and oversight to protect against abuse. It includes both CBP Office of Field Operations and Border Patrol — nearly 20,000 Border Patrol agents and 60,000 officers overall.³⁷ CBP’s budget has nearly tripled since joining DHS, ballooning from \$5.9 billion in 2003 to over \$16 billion in 2022.³⁸

While debates about CBP often focus on its role in border management, it frequently acts far beyond the immediate border. CBP patrols an expansive region of the Southwest that some 15 million people call home, and the authorities it claims extend throughout the so-called 100-mile border zone, in which two-thirds of the U.S. population live.

Over the last 20 years, Border Patrol’s abuses in the 100-mile border zone have grown increasingly violent and frequent. In just the last decade, at least 243 people have died in [fatal encounters](#) with CBP personnel.³⁹ Since just 2019, the number of deaths resulting from Border Patrol [vehicle pursuits](#) in border communities have skyrocketed by over elevenfold, causing the needless deaths of migrants and U.S. citizens.⁴⁰

CBP racially profiles, stops, and harasses local residents, including in northern border states like [Michigan](#) — frequently in violation of the Constitution. The agency also operates over 40 permanent checkpoints that individuals must pass through to leave the border region, blocking border communities from free movement and access to essential services, like vital medical and

³⁷ American Immigration Council, “The Cost of Immigration Enforcement and Border Security,” January 20, 2021, [https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security#:~:text=Since%202003%2C%20the%20budget%20of,FY%202021%20\(Figure%202\).](https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security#:~:text=Since%202003%2C%20the%20budget%20of,FY%202021%20(Figure%202).)

³⁸ Ibid, Figure 3, 23, https://www.dhs.gov/sites/default/files/publications/dhs_bib_-_web_version_-_final_508.pdf.

³⁹ ACLU of Texas, “CBP Fatal Encounters Tracker,” 2020, <https://www.aclutx.org/en/cbp-fatal-encounters-tracker>.

⁴⁰ ACLU of Texas, “Fact Sheet: The Deadly Trend of Border Patrol Vehicle Pursuits,” August 5, 2022, <https://www.aclutx.org/en/fact-sheet-deadly-trend-border-patrol-vehicle-pursuits>.

reproductive care. Now that multiple states along the southern border have partial or full abortion bans, leaving large populations trapped behind Border Patrol checkpoints without access to abortion services is particularly harmful.

To rein in abuses in U.S. communities across the border regions, the administration must take concerted and immediate action. DHS should direct CBP to fully comply with Fourth Amendment standards, publish vital data on racial profiling and other agency activities in border communities, hold CBP personnel accountable for their abuses, and work towards reducing both the number of excess Border Patrol agents and the jurisdictional reach of the border zone.⁴¹

6. Hold CBP Accountable for Human Rights Abuses

CBP has been at the heart of some of the most troubling [abuses of recent years](#), from family separation to holding families and children in outdoor cages to keeping unaccompanied children in inhumane conditions.⁴² The ACLU and others have identified [patterns](#) of harassment, discrimination, and violence by CBP officers, and have filed numerous complaints with the agency on a range of abuses.⁴³ Yet internal accountability mechanisms across DHS have lagged far behind its rapidly expanding personnel and budget.

CBP officers almost [never face consequences](#) for their actions, and some deaths even go unreported. Even efforts to hold CBP agents accountable for the murder of individuals have failed.⁴⁴ Far too many agents bully people in their custody, including children and LGBTQIA+ people; ignore pleas for medical attention; and verbally abuse people in their custody. They operate with impunity, knowing that they are unlikely to be held accountable for misconduct or even more serious abuses.⁴⁵ The agency even operated for years internal investigation units that did not actually conduct fair investigations but instead were tasked with helping agents to evade liability for deaths and injuries they caused while on duty. As James Tomsheck, CBP's former [internal affairs chief](#), has described, the agency "goes out of its way to evade legal restraints" and

⁴¹ ACLU, "Restoring Civil Liberties and Ending Militarization," <https://www.aclu.org/other/restoring-civil-liberties-and-ending-militarization-border-communities>

⁴² ACLU, "Addressing Racialized Violence Against Migrants Requires a Complete Overhaul of Customs and Border Protections," by Shaw Drake and Kate Huddleston, September 24, 2021, <https://www.aclu.org/news/immigrants-rights/addressing-racialized-violence-against-migrants-requires-a-complete-overhaul-of-customs-and-border-protection>.

⁴³ ACLU, "ACLU Calls On Biden Administration to Address CBP Abuses at Border," March 5, 2021, <https://www.aclu.org/press-releases/aclu-calls-biden-administration-address-cbp-abuses-border>.

⁴⁴ A. C. Thompson, "Why Border Patrol Agents Are Not Held Accountable for Wrongdoing," Pacific Standard, June 24, 2019, <https://psmag.com/social-justice/why-border-patrol-agents-are-not-held-accountable-for-wrongdoing>.

⁴⁵ A. C. Thompson, "Years Ago, the Border Patrol's Discipline System Was Denounced As 'Broken.' It's Still Not Fixed," ProPublica, June 20, 2019, <https://www.propublica.org/article/border-patrol-discipline-system-was-denounced-as-broken-still-not-fixed>.

is “clearly engineered to interfere with [oversight] efforts to hold the Border Patrol accountable.”⁴⁶

Internal accountability mechanisms across DHS need to be overhauled. CBP’s Office of Professional Responsibility (OPR) was granted criminal investigation power in 2016 but still lacks internal policies to implement related legislative requirements. DHS’s Office for Civil Rights and Civil Liberties (CRCL) issues internal nonpublic recommendations that agency components are under no obligation to implement, and the Office of Inspector General can issue reports and recommendations which also have little effect in securing change. CBP’s own discipline procedures are also broken and rarely result in meaningful actions taken against offending personnel.

Addressing impunity within the agency must start with DHS taking steps to bolster the role and authority of the CBP OPR and CRCL. DHS should require both entities to publicly report the outcomes of their investigations and recommendations — a reform members of Congress have [proposed](#). The agency should also ensure all internal policies are made public and available for public scrutiny and congressional oversight. DHS should update use of force and vehicle pursuit policies to align them with professional best practices,⁴⁷ better protect people from deadly encounters, and improve accountability. Finally, the agency’s disciplinary system should be overhauled to remove barriers, such as chain-of-command ability to override OPR discipline recommendations, to consistent and transparent accountability for misconduct.

7. Issue Comprehensive and Meaningful Anti-Discrimination Policy

DHS leadership has the power to remedy a fundamental rights problem cutting across its components and activities: DHS’s anti-discrimination policies permit discrimination. DHS purports to reject racial and ethnic profiling and to protect civil rights and liberties, committing to “fair, unbiased, and transparent enforcement” of the nation’s laws.⁴⁸ Yet it has deliberately chosen to maintain loopholes in its patchwork of anti-discrimination policies. As a result, allowing the nation’s largest federal law enforcement agency has given itself license to discriminate against people on the basis of their constitutionally protected traits in core national security, intelligence gathering, and border functions. As a result, DHS agencies have unfairly and wrongly targeted Muslims, Black, and Brown people and other marginalized communities,

⁴⁶ NPR, “Former Border Protection Insider Alleges Corruption, Distortion in Agency,” by Carrie Johnson, August 28, 2014, <https://www.npr.org/2014/08/28/343748572/former-border-protection-insider-alleges-corruption-distortion-in-agency>.

⁴⁷ ACLU of Texas, “Fact Sheet.”

⁴⁸ DHS, Memorandum from Secretary Napolitano for Component Heads, “The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities,” April 26, 2013, https://www.dhs.gov/sites/default/files/publications/secretary-memo-race-neutrality-2013_0.pdf; DHS, “Fact Sheet: U.S. Department of Justice Racial Profiling Guidance,” December 8, 2014, <https://www.dhs.gov/news/2014/12/08/fact-sheet-us-department-justice-racial-profiling-guidance>; DOJ, Civil Rights Division, “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,” June 2003, https://www.dhs.gov/xlibrary/assets/training/xus/crcl/racelawofficers/Common/pdf/doj_profiling_guidance.pdf.

including those engaged in First Amendment-protected activities, for surveillance, investigation, prosecution, placement on terrorism watchlists, and denial or delay of immigration benefits.

DHS has never had a comprehensive and meaningful anti-discrimination policy. In response to impacted communities' and rights groups' pressure, DHS issued its first major anti-discrimination guidance in 2013 — but that guidance, together with subsequent policies, exempted its national and border security functions from meaningful protections.⁴⁹ To this day, the DHS guidance documents fail to prohibit discrimination based on religion, gender and gender identity, and sexual orientation. This is particularly concerning given, for example, DHS's history of disproportionately profiling and wrongly watchlisting Muslims.⁵⁰ Even when the DHS Guidance purports to protect traits such as race and ethnicity, it allows consideration of them where there is “a compelling government interest.”⁵¹ This is a significant loophole because DHS unfailingly claims its national security function is a compelling government interest — a broad and elastic exception that swallows the protective rule.⁵²

The DHS Guidance and policies also permit profiling on the basis of national origin and nationality when “such consideration is based on an assessment of intelligence and risk” — another glaring loophole.⁵³ Given the opaque and flawed nature of DHS's risk assessments and methods, this loophole can also be used as a proxy for race, religion, and ethnicity and serve as a pretext for profiling on the basis of these protected traits.⁵⁴

⁴⁹ The DHS Guidance and Fact Sheet incorporate the Justice Department's 2003 and 2014 Guidance on Race, which explicitly does not apply to national and border security. DOJ, “Guidance Regarding the Use of Race”; DOJ, “Guidance for Federal Law Enforcement Agencies Regarding The Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity,” December 2014, https://www.dhs.gov/sites/default/files/publications/use-of-race-policy_o.pdf; DHS, “CBP Policy on Nondiscrimination in Law Enforcement Activities and All Other Administered Programs,” last modified February 24, 2020, <https://www.cbp.gov/about/eeo-diversity/policies/nondiscrimination-law-enforcement-activities-and-all-other-administered>; Matt Apuzzo and Michael S. Schmidt, “U.S. to Continue Racial, Ethnic Profiling in Border Policy,” New York Times, December 5, 2014, <https://www.nytimes.com/2014/12/06/us/politics/obama-to-impose-racial-profiling-curbs-with-exceptions.html>. To cite just one example, a March 2021 ACLU report examining Border Patrol activities in Michigan found evidence of rampant profiling: over 96% of people arrested by the Border Patrol's Detroit Sector were recorded as being “Black,” “Dark Brown,” “Dark,” “Light Brown,” “Medium Brown,” “Medium,” or “Yellow.” ACLU of Michigan, “The Border's Long Shadow: How Border Patrol Uses Racial Profiling and Local and State Police to Target and Instill Fear in Michigan's Immigrant Communities,” March 2021, 4, https://www.aclumich.org/sites/default/files/field_documents/100_mile_zone_report_updated.pdf.

⁵⁰ ACLU, “*Kariye v. Mayorkas*,” March 23, 2022, <https://www.aclu.org/cases/kariye-v-mayorkas>; ACLU, “*Chebli v. Kable*: Lawsuit Challenging Placement on No Fly List,” May 12, 2021, <https://www.aclu.org/cases/chebli-v-kable-lawsuit-challenging-placement-no-fly-list>); Jeremy Scahill and Ryan Devereaux, “Watch Commander: Barack Obama's Secret Terrorist-Tracking System, by the Numbers,” Intercept, August 6, 2014, <https://theintercept.com/2014/08/05/watch-commander/>.

⁵¹ DHS Guidance at 1.

⁵² Brennan Center for Justice, “Courts Have Been Hiding Behind National Security for Too Long,” by Shirin Sinnar, August 11, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/courts-have-been-hiding-behind-national-security-too-long>.

⁵³ DHS Guidance at 2.

⁵⁴ Brennan Center for Justice, “A Course Correction for Homeland Security,” by Faiza Patel, Rachel Levinson-Waldman, and Harsha Panduranga, April 20, 2022, 10-11, <https://www.brennancenter.org/our-work/research-reports/course-correction-homeland-security>; Faiza Patel, “Trump Administration's Fuzzy Math on Terrorist Origins is More than Misleading — It's

Taken together, each of these gaps can, for example, allow “fusion centers,” DHS-supported intelligence-sharing hubs, to share bias-infused “Suspicious Activity Reports” about people engaged in activities loosely labeled as “suspicious” without even reasonable suspicion of criminal activity.⁵⁵ In recent years, fusion centers have monitored protesters at Standing Rock, people protesting the Trump administration’s family separation and border policies, and Black Lives Matter activists.⁵⁶

In another example, DHS purports to address racial profiling through Intelligence Oversight Guidelines which govern the activities of the Office of Intelligence and Analysis (I&A), a channel between federal and state and local agencies to share counterterrorism information.⁵⁷ I&A’s Guidelines prohibit “intelligence activities based *solely* on an individual’s or group’s” protected characteristics,⁵⁸ but the “solely” limitation is so weak that this loophole can permit intelligence gathering based on protected traits combined with neutral and unsubstantiated justifications that still allow for discriminatory disparities.

DHS urgently needs to issue a new and comprehensive anti-discrimination policy that:

- Explicitly prohibits biased profiling based on actual or perceived race, ethnicity, religion, national origin and nationality, sexual orientation, disability and gender (including gender identity and expression), without any exceptions;
- Only permits consideration of these protected traits in legally sanctioned contexts, so long as they are narrowly tailored and safeguard against bias. Examples of legally sanctioned, permissible, and narrowly tailored use include: to review asylum claims, to verify citizenship at the border, and in descriptions of individuals suspected of criminal activity based on trustworthy factual information.

Dishonest,” Just Security, January 16, 2018, <https://www.justsecurity.org/51084/trump-administrations-fuzzy-math-terrorist-origins-misleading-its-dishonest/>.

⁵⁵ ACLU, “*Gill v. DOJ* — Challenge to Government’s Suspicious Activity Reporting Program,” July 11, 2014, <https://www.aclu.org/cases/gill-v-doj-challenge-governments-suspicious-activity-reporting-program>. A 2012 Senate investigation of Fusion Centers found that these reports were “oftentimes shoddy” and “rarely timely,” U.S. Senate, Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, “Federal Support for and Involvement in State and Local Fusion Centers,” October 3, 2021, 27, <https://www.hsgac.senate.gov/imo/media/doc/10-3-2012%20PSI%20STAFF%20REPORT%20re%20FUSION%20CENTERS.2.pdf>.

⁵⁶ Alleen Brown, Will Parrish, and Alice Speri, “Standing Rock Documents Expose Inner Workings of ‘Surveillance-Industrial Complex,’” Intercept, June 3, 2017, <https://bit.ly/37hqoxu>; Ryan Devereaux, “Homeland Security Used a Private Intelligence Firm to Monitor Family Separation Protests,” Intercept, April 29, 2019, <https://bit.ly/3ovPgQH>; George Joseph, “Exclusive: Feds Regularly Monitored Black Lives Matter Since Ferguson,” Intercept, July 24, 2015, <https://bit.ly/3otOkMT>.

⁵⁷ 6 U.S.C. § 121 (2018); DHS, Office of Intelligence and Analysis (OIA), “Office of Intelligence Oversight Program and Guidelines,” January 19, 2017, 3-4.

⁵⁸ OIA, “Office of Intelligence and Analysis Intelligence Oversight Program and Guidelines,” 2-3, <https://www.dhs.gov/sites/default/files/publications/office-of-intelligence-and-analysis-intelligence-oversight-program-and-guidelines.pdf> [emphasis added].

8. Stop the Expansion of Face-Recognition Surveillance at Airports and the Border

In the last days of the Trump administration, DHS proposed a new [rule](#) that would massively expand the use of face surveillance at airports and the border, entrenching a dystopian surveillance infrastructure that threatens privacy and disproportionately harms people of color and immigrants.⁵⁹ Under the proposed rule, CBP intends to collect the faceprint of virtually every non-U.S. citizen who enters or exits the United States, including children. The faceprints will then be stored in a government database for up to 75 years, where they may be used not only by DHS, but by foreign governments and federal, state, and local law enforcement to identify individuals for a variety of purposes.

This surveillance is unjustified, unnecessary, and dangerous. Unlike fingerprints and many other biometrics, faceprints can be collected covertly, at a distance, and without our consent. Once a government acquires a person’s faceprint, it creates a risk of a unique and unprecedented form of persistent surveillance, one that allows the government to identify and track people without their knowledge. In addition, several recent studies have shown that face recognition technology is biased and flawed, failing to accurately identify Black people at disproportionate rates.

Although civil society organizations sharply criticized the proposed rule, the Biden administration refused to rescind it. In the interim, DHS and CBP have continued to [deploy](#) face recognition technology at airports across the country.⁶⁰

DHS should rescind its proposed rule and halt its current collection of faceprints at airports and the border.

9. Stop Warrantless and Suspicionless Device Searches at Ports of Entry

CBP and ICE claim the authority, pursuant to written policy, to conduct warrantless and suspicionless searches of travelers’ electronic devices at the U.S. border, including those of U.S. citizens and lawful permanent residents. CBP’s 2017 Directive, which superseded a device search policy in place since 2009, permits border officers to conduct so-called “advanced” (or forensic) searches of devices with reasonable suspicion of unlawful activity or a “national security concern” and allows “basic” (or manual) searches of devices with no suspicion

⁵⁹ National Archives and Records Administration, “Collection of Biometric Data from Aliens upon Entry To and Departure From the United States,” November 19, 2020, <https://www.federalregister.gov/documents/2020/11/19/2020-24707/collection-of-biometric-data-from-aliens-upon-entry-to-and-departure-from-the-united-states>.

⁶⁰ DHS, U.S. Customs and Border Protection (CBP), “Statement for the Record on Assessing CBP’s Use of Facial Recognition Technology,” July 27, 2022, <https://www.cbp.gov/about/congressional-resources/testimony/statement-record-assessing-cbps-use-facial-recognition-technology>.

whatsoever.⁶¹ ICE follows a similar policy when it conducts searches of devices taken from travelers at ports of entry.

Searches of travelers' electronic devices are highly invasive and can reveal sensitive information, including photographs, contact lists, text messages, emails, documents, and location history. This information can in turn tell border officers about someone's personal, financial, medical, religious, and political history and affiliations, without any suspicion of wrongdoing. Despite these privacy concerns, CBP and ICE have increased the number of border device searches over time, with CBP conducting almost 41,000 such searches in FY2019 as compared to about 30,000 in FY2017.⁶²

CBP and ICE should change their policies to require a warrant for any electronic device search at the border, given the privacy interests at stake. At the very least, CBP and ICE should require reasonable suspicion of digital contraband on an electronic device before it can be searched, either manually or forensically. Such updated policies are necessary to protect people from the privacy invasions they can otherwise be subject to simply for traveling internationally.

10. Abandon TSA's Emphasis on Identity-Based Screening

In the wake of 9/11, the government pushed forward frantically and often thoughtlessly to increase airline security. This included sensible measures such as professionalizing airline security through the creation of the Transportation Security Agency (TSA), and the locking of cockpit doors. But it also made a major push to invest in new systems for profiling airline passengers in an attempt to sift those who pose greater and lesser threats. At first this took the form of the Computer Assisted Passenger Prescreening System II, or CAPPSS II. That system would have tapped into commercial data sources to perform background checks on the millions of Americans who fly each year and build a profile of those individuals in order to determine their "risk" to airline safety. After a battle that lasted approximately five years, the government shrank this concept, which was impractical, unwise, and unlikely to be effective, to Secure Flight, which merely collects full legal name, gender, and date of birth from all passengers.⁶³

Using that data, however, the TSA has continued to pursue security through profiling. Instead of making sure that nobody, no matter who they are, can get a weapon onto an aircraft, the government has stuck with its post-9/11 decision to move away from an exclusive focus on improving physical security and to divert resources into identity-based (a.k.a. "risk-based") security. This has taken the form of intense and costly efforts to make sure that nobody can fly with a false ID, [investments](#) in dangerous face recognition technology, and the PreCheck

⁶¹ CBP, "CBP Releases Updated Border Search of Electronic Device Directive and FY17 Statistics," January 5, 2017, <https://www.cbp.gov/newsroom/national-media-release/cbp-releases-updated-border-search-electronic-device-directive-and>.

⁶² CBP, "CBP Statement on Border Search of Electronic Devices," October 30, 2019, <https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-border-search-electronic-devices>.

⁶³ ACLU, "Airline Passenger Profiling: Back From the Grave?," February 8, 2011, <https://www.aclu.org/news/national-security/airline-passenger-profiling-back-grave>.

program, which raises fairness and due process questions and has very [dubious](#) security benefits.⁶⁴

An identity-based approach to airline security incentivizes the government to do all these things. It also creates a constant [pressure](#) for the government to begin collecting more and more information about the general population in order to make “more refined” decisions about who is and is not risky to aviation safety.⁶⁵ This is fundamentally a fool’s errand — attacks on aviation are vanishingly rare and there is no amount of biographic data that can be lifted from mass, populationwide databases that will flag a putative terrorist without creating so many false alarms as to be useless. But identity-based security creates bureaucratic momentum toward a regime of expanding information collection, surveillance, and tracking of individuals. DHS should recognize this fundamental mistake in its approach to airline security and focus its resources on making sure that nobody, no matter who they are, can bring dangerous weapons onto an aircraft.

11. Stop DHS Social Media Surveillance

In the past decade, DHS has vastly expanded its collection of individuals’ social media identifiers and social media activity, sweeping up protected speech, mapping social networks, and threatening online anonymity. For example, in 2021, DHS [launched](#) a social media monitoring program that it claimed would help identify domestic violent extremists and predict future acts of violence.⁶⁶ Almost nothing is known about what data sources the program draws on, what standards agents apply in reviewing social media posts, or how this information is acted upon by DHS or others.

This program operates alongside other surveillance programs that DHS uses to track the social media activity of certain categories of immigrants and visa holders during the entire “lifecycle” of their interactions with the U.S. government. These programs—which include U.S. Citizen and Immigration Service’s Continuous Immigration Vetting and ICE’s Visa Lifecycle Vetting Initiative — involve the suspicionless monitoring of social media for individuals who have

⁶⁴ ACLU, “ACLU White Paper — CBP’s Airport Face Recognition Program,” by Jay Stanley, February 2020, <https://www.aclu.org/other/aclu-white-paper-cbps-airport-face-recognition-program>; ACLU, “How the TSA’s Facial Recognition Plan Will Go Far Beyond the Airport,” by Jay Stanley, October 23, 2018, <https://www.aclu.org/news/privacy-technology/how-tsas-facial-recognition-plan-will-go-far>.

⁶⁵ ACLU, “TSA Once Again Considering Using Commercial Data To Profile Passengers,” by Jay Stanley, January 11, 2013, <https://www.aclu.org/news/national-security/tsa-once-again-considering-using-commercial-data>.

⁶⁶ Ken Dilanian, “DHS Launches Warning System to Find Domestic Terrorism Threats on Public Social Media,” NBC News, May 10, 2021, <https://www.nbcnews.com/politics/national-security/dhs-launches-warning-systemfind-domestic-terrorism-threats-public-social-n1266707>; Rachael Levy, “Homeland Security Considers Outside Firms to Analyze Social Media After Jan. 6 Failure,” Wall Street Journal, August 15, 2021, <https://www.wsj.com/articles/homeland-security-considers-outside-firms-to-analyze-social-media-after-jan-6-failure-11629025200>; Ken Dilanian and Julia Ainsley, “DHS Weighing Major Changes to Fight Domestic Extremism, Say Officials,” NBC News, March 21, 2021, <https://www.nbcnews.com/politics/national-security/dhs-weighing-huge-changes-fight-domestic-violent-extremism-say-officials-n1262047> (“The idea is to identify people who may through their social media behavior be prone to influence by toxic messaging spread by foreign governments, terrorists and domestic extremists.”).

sought or received permission to come to the United States for school, work, or other reasons.⁶⁷ Monitoring begins when a person applies for an immigration benefit or visa, but it appears to continue long afterward, throughout a person’s stay in the United States or until they naturalize.⁶⁸ Under another sweeping program, DHS requests that immigration applicants provide their social media identifiers on Electronic System for Travel Authorization and Electronic Visa Update System applications — and it has proposed making disclosure of this information mandatory for roughly 15 million people each year.⁶⁹

Pervasive social media surveillance raises grave First Amendment concerns, and it has not been shown to be necessary or effective. Suspicionless monitoring of online activity intrudes on individuals’ ability to associate freely, chills protected speech, and disproportionately affects racial and religious minorities. Analyzing social media is notoriously difficult, given the sheer volume of information and the ease of misinterpreting individuals’ online messages — especially for a department that vets visitors who hail from hundreds of countries and speak thousands of languages. In fact, in 2020, the Office of Information and Regulatory Affairs [rejected](#) a DHS proposal to expand its collection of social media identifiers on travel and immigration forms, ruling that the department had not “adequately demonstrated the practical utility of collecting this information.”⁷⁰ Other reviews of DHS social media surveillance programs over the past decade have reached similar conclusions, and a recent news report [stated](#) that the Biden administration was considering halting social media vetting for some categories of refugees due to concerns about “the efficiency of the process.”⁷¹ Nevertheless, DHS has continued to collect social media identifiers and engage in widespread monitoring of social media activity.

DHS should end its existing social media surveillance programs and abandon its proposal to expand social media monitoring. It should purge any social media handles, aliases, and other associated identifying information from individuals’ A-Files and all other DHS databases unless related to criminal activity. Finally, it should immediately release the results of the review President Biden ordered on the “use of social media identifiers in the screening and vetting

⁶⁷ ACLU, “Coalition Letter to Secretary Mayorkas Urging an End to Biased Profiling and Seeking Privacy-Protecting Surveillance Reforms,” September 15, 2021, <https://www.aclu.org/letter/coalition-letter-secretary-mayorkas-urging-end-biased-profiling-and-seeking-privacy>; Brennan Center for Justice, “A Course Correction for Homeland Security.”

⁶⁸ Ibid; DHS, “Privacy Impact Assessment for the Continuous Immigration Vetting,” February 2019, https://www.dhs.gov/sites/default/files/publications/pia-uscis-fdnciv-february2019_o.pdf.

⁶⁹ Brennan Center for Justice, Electronic Privacy Information Center (EPIC), “Comment re: Social Media Collection on ESTA,” OMB Control No. 1651-0111, March 25, 2022, <https://www.brennancenter.org/media/9268/download>.

⁷⁰ U.S. General Services Administration, Office of Information and Regulatory Affairs (OIRA), “Agency Information Collection Activities: Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms,” 85 Fed. Reg. 7,563, February 10, 2020, https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202007-1601-001; OIRA, April 2, 2021.

⁷¹ EPIC, “Comment re: Social Media Collection on ESTA”; Stef W. Kight and Jonathan Swan, “Biden Is Nowhere Close to Hitting His Refugee Goals,” Axios, July 7, 2022, <https://www.axios.com/2022/07/07/biden-refugee-cap-goals>.

process” as part of Presidential Proclamation 10141—the proclamation that set out to end the Muslim Ban and the Trump administration’s discriminatory “extreme vetting” processes.⁷²

12. Provide Real Transparency About DHS’s “Black Box” AI Tools

In recent years, DHS has adopted a wide range of artificial intelligence (AI) systems with virtually no public input or oversight. Yet these systems pose undeniable risks to civil rights and civil liberties. In 2021, the National Security Commission on Artificial Intelligence (NSCAI) signaled that DHS had already taken significant steps to develop and field artificial intelligence systems. Warning about “black box” systems that subject people to secret algorithmic rules, the commission stated that DHS “must take care to ensure that automated screening processes lead agents only to the information they need and are authorized to access, and do not impermissibly single out individuals based on characteristics such as race or religion.”⁷³

More broadly, DHS’s secret development and use of AI tools raises urgent concerns about whether these new systems are biased against people of color and marginalized communities, and whether they are being used to legitimize discriminatory or improper government conduct. AI systems may replicate biases embedded in the data used to train those systems,⁷⁴ and they may have higher error rates when applied to people of color, women, and marginalized communities because of other flaws in the underlying data or in the algorithms themselves.⁷⁵ In addition, AI may be deployed to expand government activities that have long been used to unfairly and wrongly scrutinize communities of color — including intrusive surveillance, investigative questioning, detention, and watchlisting.

Transparency around DHS’s AI systems is urgently needed for both public and congressional oversight. Although DHS recently released an “[inventory](#)” of its unclassified AI use cases, the bare bones descriptions of these systems are inadequate for public oversight — and information about DHS’s classified AI tools is essentially nonexistent.⁷⁶

⁷² Proclamation No. 10141, 86 Fed. Reg. 7005, January. 20, 2021, <https://www.federalregister.gov/documents/2021/01/25/2021-01749/ending-discriminatory-bans-on-entry-to-the-united-states>.

⁷³ National Security Commission on Artificial Intelligence (NSCAI), Final Report 145-46 “NSCAI Final Report,” 2021, <https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf>.

⁷⁴ U.S. Department of Commerce, National Institutes of Standards and Technology, “NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software,” December. 19, 2019, <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software>.

⁷⁵ Larry Hardesty, “Study Finds Gender and Skin-Type Bias in Commercial Artificial-Intelligence Systems,” MIT News Office, February 11, 2018, <https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-0212>.

⁷⁶ DHS, “Artificial Intelligence Use Case Inventory,” last updated August 17, 2022, https://www.dhs.gov/data/AI_inventory.

Based on its study, the NSCAI recommended that DHS impose new obligations for Privacy Impact Assessments (PIAs) and System of Record Notices (SORNs) specific to AI systems to ensure that they provide vital information to the public. It noted that “agency practices do not sufficiently support the production of SORNs and PIAs that adequately depict how AI systems collect, use, and store personal information.”⁷⁷ The report made multiple recommendations that echo many of the broader deficiencies in DHS’s public disclosures about its surveillance and information-processing systems. Among other things, the commission emphasized that PIAs and SORNs should provide: a “holistic picture” about the collection, use, and storage of personal information by any AI system; a clear description of the algorithms used and their potential for inferring information about individuals based on multiple data sources including its connections to existing systems and accounting for the layering of different surveillance technologies; and specificity in describing the types of data collected, and who will use such data and why.⁷⁸

To date, DHS’s disclosures about its use of AI have not remotely met these basic requirements for meaningful public input and oversight. DHS should ensure that this critical information is made available to the public.

13. End the Coast Guard’s Unconstitutional and Inhumane Detention Practices

The Coast Guard apprehends noncitizens suspected of drug trafficking in international waters and secretly detains them without charge on “prison ships” in horrifying conditions — chaining them by their ankles to the decks of ships, without adequate shelter from the elements, mattresses or blankets, sanitation facilities, food and water, and medical care. The Coast Guard holds noncitizens in these conditions for weeks, sometimes months, before delivering them to the United States where they are arrested, charged, and prosecuted in U.S. courts. The Coast Guard claims this practice is lawful and that the Constitution does not govern it. But this nightmarish practice violates the U.S. Constitution, U.S. and human rights laws, and it has continued despite an exposé by *The New York Times Magazine*⁷⁹ and an ACLU lawsuit⁸⁰. Secretary Mayorkas has a moral imperative to end it.

Although in place for years, the practice ramped up recently. In 2017, the last year for which we have data, the Coast Guard apprehended and detained 700 people. Prosecutions account for hundreds if not thousands of noncitizens in federal prisons. The victims are poor men of color whom the government scapegoats through aggressive extraterritorial enforcement of drug trafficking laws.

⁷⁷ NSCAI, “Final Report,” 397.

⁷⁸ *Ibid.*

⁷⁹ Seth Freed Wessler, “[The Coast Guard’s ‘Floating Guantánamos.’](#)” *New York Times*, November 20, 2017.

⁸⁰ ACLU, “[Weir v. U.S. - Complaint.](#)” June 12, 2019.

The ACLU represents four Jamaican nationals⁸¹ whom the Coast Guard snatched from their fishing boat in the Caribbean in the fall of 2017. After destroying their boat, the Coast Guard held the men incommunicado at sea for more than a month — chained outside to the decks of four Coast Guard cutters even while hurricane Maria hit the Caribbean.

Secretary Mayorkas should order the Coast Guard to immediately suspend the practice and order an immediate review of laws and policies governing the Coast Guard’s interdiction of foreign-flagged vessels on the high seas and the agency’s subsequent apprehension, detention, and treatment of noncitizens on those vessels. The Coast Guard should also ensure that if it continues to engage in the apprehension and detention of noncitizens in international waters, that its operations comply with the U.S. Constitution and U.S. and human rights laws.

14. Protect Whistleblowers

The abuses of the Trump era are a poignant reminder that the powers of DHS are too great and susceptible to abuse. That is why it is so vital that DHS whistleblowers are able to come forward — we have relied on their revelations on everything from ICE’s [gynecological procedures on women without consent](#) to DHS downplaying intelligence regarding [white supremacist groups](#). As the Project On Government Oversight has put it: “Disclosures from brave public servants have sparked congressional investigations, led to important reforms, and returned money to taxpayers. Without these insiders coming forward, it is uncertain whether the wrongdoing they expose would ever come to light. They are truly invaluable to Congress.”⁸²

While most of this paper has focused on actions that Secretary Mayorkas can take, whistleblower protections have enjoyed bipartisan support and are ripe for congressional action. Currently, whistleblowers who bring what they know directly to the public are at risk of prosecution under the Espionage Act — people like Daniel Ellsberg, who disclosed the Pentagon Papers, and Edward Snowden, risked their lives and careers to inform the public of massive abuses of government power.⁸³

Congress should allow those accused of violating the Espionage Act to raise the defense that their disclosure served the public interest. That small change would mean a far more accountable government, because government employees that witness misdeeds would be empowered to say what they saw without fear of retaliation.

⁸¹ ACLU, “U.S. Coast Guide Wrongly Detained Five Fishermen at Sea,” <https://www.youtube.com/watch?v=9EwiPxfALu8>.

⁸² Project On Government Oversight, “The State of Whistleblower Protections and Ideas for Reform,” by Liz Hempowicz, January 28, 2020, <https://www.pogo.org/testimony/2020/01/the-state-of-whistleblower-protections-and-ideas-for-reform>.

⁸³ ACLU, “Whistleblowers Are Public Servants. We Must Protect Them” by Kate Ruane, November 15, 2019, <https://www.aclu.org/news/free-speech/whistleblowers-are-public-servants-we-must-protect-them>.

The ACLU and its partners have also called on Congress to pass legislation protecting the identity of whistleblowers in the Intelligence Community, which includes components of DHS.⁸⁴

15. Serious Congressional Oversight

More than 90 congressional committees and subcommittees claim jurisdiction over DHS. Some observers argue that Congress' ability to check DHS abuses has been stymied by the fact that no single committee has jurisdiction over the mammoth agency.⁸⁵ This state of affairs underscores why DHS ultimately needs to be dismantled and broken into component parts with distinct, clear mandates — and clear lines of oversight to particular congressional committees. We urge Congress to reconsider the size and scope of DHS — and use this 20th anniversary of the agency to reassess its structure and budget.

At the same time, Congress needs to take a step back and assess DHS holistically, including the criticisms that have dogged DHS throughout its history, across different administrations and from diverse ideological perspectives.⁸⁶ The congressional oversight agenda should include chronic waste and fraud, the profiteering by private prison companies and other DHS contractors, the negative influence of DHS on state and local law enforcement agencies and grantees, problems at the DHS Office of Inspector General and other internal watchdogs, and susceptibility to politicization and weaponization against domestic dissent.

Conclusion

The Department of Homeland Security's sweeping and ever-growing enforcement, surveillance and detention structures continue to harm American communities, squander taxpayer dollars, and put our civil liberties in jeopardy. While increased oversight and scrutiny of the department are necessary, the last two decades have demonstrated that they must be followed by significant reform, including a fundamental restructuring. DHS must change course in the face of skyrocketing costs and law enforcement strategies that seem to fail time and time again.

Mass detention and mass surveillance aren't just antithetical to our values, they simply aren't working. Trying to increase their budget and scope won't make them any more effective and may instead play into the hands of demagogic leaders who wish to use department agencies as their own personal, political police force.

⁸⁴ Project on Government Oversight, "Advocates Seek Stronger Protections and Confidentiality for Intel Community Whistleblowers," November 12, 2019, <https://www.pogo.org/letter/2019/11/advocates-seek-stronger-protections-and-confidentiality-for-intel-community-whistleblowers>.

⁸⁵ Scott Welder, Christine Kwon, and Jennifer Dresden, "There's Just One Department of Homeland Security. So Why Does It Have So Many Bosses in Congress?," Washington Post, October 21, 2021, <https://www.washingtonpost.com/politics/2021/10/21/theres-just-one-department-homeland-security-so-why-does-it-have-so-many-bosses-congress/>.

⁸⁶ Dara Lind, "The Department of Homeland Security Is a Total Disaster. It's Time to Abolish It," Vox, February 17, 2015, <https://www.vox.com/2015/2/17/8047461/dhs-problems>; CATO, "Abolish the Department of Homeland Security," by David Rittgers, September 8, 2011, <https://www.cato.org/policy-analysis/abolish-department-homeland-security>; Blitzer, "Is it Time to Defund the Department of Homeland Security?"

The violence and discrimination documented in DHS agencies must be dealt with, and it is time for Congress to rein in the agency's powers and ballooning funding. In the long run, the agency needs to be broken into component parts with distinct mandates to which Congress and the public can hold them accountable. In the immediate term, new policies must be enacted to make sure that personnel are following the Constitution and that people, particularly groups that have borne the brunt of DHS's punitive strategies, are afforded their rights.