A Realignment for Homeland Security Investigations

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Introduction

The lack of systemic controls on the Department of Homeland Security (DHS) has been the subject of sustained public criticism throughout the agency’s history. Much of the scrutiny has focused on the practices of Immigration and Customs Enforcement (ICE), whose Enforcement and Removal Operations (ERO) division is charged with apprehending, detaining, and deporting undocumented people in the United States. Meanwhile, ICE’s investigative and intelligence arm, Homeland Security Investigations (HSI), has largely evaded criticism by disassociating itself from these activities.¹

Instead, HSI emphasizes its investigation and prosecution of “a wide array of transnational crime, including: terrorism, national security threats, narcotics smuggling, transnational gang activity, child exploitation, [and] human smuggling and trafficking.” Its purported focus is to “identify and build criminal cases against Transnational Criminal Organizations (TCOs), terrorist networks and facilitators, and other criminal elements that threaten the United States.”²

In reality, however, HSI frequently involves itself in routine immigration enforcement focused on deporting undocumented workers — a responsibility assigned to ERO — for violations unrelated to complex criminal investigations.³ HSI’s broad authorities, coupled with a dearth of transparency, invite abuse and overreach. Repeated incidents, particularly over the course of Donald Trump’s presidency, highlight that few safeguards exist to limit these authorities.

Although the Biden administration has rolled back HSI’s involvement in deportations, the ease with which HSI and its considerable investigative and surveillance power have been co-opted reveals both HSI’s susceptibility to political manipulation and the risk that it will pursue similar — or more troubling — objectives in the future. Given the lack of transparency into HSI’s characterization of its work, oversight should be a priority under any administration.

In addition, HSI has increasingly pursued extensive intelligence-gathering operations and sought invasive surveillance tools to covertly amass and analyze personal data. Such tools raise civil liberties concerns when used by any law enforcement agency; they present magnified risks in the hands of DHS, with its documented history of targeting minority communities, journalists, and political activists.

It is past time for policymakers to limit HSI’s authority and establish stronger safeguards and accountability to prevent further abuse.

Section I of this report details HSI’s history and mandate, explaining how the office’s role has expanded over time. It illustrates HSI’s broad discretion to decide what to investigate and compares HSI with other federal law enforcement and intelligence agencies to show the extent of its power and lack of safeguards.

Section II documents HSI’s involvement in DHS’s deportation activities, including its lead role in initiatives unrelated to its mission of targeting criminal networks and complex crimes — such as workplace raids, DNA testing of families at the border, investigations targeting naturalized citizens and sponsors of unaccompanied children, and warrantless searches of cell phones and laptops. The section also analyzes how HSI exploits its transnational crime mandate to conduct dragnet surveillance of financial transactions, as well as its involvement in the detention and deportation of young immigrants by labeling them as gang members or associates, sometimes with minimal or no proof.

Section III analyzes HSI’s intelligence and surveillance activities. Surveillance technologies include devices used to collect data from cell phones; facial recognition tools used to identify detained persons and generate lists of suspects for investigations; and the data analytics platform that HSI is currently building, which uses artificial intelligence (AI) to collect and analyze personal data.

Section IV offers a series of recommendations for reform. First, Congress and the secretary of homeland security should establish greater separation between ERO and HSI to acknowledge what HSI’s own senior staff has long said: the two components have distinct missions and the department’s structure should reflect that.⁴ Such a realignment would reduce structural pressures on HSI to involve itself in immigration matters with no nexus to serious crimes and limit ERO’s access to HSI’s array of surveillance tools and troves of personal data.

In addition, Congress should adopt a legislative charter that delineates HSI’s investigative authority. In the meantime, the DHS secretary should issue interim guidelines that establish boundaries for HSI’s investigative authorities and tools. Finally, the secretary should institute reporting requirements to facilitate disclosures, and Congress should use its oversight power to increase transparency around HSI’s surveillance use.
I. HSI’s History and Law Enforcement Mandate

HS was formally established in 2002, in the aftermath of the September 11 terrorist attacks the year prior. The new department absorbed two offices focused on immigration: the Immigration and Naturalization Service, formerly under the Department of Justice (DOJ), which was responsible for all stages of immigration enforcement and services, from border inspection and investigation to apprehension and prosecution; and the Treasury Department’s Customs Service, which oversaw inspections and investigations related to goods that crossed U.S. borders.5

When these offices migrated into DHS, the newly created ICE partially assumed their enforcement functions, along with responsibility for investigations, intelligence, detention, and deportation.6 The new Customs and Border Protection (CBP) took responsibility for the U.S. Border Patrol and the inspection of goods and people at U.S. ports and assumed some authority (overlapping with ICE’s) to gather intelligence and investigate crimes in border zones.7

From the outset, this structure concerned federal officials and civil society groups. DHS offered no coherent rationale for the creation of ICE, which had similar responsibilities to — yet a separate reporting structure from — CBP.8 As early as 2005, DHS’s Office of Inspector General called for ICE to be eliminated and its nonredundant functions to be merged into CBP, a recommendation that the department ignored.9

Although ICE was formed from immigration and customs agencies, the George W. Bush administration framed its mission as one of counterterrorism.10 This framing was part of an administration-wide narrative linking immigration to security threats.11 Advocates warned that commingling immigration and national security would prove problematic. As Professor Bill Ong Hing testified before Congress in June 2002, “We must consider . . . how placing the responsibility for immigration and naturalization functions unrelated to national security in an anti-terrorism organization would affect the day-to-day administration of our national immigration laws and procedures, as well as how immigrants themselves are viewed by fellow Americans.”12

Increasing Criminalization of Immigration

The merging of criminal and immigration law is a relatively recent phenomenon. Until the late 1980s, criminal convictions rarely resulted in deportation, with a few exceptions: crimes of moral turpitude, drug trafficking, and automatic weapons offenses.13 Between 1988 and 1996, however, Congress expanded the range of offenses that provide grounds for deportation. After the passage of the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, individuals could be deported based on a single crime of moral turpitude — a category that Congress has never defined, inviting prosecutorial overreach — or a felony punishable with a year of imprisonment.14

Congress also criminalized a number of immigration-related offenses, including intentionally hiring undocumented workers, evading immigration laws through marriage, casting a federal election ballot as a noncitizen, and purporting to be a citizen in order to get an immigration benefit or employment.15 These were previously only civil offenses, which could prompt deportation but not imprisonment.16

During the same period, Congress increased the penalties for unlawful reentry — a crime hitherto rarely enforced — establishing prison terms of up to 20 years.17 After the changes were made, prosecutors doubled down on immigration prosecutions, which in 2011 became the largest category of crimes prosecuted by federal prosecutors.18 In 2020, such cases constituted 41 percent of all offenses.19

The systematic merging of criminal and immigration law penalizes a population that has strong ties to the United States: 60 percent of undocumented immigrants have spent at least 10 years here, and 33 percent live with at least one U.S. citizen child. In addition, immigrants commit crimes at far lower rates than native-born citizens.20 Increasing criminal penalties for immigration has also been costly and administratively burdensome.21

The convergence of immigration and criminal enforcement has also resulted in high-profile mistreatment of vulnerable populations, including the Trump administration’s policy of separating parents and children in immigration detention. And the problems continued into the Biden administration: charged images of CBP officers deploying whips against migrants at the southern border appeared in 2021.22
HSI’s Creation and Growth

In 2010, ICE reorganized, creating HSI and turning the Office of Detention and Removal Operations into ERO. HSI took on the roles of three predecessor criminal investigation entities — the Offices of Investigations, Intelligence, and International Affairs — while ERO was “devoted to civil immigration enforcement.” At the time, ICE was plagued by allegations that more than a decade later are still familiar: worksite raids and neighborhood sweeps targeting longtime residents with no criminal or security rationale, poor conditions and inadequate medical services in detention facilities, and the rigid application of policies leading to separation of immigrant families.

Whereas ICE’s activities have faced considerable criticism, HSI has been relatively spared. Yet not only does HSI share a budget and senior reporting line with ERO, it also provides ERO with access to expansive HSI databases that enable ERO to carry out deportations. DHS documentation even notes that ERO personnel are authorized to query HSI’s Investigative Case Management system “as needed for information related to their immigration enforcement cases, which are civil in nature.” In 2017, senior ICE officials increased and improved data sharing between the two directorates, amplifying the risk that information collected by HSI under its broad criminal investigation authority could be funneled to ERO and used to apprehend people not suspected of any criminal activity whatsoever.

The National Immigration Law Center has warned that these practices amount to “mission-creep that has allowed HSI to engage in civil immigration enforcement and to carry out sweeping collateral arrests, using its authority to conduct criminal investigations as a pretext for deportations and family separations.”

HSI’s Expansive Authorities

HSI has interpreted its authority in an overly broad way unconstrained by safeguards or public awareness.

First, HSI officials routinely profess that the office enforces 400 federal laws. In training materials, HSI has also claimed the authority to investigate “any federal crime.” This claim derives from statutory authorizations to interrogate people suspected not to be citizens or nationals of the United States and to make arrests for violations of immigration law or federal crimes, as well as to perform “any other law enforcement duty” the DHS secretary designates. Despite the absence of any language in the governing statutes directing immigration or customs officers to broadly undertake the investigation of all federal crimes, courts have upheld immigration officers’ incidental authority to conduct investigations subject to the limitations of the Fourth Amendment.

The FBI holds similarly broad investigative power, but its agents are constrained by the publicly available Attorney General’s Guidelines for Domestic FBI Operations, which, while allowing the bureau extensive latitude, define its investigative methods and impose limits and an oversight structure. The FBI’s Domestic Investigations and Operations Guide provides more granular rules and is also partially available to the public. DHS has published no such rules for HSI’s investigations.

Second, the government asserts — and courts have largely affirmed — broad search and seizure powers at ports of entry and in border zones. DHS claims that this authority covers all terrain within 100 miles of a U.S. land or coastal border, territory that is home to two-thirds of the U.S. population and 9 of the 10 largest cities in the United States. HSI, which has more than 250 offices in the United States, including at least one in every state and in the District of Columbia, makes liberal use of this authority. It also routinely collaborates with other federal law enforcement agencies that would not otherwise be able to use expansive border search authorities, such as the FBI, the Drug Enforcement Administration (DEA), and state and local law enforcement.

This involvement in both ordinary criminal searches and the work of other law enforcement entities has led to well-documented mission creep — the assertion of a broader and broader mandate to investigate criminal matters in which HSI has no documented expertise, as well as in areas over which other federal entities have primary investigative authority, like narcotics, financial crimes, cybercrime, and counterterrorism.

Finally, HSI interprets its broad investigative authorities to allow its special agents to collect substantial amounts of data, including on U.S. persons (a category that encompasses citizens, lawful permanent residents, and certain organizations). In addition to publicly or commercially available information, HSI obtains data through its own surveillance tactics using a variety of technologies — among them automated license plate readers (ALPRs), video surveillance, and unmanned aerial systems. In support of these activities, HSI cites a hodgepodge of broadly worded statutes allowing immigration officers to collect and inspect information and evidence to further investigations of potential immigration and customs violations. Other federal agencies are required to adhere to public guidelines on the collection and use of information on U.S. persons, which, though imperfect, impose important limitations on their surveillance activities.

Despite HSI’s similar conduct, it has never been required to issue similar publicly available guidelines constraining its data collection and surveillance techniques.
II. HSI’s Involvement in DHS’s Deportation Activities

HSI’s publicly stated mission is to focus on serious crimes involving particularly vulnerable victims, such as human trafficking and child exploitation. Little information is publicly available about HSI’s investigative priorities and allocation of resources, but reports of its activities demonstrate that it plays an instrumental role in executing deportations outside of that mandate.

During the Trump administration in particular, HSI led multiple initiatives focused on removing undocumented persons from the United States, including workplace raids and DNA testing of families at the border. These activities also harm U.S. citizens: millions of U.S. citizen children live with at least one undocumented parent, and they suffer physically and emotionally when their parents are arrested or detained. DHS Secretary Alejandro Mayorkas has taken steps to reduce workplace raids and broad detention policies, yet their prevalence over several administrations highlights the risks that HSI will restart or even expand these practices under different leadership. HSI also produces memos labeling young immigrants as gang members or “associates.” Memos that have been made public show conclusions that may be based on speculative evidence, such as unverified information drawn from state and local gang databases, which can contain false and inaccurate information, as described in further detail below. The memos are placed in immigrants’ permanent files, forming the basis for requests for detention without bail and denial of immigration benefits.

Taken together, these activities suggest that the absence of structural mechanisms limiting HSI’s core mission, along with its methods, allows the office to significantly involve itself in the deportation activities carried out by ERO.

Workplace Enforcement Actions

From at least 2018 until 2021, HSI took the lead role in selecting targets for workplace immigration enforcement and conducting workplace raids. HSI does not release comprehensive investigation statistics, but the number of worksite enforcement actions dwarfed other reported investigations: in fiscal year 2019, HSI inspectors carried out 6,921 workplace enforcement investigations. In comparison, human trafficking and human smuggling — two areas on which HSI purports to focus — taken together resulted in approximately half as many investigations during the same year. In 2020, despite the global Covid-19 pandemic, HSI initiated more than 4,000 workplace enforcement investigations.

Human trafficking and human smuggling investigations might arise less frequently and occupy more resources than worksite enforcement actions, which would account for their lower numbers. Yet for several years, HSI reallocated workers from other offices to increase personnel devoted to workplace raids.

In October 2021, Mayorkas announced that DHS would stop conducting workplace raids. In announcing the decision, he described the raids as “resource-intensive,” suggesting the considerable amount of time and effort devoted to these efforts. As Mayorkas explained, “the deployment of mass worksite operations . . . misallocated enforcement resources while chilling, and even serving as a tool of retaliation for, worker cooperation in workplace standards investigations.”

HSI’s workplace enforcement efforts did not target immigrants suspected of serious crimes. Rather, the office’s involvement escalated interactions with immigrants, enabling the government to charge working immigrants with crimes such as illegal reentry and false statements. Criminal charges brought after large raids routinely involved these low-level offenses, which are a far cry from the serious crimes that HSI claims are its focus.

These raids overwhelmingly ensnared workers, not employers. Of the 779 criminal worksite arrests that HSI made in 2018, 85 percent were of workers. In 2019, a series of coordinated raids across several poultry plants in Mississippi resulted in the arrests of 680 workers but not a single employer. Although managers at the plants were later indicted in connection with the raid, the disparity between the treatment of employees — whose minor violations were mostly civil in nature but who were nonetheless torn from their children — and employers suggests that the raids were not executed out of concern for vulnerable victims. It also indicates more leniency for employers, who typically have far more political and economic capital than their vulnerable employees. In a review of 161 workplace enforcement raids, DHS’s inspector general found that employers were fined in only 23 cases; in at least 15 of those, HSI special agents reduced these fines.

Furthermore, at least during the Trump administration, HSI special agents repeatedly arrested undocumented immigrants they encountered in the course of criminal investigations into employers’ conduct. From 2017 through
January 2021, HSI’s executive associate director ordered special agents to detain all undocumented immigrants they encountered, subject to a handful of narrow exceptions. The Biden administration has rolled back this directive and pledged to eliminate raids, but HSI’s continuing authority over workplace enforcement, lack of guidelines, and close coordination with ERO mean that such tactics could easily be reinstated under a new administration.

Investigative Initiatives Without a Serious Crime Nexus

HSI has often enlisted agents to support CBP’s and ERO’s detention and removal efforts that are unconnected to the serious crimes that are its stated focus. Because of HSI’s sizable presence on the southwestern border, its special agents are a ready source of supplemental personnel for CBP. And since HSI shares senior leadership and a budget with ERO, it is easy to divert personnel and resources to deportation sweeps. On multiple occasions during the Trump administration, HSI special agents were deployed to sanctuary cities — jurisdictions that have limited their cooperation with ICE’s deportation efforts — to assist ERO in rounding up immigrants for detention and removal.

These roundups did not target immigrants with criminal histories: in at least one raid, conducted in Philadelphia in March 2017, HSI and ERO apprehended 160 “non-criminal” immigrants. Federal prosecutors subsequently declined to prosecute more than 70 percent of the 52 immigrants referred to them.

HSI has also used the mantle of organized crime to target immigrants not suspected of violent crimes. For example, through a 2019 initiative called Operation Double Helix — on the heels of ICE’s family separation efforts, in which HSI also played a role — HSI special agents interviewed immigrant families to try to identify so-called fraudulent families. The agency quickly added DNA testing to its interview efforts, ultimately awarding a $5.2 million contract to Bode Cellmark Forensics in June 2019 to conduct “rapid DNA testing” on families arriving at the southwestern border.

The agency allocated 200 special agents to the testing project and reallocated funding from other HSI programs. It ultimately deployed more than 2,500 DNA kits to test immigrant families.

This operation was ostensibly connected to efforts to combat human trafficking. Yet the absence of any pronouncements on whether and how victims of trafficking or smuggling were treated — including whether they were informed about immigration relief to which they may have been entitled — suggests that victim support was not the focus of the testing.

Efforts to Decriminalize Working Immigrants

While Congress has struggled to pass comprehensive immigration reform for almost two decades, policymakers across the political spectrum have long agreed on the need to create a path for working immigrants to acquire legal status, particularly those who are longtime residents and have children who are U.S. citizens. Although proposals have differed with respect to the type of status available and requirements for eligibility, almost all have aimed — except during the Trump administration — to divert enforcement efforts away from working immigrants.

In his 2006 national address on immigration reform, for instance, President Bush lauded the hardworking nature of the “vast majority of illegal immigrants,” stating that “it is neither wise, nor realistic to round up millions of people, many with deep roots in the United States, and send them across the border.” In 2014, President Barack Obama echoed these sentiments, declaring that “tracking down, rounding up, and deporting millions of people isn’t realistic” and is “not who we are as Americans.”

President Obama’s words built on a bipartisan effort to create a path to citizenship led by four Republican and four Democratic senators. In 2013 remarks, Sen. Robert Menendez, one of this so-called gang of eight, affirmed that “giving 11 million people a clear and defined pathway to citizenship is, in effect, an economic growth strategy and exactly the right thing to do.”

In a fall 2021 memo, Secretary Mayorkas pushed for broad discretion in immigration enforcement, declaring that “the fact [that] an individual is a removable noncitizen … should not alone be the basis of an enforcement action against them …. By exercising our discretionary authority in a targeted way, we can focus our efforts on those who pose a threat to national security, public safety, and border security and thus threaten America’s well-being.”

In reality, HSI separated children from trusted adult guardians — an explicit goal of DHS — while relying on tests of indeterminate accuracy and collecting DNA information from arriving immigrants. HSI did not disclose any selection criteria for determining whether families warranted invasive testing, and it put no clear limits in place to block bulk DNA collection from immigrants in the future. HSI assured DHS’s chief privacy officer that its program did “not engage in the indiscriminate bulk collection of DNA,” but rather “judiciously select[ed]” a subset of families for testing.

Beginning in July 2017, HSI directed an operation targeting the parents and relatives of unaccompanied immigrant children who were entering the United States to
In 2020, President Trump’s DHS secretary directed HSI special agents to mobilize against Americans with no pretense of a connection to immigration enforcement or to any of HSI’s other authorities. As protests swept the country in response to the police killings of George Floyd and Breonna Taylor, media outlets reported abuses by HSI special agents deployed by then-acting DHS Secretary Chad Wolf to New York City, Washington, D.C., Chicago, and Portland, Oregon. During a peaceful daytime protest in New York, an HSI special agent arrested a military veteran of Puerto Rican descent, claiming — with no supporting evidence — that the man was believed to be carrying a weapon. In Portland, HSI special agents joined with other DHS officers to arrest protestors based on faulty or nonexistent evidence.

During this time, HSI also reportedly requested aerial surveillance of protest activity in Minneapolis. Conducting surveillance of lawful protestors in the U.S. interior has no grounding in the office’s mandate or authorities, no matter how broadly these are interpreted. Furthermore, the use of militarized aircraft to surveil protestors poses a significant risk of chilling speech, association, and dissent. Yet the public and Congress have had little recourse but to accept DHS’s word about the technologies deployed and the information collected. Letters from members of Congress to DHS and to the Privacy and Civil Liberties Oversight Board — which has the statutory authority “to continually review” the counterterrorism-related actions of any executive agency to ensure that those actions “appropriately protect privacy and civil liberties” — have yielded few specifics about the protest surveillance.

Exploitation of Transnational Crime Mandate

HSI’s work to disrupt and dismantle transnational criminal organizations has also stretched into aggressive and exploitative investigations.

In March 2022, Sen. Ron Wyden revealed that HSI had been using administrative subpoenas to collect a massive
tranche of transaction data from multiple money transmitters for the previous three years, including sender and recipient names and addresses for all money transfers over $500 to or from Arizona, California, New Mexico, Texas, and Mexico.\textsuperscript{108} Its use of administrative subpoenas had been far more aggressive than the agency first admitted, as Senator Wyden’s office determined the following year: HSI officials had been soliciting bulk data on transactions between anywhere in the United States and a list of 21 countries.\textsuperscript{109} HSI justified the program by referencing its goals of “combating transnational criminal actors and other security threats.”\textsuperscript{110} Its partner in the surveillance, the Arizona attorney general’s office, echoed this sentiment, asserting: “This is done to combat human and drug trafficking.”\textsuperscript{111} There is no indication, however, that this dragnet surveillance program targeted any particular criminal activity. Indeed, the low threshold for information collection suggests that it swept in millions of routine transactions among family and friends.\textsuperscript{112}

According to a Freedom of Information Act (FOIA) request filed by Wired magazine, HSI issued administrative subpoenas — which are intended for use in only a limited class of customs investigations — 170,000 times between 2016 and 2022.\textsuperscript{113} According to the magazine, “in at least two instances, agents at ICE used the custom summons to pressure news organizations to reveal information about their sources,” and in others, subpoenas were issued to service providers that work with vulnerable populations and have no customs role, including schools and abortion providers.\textsuperscript{114}

Through a practice that intensified in 2017, HSI has also aggressively investigated young immigrants and used vague criteria to designate them as gang members or “gang affiliated.” Such determinations often rely on the unverified observations of state and local police (and, at times, even school police) of inconclusive characteristics or online activity rather than evidence of violence, and they have drastic immigration consequences, from lengthy detentions without possibility of bond to deportation.\textsuperscript{115}

HSI memos regarding gang affiliation are added to young immigrants’ A-Files — permanent records that USCIS maintains on all immigrants — and, according to the New York Civil Liberties Union, used as evidence in removal proceedings and applications for immigration relief.\textsuperscript{116} The memos sometimes use vague and inconclusive criteria to attribute gang membership or affiliation, including “wearing or possessing clothing, accessories, or ‘paraphernalia’ indicative of gang membership (such as a bandana or rosary beads)” or “being seen with known gang members.”\textsuperscript{117} Other factors that may — but need not — be present include “having a tattoo associated with gang members,” “identification as a gang member by confidential informants” (who may have their own motivations for accusing people of being gang members) or by other gang members (whose designation may itself be questionable); “being arrested in the presence of other gang members” (whether or not the crime was gang-related); or “self-admitting gang membership.”\textsuperscript{118} While the prevalence of HSI memos is not known, the lack of transparency around HSI’s activities suggests that these kinds of criteria are used more often than the sparse public reporting indicates.

Assessments of gang designations have repeatedly shown that law enforcement officers often attribute these characteristics to young people of color without a basis, even when faced with contradictory evidence.\textsuperscript{119} Often, social media posts or boastful statements to friends cannot accurately be characterized as admissions at all. To the contrary, young people may exaggerate their “toughness” as a way to deter others from harassing them, or they may interact with posts by individuals they know through family or community connections, not gang affiliation.\textsuperscript{120}

Critically, HSI special agents may rely in part on locally maintained gang databases to tag youths as gang members — databases that have been shown on multiple occasions to be overbroad and inaccurate.\textsuperscript{121} For example, an audit of California’s gang database identified widespread entries based on tenuous evidence (such as neighborhood of police encounter and clothing color) or no evidence at all, including entries for children as young as one year old.\textsuperscript{122} Several police officers allegedly falsified information in the database, including by recording admissions of gang membership despite body camera footage showing that no such admission occurred during the encounter.\textsuperscript{123} Similar issues led the Portland, Oregon, police department to dismantle its gang databases,\textsuperscript{124} and other cities are facing pressure to discontinue or drastically reform their use of such databases.\textsuperscript{125}

Notwithstanding their potentially dubious bases, HSI memos become part of the record in hearings to determine whether an immigrant should receive bond or immigration benefits.\textsuperscript{126} ICE deliberately hides the existence of HSI determinations by way of an internal policy barring agents from mentioning evidence on purported gang affiliation or membership in court filings.\textsuperscript{127} And, due to procedural limitations in immigration proceedings, the memos need not be disclosed to immigrants or their counsel before those hearings, and immigrants have no right to cross-examine the authors, making the memos difficult to refute.\textsuperscript{128}

Designation as a gang member or gang affiliate has severe consequences, beginning with bond determinations. In deciding whether an immigrant should be detained or released on bond while their immigration proceedings are pending, courts consider whether the individual poses a danger to the community.\textsuperscript{129} Courts place significant weight on the government’s recommendations, and immigrants have the burden of definitively establishing — usually without any prior notice of allegations — that they have no gang affiliation.\textsuperscript{130} Based on unsubstantiated gang allegations, immigration judges often deny bond or set prohibitively high bond, which
leads to lengthy detentions. Finally, DACA status — which allows eligible undocumented people who immigrated when they were children to be granted work authorization and remain in the United States — can be denied or revoked based on alleged gang membership.

These serious consequences are not a side effect of HSI’s work but, according to some special agents, its core aim. In 2017, ICE carried out a nighttime raid on the house of an immigrant who lacked legal status but was not suspected of any crime — which should have placed him squarely outside HSI’s purview — and had no weapons in his home. An HSI special agent taking part in the raid nevertheless told a news reporter shadowing the raid: “The purpose of classifying him as a gang member or a gang associate is because once he goes in front of an immigration judge, we don’t want him to get bail, because the whole point of this operation is to get these known gang members off the street.”
III. HSI’s Surveillance Tools

In recent years, law enforcement agencies have sought out or deployed surveillance technologies granting extraordinary access to people’s private lives without sufficient safeguards, oversight, or transparency. HSI appears to have followed this trend: public records show that the organization has obtained access to multiple surveillance tools, including facial recognition systems and cell site simulators, and has undertaken a multiyear project to build a data analytics platform with AI capabilities. The ways in which HSI uses these technologies are unknown, largely due to an absence of federal legislation governing their use and a lack of known safeguards at the agency. HSI has made public few internal policies that limit or guide how the technologies should be used, nor has it released statistics on their use. Given HSI’s involvement in ERO’s deportation activities and its targeted searches of journalists and activists, along with its broad interpretation of its authority to investigate and surveil more generally, its unfettered access to these technologies raises red flags.

Facial Recognition Technology

HSI’s special agents are permitted to use facial recognition tools to identify suspects or victims for crimes within its jurisdiction, which the agency has interpreted to include any federal crime. Of particular concern, HSI uses multiple facial recognition tools that search photographs collected by private parties; these tools enable searches of billions of images obtained without consent from the internet. Most notably, HSI has used facial recognition software provided by Clearview AI, a company that attracted congressional opposition and was banned in several countries for scraping social media platforms for photos, allowing law enforcement officers to gain access to photos that the government was not authorized to collect itself. ICE spent more than $200,000 on Clearview contracts in 2020, and the company issued a public statement — in an effort to distance itself from ICE’s deportation regime — confirming that the company’s contract was with HSI rather than ERO.

No federal law currently constrains law enforcement’s use of facial recognition technology. A 2020 DHS privacy impact assessment articulates the scope of HSI’s authority to use facial recognition tools but does not detail any constraints beyond stating that special agents are required to treat the results only “as investigative leads,” not as definitive evidence of wrongdoing. The assessment also refers to a nonpublic HSI policy governing use of facial recognition tools. HSI does not publicize the systems it uses, nor does it report on its use of such tools in the aggregate. It may not even preserve information about the results of facial recognition searches.

All of this leaves HSI to self-police its use of this highly intrusive technology despite risks of inaccuracy and abuse, as well as the risk that surveillance will jeopardize the exercise of constitutionally protected rights. Although it is improving, the accuracy of facial recognition still varies widely among software providers. Facial recognition tools may be less accurate when they encounter facial hair, glasses, or other facial obstructions. They may draw on outdated photos and fail to account for changes due to age. Accuracy also degrades when the photo for which a match is sought is of low quality or does not depict the subject looking directly into a camera — both prevalent characteristics of the surveillance footage and social media photos that typically prompt facial recognition requests.

Facial recognition tools have also proven particularly susceptible to abuse. Law enforcement officers have used the technology to track and intimidate activists by charging them with petty offenses. Even absent abuse, the use of these tools still threatens the ability to remain anonymous — or at least relatively unrecognized — in public and chills the free exercise of speech and association. These risks have prompted several companies that develop facial recognition software to exit the market or ban law enforcement from using their products. In addition, lawmakers in multiple cities and states have banned the use of facial recognition tools by law enforcement outright or in combination with police-worn body cameras.

HSI has released limited information about how it assesses and mitigates the substantial risks that facial recognition technology presents. DHS’s privacy impact assessment suggests that HSI is not properly vetting the accuracy of the commercial tools it selects. Although it
outlines procedures for ensuring that facial recognition systems meet approved department standards, it also states that supervisors may approve such tools on a "case-by-case basis" when “exigent circumstances” warrant — even as it acknowledges those individuals' lack of “technical capacity” to “evaluate a facial recognition algorithm for accuracy or bias.” Given the extreme variance in the accuracy of facial recognition algorithms and companies’ incentives to exaggerate product precision for marketing reasons, this leeway is especially problematic.

The privacy impact assessment also states that special agents are to treat any matches returned by facial recognition software only “as investigative leads,” which it touts as a mitigation of the technology’s risks. But this policy language alone is an insufficient restraint. In three recent, high-profile incidents in which law enforcement officers made a false arrest based on a facial recognition match, the match was the only evidence connecting the arrestee to the crime. In at least one case, the arresting officer acted in violation of a directive stating that the match could not be the sole basis to seek an arrest warrant. At a minimum, further measures that go unmentioned in the privacy impact assessment — such as oversight, auditing, and limitations on the crimes for which facial recognition tools can be used as evidence — are needed to cabin use of these tools.

**Cell Site Simulators**

HSI also uses cell site simulator devices to identify suspects and persons of interest in its investigations. These devices — commonly called stingrays — imitate cell phone towers, forcing all phones in the area to connect to the device instead of a tower operated by a phone company. When cell phones connect to stingrays, they transmit unique identification numbers, which can be used to locate a particular device or identify all of the devices in the vicinity of the stingray. Stingrays also have the technical capacity to collect messages and other content from connected cell phones, although HSI special agents are required to disable this function. Despite the intrusive character of these devices, DHS does not limit their use to investigations into serious crimes.

Additionally, documents obtained through FOIA requests show that as early as 2010, HSI sought the equipment necessary to mount stingrays on aircraft. Mounting a stingray on an aircraft drastically increases the device’s radius, allowing it to both sweep more broadly and move more quickly. A 2019 training module (also released through a FOIA request) that requires HSI special agents to seek supervisory approval before deploying aircraft-mounted stingrays suggests that HSI has operationalized the technology and continues to use it. DHS’s internal policy on stingrays, implemented in 2015, lacks sufficient safeguards to meaningfully constrain HSI special agents’ actions. It applies only to HSI’s “criminal investigations,” not to the border monitoring efforts and workplace enforcement audits that have at times made up a sizable portion of the office’s activities. When stingrays are used for criminal investigations, the policy requires that agents obtain a search warrant, but it allows two exceptions: exigent circumstances and exceptional circumstances. Whereas exigent circumstances are defined by reference to Fourth Amendment case law, exceptional circumstances have no grounding in Fourth Amendment history. DHS’s policy provides little guidance on what exceptional circumstances entail, stating only that they are present when “exigent circumstances do not exist, the law does not require a search warrant and circumstances make obtaining a search warrant impracticable.” A February 2023 DHS inspector general report finding that HSI special agents failed to adhere to the policy cited the lack of specific guidance as one of the reasons.

Several courts have held that using a stingray constitutes a Fourth Amendment search for which special agents must obtain a judicial warrant — and for which no “exceptional circumstances” exemption exists. Yet HSI policy does not require disclosing warrantless stingray use in subsequent criminal proceedings. Notably, in order even to challenge a warrantless stingray search, a subject would need to be notified of its use, which is unlikely to occur under DHS’s current policy.

Finally, the policy does not on its face apply to the state and local law enforcement agencies with which HSI routinely partners, meaning that agents could rely on those partners to use stingrays without seeking a warrant. In its report, the DHS inspector general found that HSI relied on local law enforcement partners to follow the proper protocol for stingray use, which those partners failed to do in an undisclosed number of cases. And unlike DOJ, DHS does not require HSI to collect and maintain statistics about circumstances in which the device is used without a warrant.

**Data Collection and Artificial Intelligence**

HSI is currently developing — and has partially implemented — a data analytics and AI platform called the Repository for Analytics in a Virtualized Environment (RAVEn). While RAVEn’s progress remains unclear, the project aims to significantly expand HSI’s in-house data analytics and AI capabilities in two important ways. First, RAVEn will ultimately ingest data from or automatically query commercial databases and open-source
information and make the data accessible from a single platform. Pre-RAVEn, a single query through ICE’s search tools yielded results from only a limited subset of federal databases, and agents had to conduct separate queries to access information in other federal, state, and commercial databases or search open-source information. RAVEn is also expanding integrated HSI access to a broader array of government databases, including the FBI’s National Crime Information Center database, two massive DHS biometrics databases, and a database of human resources and payroll information for more than half a million employees affiliated with 170 federal agencies and organizations.

By aggregating vast troves of public and nonpublic data — information collected by the federal government as well as data purchased from commercial data brokers — and eliminating the time and effort required to perform separate searches, RAVEn will enhance HSI’s ability to analyze private aspects of individuals’ lives, from their religious affiliations to their granular location data. This mountain of information will allow agents to create detailed profiles that can be used for surveillance.

 Whereas HSI currently purchases access to data from a wide range of sources, including addresses, utility company records, credit reports, and ALPR data, reporting suggests that when fully operable, RAVEn will “ingest data from tens of thousands of sources, then make[] it searchable, shareable between agents, and graphable by values like time and place.” Concerning, despite the variety of sources from which RAVEn draws, HSI agents are not required to verify data for accuracy.

RAVEn risks empowering HSI to expand its monitoring of activists and journalists, particularly in the absence of published policies that constrain agents’ use of this expansive tool. Using currently available technology, for example, HSI special agents in 2018 tracked a variety of left-leaning gatherings lumped together under the category “anti-Trump protests.” Expanded data analytics capabilities and the ability to conduct searches more quickly could empower agents to profile, more frequently and in greater detail, individuals who are not suspected of crimes but whom special agents nevertheless view as suspicious, such as protestors, journalists, and activists.

Second, HSI seeks to develop and integrate AI tools with RAVEn. While this goal appears still to be aspirational, in its 2021 budget justification, HSI boasted that a trial use of RAVEn allowed HSI special agents to automate review of “55,278 individual I-9s” to identify workplace enforcement targets, which the agency estimated replaced nearly 3,000 investigative hours.

Aside from these stray references, HSI has released little information about the AI tools being developed, how they are trained and tested, and how they are deployed. This lack of transparency raises concerns. As DHS itself has recognized, the decisions made by AI tools may not be scrutable, making them difficult to understand much less cross-examine or challenge.

AI tools can absorb the gender, racial, and political biases of the data on which they are trained. Despite the notorious difficulty of measuring AI systems’ accuracy, DHS has said almost nothing about how RAVEn’s AI tools will be tested for accuracy, instead describing in general terms a review by HSI Innovation Lab personnel.

No independent review seems to be contemplated, and no testing metrics have been articulated.
IV. Recommendations

HSI's broad authorities, its involvement in deportations, and its access to invasive surveillance technologies call for greater transparency and accountability. To that end, this report recommends that Congress and the secretary of homeland security take the following steps at a minimum: separating HSI from ERO and limiting HSI's mandate; requiring HSI to follow and disclose investigative guidelines; and instituting reporting requirements on HSI's use of surveillance technologies.

>> Separate HSI from ERO and limit HSI's mandate. As HSI's own special agents and others have suggested, DHS should separate HSI and ERO in light of their distinct mandates. The current combination encourages HSI to participate in deportations that are purportedly outside its purview and facilitates access to invasive surveillance technologies that should be limited to serious criminal investigations if used at all.

To separate the components, the secretary should commission a review of HSI and ERO operations. DHS's Office of Inspector General has the appropriate independence and resources to conduct such a review and should develop recommendations for separating the offices into two distinct departments with separate mandates, budgets, and reporting lines.

The resulting recommendations should ensure that HSI focuses on serious crimes for which it can demonstrate expertise, including when it collaborates with state and local law enforcement agencies. The recommendations should also detail mechanisms to assure that HSI only shares surveillance technologies and information collected for criminal investigations with ERO when the latter seeks to apprehend immigrants convicted of serious crimes, not as a matter of course. Finally, the recommendations should address strengthening oversight structures in the newly separate HSI. The office's recent dragnet collection of data from money transmitters highlights the urgent need for greater supervision of regional offices at a minimum; additional approval processes or organizational changes may also be warranted.

Congress should also issue a legislative charter that clarifies HSI's mandate, limiting it to serious crimes and eliminating areas in which its work unnecessarily duplicates that of other agencies. At present, HSI undertakes many of the same types of investigations that are also conducted by the FBI; the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); DEA; other DHS components, such as CBP; and state and local law enforcement.

Unlike ATF and DEA, HSI does not currently specialize in a class of investigations; rather, it asserts and capitalizes on broad authority derived from expansively worded immigration statutes, creating tensions with other federal agencies as well as with local partners. HSI also does not publicly report on the distribution of its investigations across subject matters, making it difficult to discern what cases the office takes on and why.

In analyzing what types of investigations should remain within HSI's mandate, Congress should consider whether HSI's apparent expertise in human trafficking is genuine and merits continued jurisdiction over these cases, or whether it is improperly deployed to expand HSI's jurisdiction into investigations already handled by other law enforcement agencies — such as those primarily focused on transnational criminal organizations, counterterrorism, and narcotics investigations — over which the FBI has primary authority. In order to encourage victims and witnesses to come forward without fear of immigration consequences for themselves and their families, Congress should also consider grounding human trafficking prevention efforts in an agency with expertise in protecting vulnerable victims rather than one, like HSI, with a primarily investigative and law enforcement focus. Additionally, Congress should explore whether other types of investigations that HSI could devote resources to — such as investigations of cyberattacks and violations of export control laws — implicate DHS's core mission and are more suitable for HSI.

In the meantime, the secretary should preemptively clarify HSI's investigative priorities, working with the attorney general as needed to effectively divide responsibilities among federal agencies. The secretary should also direct HSI to publicly report how it currently allocates resources. Although a future administration could reverse this mandate, the exercise will strengthen HSI's ability to meaningfully contribute to important investigative areas in which it has significant and unique added value; it will also reduce waste and duplication and provide critical insight that will facilitate Congress's review of the office's role.

>> Issue publicly available investigative guidelines. HSI cannot continue to operate without limits on the vast authorities it claims for itself. Congress should issue guidelines on the use of HSI's investigative authorities and
tools, incorporating and improving on the guidelines that constrain other federal law enforcement and intelligence agencies. The Attorney General’s Guidelines, which law enforcement entities within DOJ must follow, are perhaps the best-known guidelines governing a federal government agency’s exercise of its law enforcement authorities. If Congress looks to these guidelines as a model for HSI’s investigations, however, it should make critical changes to restore lost civil rights and civil liberties protections, provide for impartial review of troubling HSI practices, and impose new safeguards. These should include:

- a requirement that agents document suspicion of wrongdoing before initiating an investigation;
- time limits for completing each investigation stage;
- audit requirements, written procedures, and regular civil rights and civil liberties training; and
- a requirement that agents conduct data collection using “the least intrusive collection techniques feasible.”

Given the likelihood that a legislative charter will take time to draft and pass, the secretary should publish interim guidelines that include these restrictions and require HSI special agents to follow them. Interim guidelines would constrain HSI special agents’ broad discretion and could serve as a helpful model for legislative action.

>> Report on the use of surveillance technology.

Finally, Congress should require HSI to increase transparency into both its internal policies regarding use of surveillance tools and the investigations for which it deploys sensitive technologies. As former Sen. Tom Coburn observed in 2015, in a critique that is equally salient today, “DHS and its component agencies are empowered to intrude on Americans’ notions of privacy and freedom to an extent shared by very few other federal agencies.”

Congress should require HSI leadership to issue public guidance on the use of surveillance technologies designed to constrain the risk that these tools will infringe on civil liberties or chill the exercise of fundamental rights. Congress should also require HSI to compile and publish statistics on the use of these technologies, including data about the investigations and purposes for which they are deployed, to allow ongoing analysis by lawmakers, affected communities, technologists, and civil society about the potential of these technologies to cause harm. The secretary can assist in this effort by publishing interim guidelines and reports.
Conclusion

HSI’s activities have highlighted the dangers of embedding a law enforcement agency within an immigration office, particularly when that agency is given broad investigative and intelligence authority. Congress and DHS leadership should respond by implementing durable reforms that will decrease HSI’s involvement in civil immigration work, reduce opportunities for abuse, and bring much needed transparency to its operations.
1 David Shaw (special agent in charge, HSI) et al. to Kirstjen Nielsen (secretary of homeland security, DHS), letter, June 21, 2018 (hereinafter Shaw et al. to Nielsen), https://www.documentcloud.org/documents/4562896-FILE-3286 (describing ICE as having “two distinct missions” and arguing that “the pernicious action of HSI’s investigative independence is unnecessarily impacted by the political nature of civil immigration enforcement” by ERO).


4 Shaw et al. to Nielsen (“The two ICE sub-agencies have become so specialized and independent that ICE’s mission . . . can only be described as a combination of the two distinct missions.”); and Carrie F. Cordero, Reforming the Department of Homeland Security Through Enhanced Oversight and Accountability, Center for a New American Security, May 12, 2020, 24, https://www.cnas.org/publications/reports/reforming-the-department-of-homeland-security-through-enhanced-oversight-accountability (noting that HSI special agents in charge have identified the “problem” of “HSI continually competing for resources with ERO and its separate mission”).


6 ICE, “Honoring the History of ICE, 2003–2023,” DHS, accessed May 16, 2023, https://www.ice.gov/features/history; and DHS IG, Proposal to Merge CBP with ICE, 3. Operational functions like the administration of immigration benefits and assessment of customs duties were transferred to other new DHS offices, including U.S. Citizenship and Immigration Services (USCIS) and Customs and Border Protection (CBP). The Federal Protective Service and the Federal Air Marshals were also folded into ICE before being transferred to DHS’s Management Directorate and Transportation Security Administration, respectively.


10 Early federal publications proffer that “the primary mission of ICE is to prevent acts of terrorism by targeting the people, money, and materials that support terrorist and criminal activities.” Brian A. Reaves, Federal Law Enforcement Officers, 2004, DOJ, Bureau of Justice Statistics, July 2006, 2. https://www.bjs.gov/content/pub/pdf/leo04.pdf. See also DHS IG, Proposal to Merge CBP with ICE, 124.


26 Becker, "Rebranding at ICE.


32 ICE, "U.S. Immigration and Customs Enforcement;


35 United States v. Chen, 2 F.3d 330, 333 (9th Cir. 1993) (rejecting challenge to investigation conducted outside U.S. territorial waters, explaining "Congress need not confer such authority explicitly and directly on the INS agents themselves. . . . Congress has provided extremely broad powers to the Attorney General for the enforcement of the immigration laws. . . . If the Attorney General deemed it necessary, she could, by herself, undertake an undercover investigation of the type involved here, as long as her actions did not directly contravene any constitutional provision. . . . It follows, again from the face of the statute, that she could, in her discretion, delegate the authority to conduct such an operation, or even the discretion to decide whether such an operation is necessary, to the [INS] Commissioner.").

36 Michael German and Kaylana Mueller-Hsia, Focusing the FBI, Brennan Center for Justice, July 8, 2022, 3, https://www.brennancenter.org/our-work/research-reports/focusing-fbi (observing that FBI agents are “authorized to conduct intrusive investigations even when there is no authorized purpose, allegation, or information suggesting that criminal activity may occur”); and German and Mueller-Hsia, Focusing the FBI, 4–5 (describing the breadth of authority under the Attorney General’s Guidelines for Domestic FBI Operations and the FBI’s Domestic Investigations and Operations Guide cited in the next two endnotes).


39 HSI publishes investigations handbooks in a number of subject matter areas, but none contain the detailed guidelines on opening and terminating investigations based on evidence that are contained in the Attorney General’s Guidelines and the DIOG. HSI has also declined to make the handbooks public and has released only redacted portions through FOIA requests. Brennan Center for Justice, "Homeland Security Investigations Documents," June 28, 2023, https://www.brennancenter.org/our-work/research-reports/homeland-security-investigations-documents.


and Michael Coleman, “Mission Creep: Homeland Security — while extremely important — arguably stretch concepts of mission to protect the homeland, these types of criminal violations — while extremely important — arguably stretch concepts of homeland security beyond a recognized conceptual framework.”)


Sen. Tom Coburn, A Review of the Department of Homeland Security’s Missions and Performance, S. Comm. on Homeland Security and Governmental Affairs (113th Cong.), January 2015 (hereinafter Coburn, Review of DHS’s Missions and Performance), 71, https://www.hsrgac.senate.gov/imo/media/doc/Senator%20Coburn%20DHS%20Report%20FINAL.pdf ("Many of HSI's investigative missions, such as narcotics, weapons, financial, and cybercrime, overlap with the investigative jurisdiction of other federal law enforcement agencies with longer histories and more experience, such as the Federal Bureau of Investigations (FBI), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), the Drug Enforcement Agency (DEA), and the U.S. Secret Service. This raises important questions, including whether some of [HSI's] responsibilities are duplicative [and] whether it is making a significant contribution to enforcing federal laws."); and DHS IG and DOJ IG, Joint Review of Law Enforcement Cooperation, Z1n20 ("The FBI’s perceptions of HSI mission creep have been longstanding [sic] and may expand beyond Southwest border field offices. In 2014, FBI leadership issued an internal report based on an internal survey that highlighted perceived HSI mission creep in 30 field offices. These offices reported conflicts between the agencies in human trafficking, violence against children, drugs, shootings, gangs, and robbery investigations."). See also Brennan Center, "Homeland Security Investigations Documents.”


Additional guidelines may be a requirement, not just a best practice, for entities like HSI. Executive Order 12333 Section 1.5(f) directs “heads of all departments and agencies” — including DHS’s secretary — to ensure that all elements, regardless of Intelligence Community affiliation, comply with U.S. person procedures required by part 2 of the executive order when undertaking “foreign intelligence and counterintelligence functions.” Those procedures should set forth standards for the collection, retention, and dissemination of information concerning U.S. persons. While agencies like HSI certainly conduct this type of intelligence, DHS’s secretary has not yet implemented any procedures to protect the interests of U.S. persons. The extent to which the secretary has unfulfilled obligations under Executive Order 12333 is outside the scope of this report, but it merits additional analysis.


President Trump made headlines for sweeping immigration raids, but the practice actually gained prevalence during the Bush administration, during which a raid of an Iowa meatpacking plant involving more than 1,000 ICE agents made headlines; President Obama’s administration also conducted smaller raids that drew criticism. Esther Yu Hsi Lee, "The Largest Workplace Raid Under the Obama Administration Just Happened in New York,” ThinkProgress (Center for American Progress), October 28, 2016, https://archive.thinkprogress.org/workplace-raid-buffalo-69390e0032ba/.


Sullivan, “Biden Ends Workplace Immigration Raids.”


HSI, “FW: Messaging on FAMU Separation,” email, April 23, 2018, 344–47, https://www.documentcloud.org/documents/6785901-3-8-19-ICE-Pred1#document/3344/553934 (emails showing requests from DHS leadership to HSI to support a ‘good narrative’ about family separation by providing examples of families separated due to a lack of direct parent-child relationship or allegations of human smuggling or trafficking).
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75 ICE, “ICE Awards New Contract for Rapid DNA Testing”; and McAleenan, answers to Senator Whitehouse’s questions, 2.


77 See, e.g., McAleenan, answers to Senator Whitehouse’s questions.


84 See, e.g., McAleenan, answers to Senator Whitehouse’s questions, 1 (noting the goal of separating children from anyone who is not their biological parent); and HSI, “FW: Messaging on FAMU Separation” (emails requesting examples of families separated due to “unclear family relationship”).

85 HSI policy when interviewing families at the border was to separate children from any “adult relative who is not the parent or legal guardian” and the tests agents used were only capable of “verifying” or refuting the existence of a direct parent-child relationship, putting other legal guardians who did not fit within HSI’s narrow definition of family at risk of losing their children. Jonathan R. Cantor, Privacy Impact Assessment: Rapid DNA Operational Use, DHS/ICE/PIA-050, DHS Privacy Office. June 25, 2019 (hereinafter Cantor, PIA for Rapid DNA Operational Use), 1–3. https://www.dhs.gov/sites/default/files/publications/privacy-ncia-ricrapiddna-june2019_1.pdf; and McAleenan, answers to Senator Whitehouse’s questions, 1. Additionally, whereas HSI’s privacy impact assessment claims that the agency has considered and mitigated accuracy concerns, the basis for this assertion is unknown: HSI provided no independent studies to support this assertion, and at least one rapid DNA test subjected to independent review showed significantly lower accuracy rates. Sara Hussen, “ICE’s Rapid DNA Testing on Migrants at the Border Is Yet Another Iteration of Family Separation,” Electronic Frontier Foundation, August 2, 2019, https://www.eff.org/deeplinks/2019/08/ices-rapid-dna-testing-migrants-border-yet-another-iteration-family-separation.

86 Cantor, PIA for Rapid DNA Operational Use. HSI also asserts that it obtained the consent of the adult member or members of families selected for testing, Cantor, PIA for Rapid DNA Operational Use, 4. However, considering that travelers who were refused into ICE custody and faced the prospect of being separated from the children they were traveling with, this consent cannot be considered freely given. Cantor, PIA for Rapid DNA Operational Use, 8.


89 Dickerson, “Trump Administration Targets Parents.”


92 Reporting has also suggested that HSI was part of an interagency working group in which one of the members, CBP, tracked “ten journalists, seven of whom are U.S. citizens, a U.S. attorney, and 48 people from the U.S. and other countries . . . including advocates from organizations like Border Angels and Pueblo Sin Fronteras,” Tom Jones, Mari Payton, and Bill Feather, “Source: Leaked Documents Show the U.S. Government Tracking Journalists and Immigration Advocates


Brewster, “Immigration Cops Just Spent a Record $1 Million;” See, e.g., United States v. Cotterman, 709 F.3d 952, 989 (9th Cir. 2013) (en banc) (Smith, J. dissenting) (“The majority’s mutation of the border search exception is especially unnecessary given that this search did not occur at the border, but rather 170 miles away from the border and five days after the border was crossed. . . . By labeling this a border search, the majority has conjured a sort of ‘floating border,’ whereby any item initially seized at the border, but not cleared there, can be transported thousands of miles away and searched anywhere, and at any time, simply because the government did not find anything (or enough) during its original search at the border.”); and United States v. Kim, 103 F. Supp. 3d 32, 57 (D.D.C. 2015) (“It is true that [the defendant’s] laptop was seized at the border — in this case, LAX — but it was not even opened, much less searched, there. It was transported approximately 150 miles to San Diego [for imaging and search].”)

Kim, 103 F. Supp. 3d at 32, 57. Most courts, however, have upheld the use of extended, off-site searches as within HSI’s border search authority. See, e.g., United States v. Kolsuz, 185 F. Supp. 3d 843, 851–52 (E.D. Va. 2016), aff’d, 890 F.3d 133 (4th Cir. 2018) (“As several courts have held, an off-site forensic search of an electronic device over a long period of time is nonetheless a border search where, as here, the electronic device was seized at the border, the device was never cleared to pass through the border, and therefore the defendant never ‘regain[ed] an expectation of privacy in the electronic device.’” (quoting United States v. Stewart, 729 F.3d 517, 526 (6th Cir. 2013))).


Under HSI policy, special agents may retain information if it is “relevant to immigration, customs, [or] other law enforcement matters.” Ex. 21 to Plaintiffs’ Motion for Summary Judgement at 63. Merchant v. Mayorkas, 1:17-cv-11730-DJC.


111 Hackman and Volz, “Secret Surveillance Program.”


114 Mehrotra, “ICE Is Grabbing Data.”

115 Austin et al., Stuck with Suspicion, 15–17.

116 Austin et al., Stuck with Suspicion, 14.

117 Austin et al., Stuck with Suspicion, 15.

118 Austin et al., Stuck with Suspicion, 15.


126 Austin et al., Stuck with Suspicion, 23.


130 Austin et al., Stuck with Suspicion, 16–17 (describing a bond denial — later reversed on appeal — finding an immigrant’s multiple letters of support, school transcript, and the absence of any arrest record to be insufficient evidence to refute gang allegations).

131 García-Leyas et al., Mislabeled, 17.

132 See, e.g., Hlass and Prandini, Deportation by Any Means Necessary, 15 (describing a 16-year-old immigrant transferred from Massachusetts, where his family was located, to facilities in New York and then Virginia before requesting to be deported approximately two years later due to the detention conditions).

133 Austin et al., Stuck with Suspicion, 23; and Chicago IG, Review of the Chicago Police Department’s “Gang Database,” 28–29.


Even voluntarily uploaded photos were not subject to law enforcement facial recognition queries until companies like Clearview AI emerged, making it unlikely that those who had once uploaded such photos online consented to this use. See, e.g., Hill, “Your Face Is Not Your Own” (noting that Clearview AI “dwarfed” other law enforcement facial recognition databases, “which drew only on official photography like mug shots, driver’s licenses, and passport pictures”). Traditionally, law enforcement access to facial recognition technology has been limited to searching within a department’s own files, or those of other departments to which it has access — which HSI has significantly expanded in recent years. For example, HSI has arranged to search state driver’s license databases by submitting facial recognition search requests to state and local agencies. Bill Chappell, “ICE Uses Facial Recognition to Sift State Driver’s License Records, Researchers Say,” NPR, July 8, 2019, https://www.npr.org/2019/07/08/739491857/ice-uses-facial-recognition-to-sift-state-drivers-license-records-researchers-say; Utah HSI, list of requests to search through state photo or facial recognition repositories, Center on Privacy and Technology, last modified July 9, 2019, https://drive.google.com/drive/folders/18wcdkwm8W_WNxxo2pBBwPbCwMf3Xh; Vermont HSI, list of requests to search through state photo or facial recognition repositories, Center on Privacy and Technology, last modified July 12, 2019, https://drive.google.com/drive/folders/1_iHTqB2ULtTkBe-yuUh2uMIN-Gz2z; and Washington HSI, list of requests to search through state photo or facial recognition repositories, Center on Privacy and Technology, last modified July 8, 2019, https://drive.google.com/drive/folders/1l1Yypuf_aiera7V5eOQP7Ycm7NblyC. Other arrangements allow HSI to search directly in states’ DMV databases without seeking permission for any particular search, giving its agents access to broad swaths of data without meaningful accountability. Drew Harwell, “FBI, ICE Find State Driver’s License Photos Are a Gold Mine for Facial Recognition Searches,” Washington Post, July 7, 2019, https://www.washingtonpost.com/technology/2019/07/07/fbi-ice-find-state-drivers-license-photos-are-gold-mine-facial-recognition-searches/; and Drew Harwell and Erin Cox, “ICE Has Run Facial-Recognition Searches on Millions of Maryland Drivers,” Washington Post, February 26, 2020, https://www.washingtonpost.com/technology/2020/02/26/ice-has-run-facial-recognition-searches-millions-maryland-drivers.


Kozanas, PIA for ICE Use of FR, 11.

Kozanas, PIA for ICE Use of FR, 17 (“Vendor facial recognition queries are treated as equivalent to open web searches via a search engine. HSI will not save the entirety of returned query results in ICE systems. Rather, HSI will only collect and document salient results as they pertain to the investigation.”) (emphasis added). Although discarding the query results that are not used further in an investigation is a good practice for privacy protection, HSI special agents should be required to document that a search occurred, what tools were used, the photo(s) used for the search, the number of potential matches each tool returned, the range of confidence levels returned, and the confidence level of the match selected for further use in the investigation.


Kozanas, PIA for ICE Use of FR, 3–4. See also Grother et al., FRVT Part 3: Demographic Effects, 2; and Jeremy Shur and Deborah Won, “The Computer Got It Wrong: Why We’re Taking the Detroit Police to Court over a Faulty Face Recognition ‘Match,’” ACLU, April 13, 2021, https://www.aclu.org/news/privacy-technology/the-computer-got-it-wrong-why-were-taking-the-detroit-police-to-court-over-a-faulty-face-recognition-match (describing one of the first documented false arrests due to an incorrect facial recognition match, which involved a purported match to the arrestee’s expired driver’s license photo, not the current version on file with the DMV).


See, e.g., Tatum Millet, “A Face in the Crowd: Facial Recognition Technology and the Value of Anonymity,” Columbia Journal of Transnational Law, October 18, 2020, https://www.itl.columbia.edu/bulletin-blog/a-face-in-the-crowd-facial-recognition-technology-and-the-value-of-anonymity (“Governments need not use facial recognition systems with great frequency to chill associational freedoms; the potential for such use is enough. When one Black Lives Matter protester is tracked down using facial recognition, it reveals that every protester is potentially vulnerable to such surveillance methods. . . . Protecting the fundamental rights to privacy, expression, association, and equality requires protecting the right to remain anonymous in public spaces.”).


165 Mayorkas to Saldaña et al., “Policy Directive 047-02,” 4–5. Exigent circumstances include “the need to protect human life or avert serious injury; the prevention of the imminent destruction of evidence; the hot pursuit of a fleeing felon; or the prevention of escape by a suspect or convicted fugitive from justice.”


168 DHS IG, Secret Service and ICE Did Not Always Adhere to Statute and Policies Governing Use of Cell-Site Simulators (Redacted), DHS, February 23, 2023, 3, https://www.oig.dhs.gov/sites/default/files/assets/2023-03/OIG-23-17-Feb23-Redacted.pdf. Among other things, agents failed to document supervisor approval, comply with agency data deletion requirements, and seek the appropriate process (either a search warrant or a court order) in an undisclosed number of cases.


171 DHS IG, Secret Service and ICE, 11.
Companies. Kaplan, weak protections in the ALPR assessment suggest that this check privacy impact assessment in connection with any such contract, the data/?sh=58cd13ed50c5. Although DHS would need to publish a cars-immigration-and-border-police-have-been-grabbing-their- data. Thomas Brewster, “These Companies Track Millions of companies that provide digital services to vehicles — raising the specter of future contracts with these companies to purchase this data on an ongoing basis, much like the agency currently purchases ALPR data. Thomas Brewster.” These Companies Track Millions of Cars — Immigration and Border Police Have Been Grabbing Their Data; Forbes, April 1, 2021, https://www.forbes.com/sites/thomasbrewster/2021/04/01/these-companies-track-millions-of-cars-immigration-and-border-police-have-been-grabbing-their-data/?sh=58cd13ed50c5. Although DHS would need to publish a privacy impact assessment in connection with any such contract, the weak protections in the ALPR assessment suggest that this check would not be sufficient to curb potential abuse. Kaplan, PIR for LPRs.

178 Haskins, “Amazon, Google, Microsoft, and Other Tech Companies.”

179 Kozanas, PIA for RAVEn, 11.


182 Kozanas, PIA for RAVEn, 13. Although HSI characterizes these computer-developed recommendations as “investigative leads” that require additional investigation before an agent may take action, parallel limitations on the use of facial recognition technology have been ineffective; numerous false arrests have shown that the matches are treated as evidence of wrongdoing. Kozanas, PIA for RAVEn, 27. See also DHS, ICE FY 2021 Congressional Justification, 19.


186 Kozanas, PIA for RAVEn, 3.

187 Shaw et al. to Nielsen; Maria Sacchetti and Nick Miroff, “Agents with Homeland Security Investigations Push to Break Away from ICE, Saying Negative Reputation Hurts Their Work,” Washington Post, December 29, 2021, https://www.washingtonpost.com/national-security/hsi-ice-split/2021/12/28/85dc6c66-61ad-11ec-8ec3-9454d0b46d42_story.html; and Cordero and Galgano, Mardi Gras to the Philippines (proposing, among other alternatives, that “Congress . . . establish HSI as a stand-alone investigative entity within DHS, separating it from ERO. A separated HSI should be led by a Senate-confirmed official, as is the case with HSI’s peer organizations at DOJ, such as the FBI, DEA, and ATF.”).

188 See 5 U.S.C. App. 3 § 4(a) (authorizing inspectors general of federal agencies to “provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment”); and DHS IG, “Frequently Asked Questions,” accessed May 16, 2023, https://www.oig.dhs.gov/about/faqs (noting that the Office of Inspector General may initiate “reviews of DHS components” of its own volition or as requested by “important stakeholders such as Congress or the DHS Secretary”).

189 Offices that could play a role in oversight include DHS’s Office for Civil Rights and Civil Liberties (CRCL), Privacy Office, Office of the General Counsel, and Office of Strategy, Policy, and Plans — although each of these offices has its own challenges and needed reforms that are outside the scope of this report. See Spencer Reynolds and Faiza Patel, A New Vision for Domestic Intelligence: Fixing Overbroad Mandates and Flimsy Safeguards, Brennan Center for Justice, March 30, 2023, 9–11, https://www.brennancenter.org/our-work/policy-solutions/new-vision-domestic-intelligence.

190 Although reforms to ERO’s mission are outside the scope of this report. Other commentators have recommended recalibrating the treatment of immigration violations, which are primarily civil, as administrative rather than law enforcement issues; they argue that the current system inappropriately conflates civil immigration violations with crimes and dehumanizes immigrants. See, e.g., Rudman et al., Redefining Homeland Security, and Peter L. Markowitz, A New Paradigm for Humane and Effective Immigration Enforcement, Center for American Progress, November 30, 2020, https://www.americanprogress.org/issues/immigration/reports/2020/11/30/493173/new-paradigm-humane-effective-immigration-enforcement. See also Waxman, “ ‘Abolish ICE’ Movement Is Growing.” A clear separation of criminal investigations from civil immigration enforcement would be a helpful first step in this reframing.


192 Coburn, Review of DHS’s Missions and Performance, 71; DHS IG and DOJ IG, Joint Review of Law Enforcement Cooperation, 21n20; and Mackenzie Shuman et al.,“Homeland Security Investigations Agents Involved in Shootings Nationwide,” AZ Central, February 24, 2020, https://www.azcentral.com/story/news/local/ahwatukee/2020/02/24/homeland-security-investigations-agents-involved-shootings-nationwide/4853637002 (describing two investigations by Maricopa County in which HSI agents involved in shootings were found not to have remained on the scene or given prompt interviews as required under local rules — one in which the agents sought to take custody of a defendant facing state law charges, the other in which the agents sought to intercept a meth sale planned to result in armed robbery).

193 Cordero and Galgano, Mardi Gras to the Philippines (estimating HSI investigation selection using press releases but observing that press releases do not necessarily offer an accurate accounting of investigative investments).

which can lead to surveillance and profiling without any indication that a subject has or intends to participate in illegal activity. Testimony of Michael German Before the Portland City Council, Brennan Center for Justice, April 18, 2018, 2, https://www.brennancenter.org/sites/default/files/MGerman%20Portland%20Testimony%20on%20JTTF%20final.pdf; and DOJ, Attorney General’s Guidelines.


200 The Attorney General’s Guidelines currently encourage — but do not require — the FBI and other law enforcement agencies within DOJ to use the least intrusive methods possible. DOJ, Attorney General’s Guidelines, 12–13. The Brennan Center has recommended that the FBI eliminate this ambiguity and return to a firm requirement that agents use the least intrusive means feasible. Berman, Domestic Intelligence, 44.

201 Coburn, Review of DHS’s Missions and Performance, 158. See also Rudman et al., Redefining Homeland Security (“There is a clear need for strengthened protections and safeguards for civil liberties and privacy to prevent abuses — such as those DHS has committed in the past — whereby religious, racial, ethnic, and migrant communities are disproportionately affected or targeted by such threat-sharing.”).

202 CRCL could play a greater role in DHS’s safeguarding of civil rights if its statutory authorities were amended to give the office more authority to play a role in policymaking. See Rudman et al., Redefining Homeland Security. If CRCL were reformed to take on a more proactive role at DHS, its involvement in reviewing the policies that constrain surveillance technologies and in auditing how these technologies are used would be prudent.
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The Brennan Center’s Liberty and National Security Program works to advance effective national security policies that respect constitutional values and the rule of law, using research, innovative policy recommendations, litigation, and public advocacy. The program focuses on reining in excessive government secrecy, ensuring that counterterrorism authorities are narrowly targeted to the terrorist threat, and securing adequate oversight and accountability mechanisms.

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