

A Realignment for Homeland Security Investigations

By Mary Pat Dwyer and Rachel Levinson-Waldman PUBLISHED JUNE 29 2023

Table of Contents

Introduction	3
I. HSI's History and Law Enforcement Mandate	4
HSI's Creation and Growth	5
HSI's Expansive Authorities	5
II. HSI's Involvement in DHS's Deportation Activities	6
Workplace Enforcement Actions	6
Investigative Initiatives Without a Serious Crime Nexus	7
Exploitation of Transnational Crime Mandate	8
III. HSI's Surveillance Tools	11
Facial Recognition Technology	11
Cell Site Simulators	12
Data Collection and Artificial Intelligence	12
IV. Recommendations	14
Conclusion	16
Endnotes	17

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform and revitalize — and when necessary defend — our country's systems of democracy and justice. The Brennan Center is dedicated to protecting the rule of law and the values of constitutional democracy. We focus on voting rights, campaign finance reform, ending mass incarceration, and preserving our liberties while also maintaining our national security. Part think tank, part advocacy group, part cutting-edge communications hub, we start with rigorous research. We craft innovative policies. And we fight for them — in Congress and the states, in the courts, and in the court of public opinion.

STAY CONNECTED TO THE BRENNAN CENTER

Visit our website at
www.brennancenter.org

© 2023. This paper is covered by the [Creative Commons Attribution-NonCommercial-NoDerivs](https://creativecommons.org/licenses/by-nc-nd/4.0/) license. It may be reproduced in its entirety as long as the Brennan Center for Justice at NYU School of Law is credited, a link to the Brennan Center's web pages is provided, and no charge is imposed. The paper may not be reproduced in part or in altered form, or if a fee is charged, without the Brennan Center's permission. Please let the Brennan Center know if you reprint.

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

DHS 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 nonredun-

dant 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.²³ HSI took on the roles of three predecessor criminal investigation entities — the Offices of Investigations, Intelligence, and International Affairs²⁴ — while ERO was “devoted to civil immigration enforcement.”²⁵ 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.²⁶

Whereas ICE's activities have faced considerable criticism, HSI has been relatively spared.²⁷ Yet not only does HSI share a budget and senior reporting line with ERO,²⁸ 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.”²⁹ 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.³⁰

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.”³¹

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.³² In training materials, HSI has also claimed the authority to investigate “any federal crime.”³³ 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.³⁴ 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.³⁵

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,³⁶ define its investigative methods and impose limits and an oversight structure.³⁷ The FBI's *Domestic Investigations and Operations Guide* (DIOG) provides more granular rules and is also partially available to the public.³⁸ DHS has published no such rules for HSI's investigations.³⁹

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.⁴⁰ 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.⁴¹ 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.⁴² 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,⁴³ as well as in areas over which other federal entities have primary investigative authority, like narcotics, financial crimes, cybercrime, and counterterrorism.⁴⁴

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.⁴⁵ 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.⁴⁶ 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.⁴⁷ Despite HSI's similar conduct, it has never been required to issue similar publicly available guidelines constraining its data collection and surveillance techniques.⁴⁸

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.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵²

HSI also produces memos labeling young immigrants as gang members or “associates.”⁵³ 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.⁵⁴ 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.⁵⁵ In comparison, human trafficking and human smuggling — two areas on which HSI purports to focus⁵⁶ — taken together resulted in approximately half as many investigations during the same year.⁵⁷ 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.⁵⁸

In October 2021, Mayorkas announced that DHS would stop conducting workplace raids.⁵⁹ In announcing the decision, he described the raids as “resource-intensive,” suggesting the considerable amount of time and effort devoted to these efforts.⁶⁰ 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.”⁶¹

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.⁶² 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.⁶³

These raids overwhelmingly ensnared workers, not employers. Of the 779 criminal worksite arrests that HSI made in 2018, 85 percent were of workers.⁶⁴ 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.⁶⁵ 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.⁶⁶ 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.⁶⁷

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.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.⁷¹ 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.⁷²

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 role⁷³ — 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.⁷⁴ The agency allocated 200 special agents to the testing project and reallocated funding from other HSI programs.⁷⁵ It ultimately deployed more than 2,500 DNA kits to test immigrant families.⁷⁶

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.⁷⁷

Efforts to Decriminalize Working Immigrants

While Congress has struggled to pass comprehensive immigration reform for almost two decades,⁷⁸ policy-makers 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.”⁷⁹ 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.”⁸⁰

President Obama's words built on a bipartisan effort to create a path to citizenship led by four Republican and four Democratic senators.⁸¹ 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.”⁸²

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.”⁸³

In reality, HSI separated children from trusted adult guardians — an explicit goal of DHS⁸⁴ — while relying on tests of indeterminate accuracy and collecting DNA information from arriving immigrants.⁸⁵ 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.⁸⁶

Beginning in July 2017, HSI directed an operation targeting the parents and relatives of unaccompanied immigrant children who were entering the United States to

reunite with them.⁸⁷ HSI's easy access to the information needed to identify sponsors facilitated this operation. Pursuant to a memorandum of agreement in force from 2018 through March 2021 between ICE, CBP, and the Department of Health and Human Services' Office of Refugee Resettlement (ORR) — the office tasked with finding safe and suitable homes for unaccompanied immigrant children — ORR provided to ICE the “name, date of birth, address, fingerprints . . . and any available identification documents or biographic information regarding the potential sponsor and all adult members of the potential sponsor's household.”⁸⁸

HSI's decision to arrest sponsors risked deterring family members from accepting custody of unaccompanied children and prolonging child detentions at the border.⁸⁹ The Biden administration halted the automatic information flow between ICE, CBP, and ORR, yet DHS has issued no restrictions on HSI's ability to use the previously collected information to target sponsors of immigrant children.⁹⁰

Similarly, through Operation Second Look, a program conceived during the Obama administration and intensified under President Trump, HSI investigates naturalized citizens, searching for deportation orders that may have been issued before they became naturalized or for inconsistencies in their documents. Along with its partners, U.S. Citizenship and Immigration Services (USCIS) and ERO, as well as DOJ, HSI has reviewed the files of hundreds of thousands of naturalized citizens for irregularities in order to pursue criminal charges and denaturalization.⁹¹

U.S. citizens have also been the subjects of HSI's collaboration with CBP to conduct border searches of electronic devices, including laptops, phones, tablets, data storage cards, and thumb drives.⁹² For example, a 2017 lawsuit alleged that HSI and CBP have a practice of flagging journalists, activists, and academics for invasive, warrantless searches at U.S. borders.⁹³ HSI performs at least some of these searches using GrayKey, sophisticated hacking software on which DHS has spent more than \$1 million since 2018.⁹⁴ This tool is capable of bypassing passcodes to give “access to all the data inside [a device], including user passwords.” Its manufacturer, Grayshift, advertises additional hacking features that are revealed only after signing a nondisclosure agreement.⁹⁵

HSI conducts intrusive forensic searches off-site as well, sometimes more than 100 miles from the border location at which electronic devices were seized.⁹⁶ It is unlikely that these extended searches plausibly implicate “the security or territorial integrity of the nation” that traditionally justifies HSI's border search authority. Rather, they highlight the office's willingness to push the boundaries of its power.⁹⁷

HSI's deployment of these tactics lacks safeguards and transparency. By HSI's own admission, it does not track the number of electronic device searches it performs, and it cannot estimate how many are carried out on U.S. citi-

zens' belongings,⁹⁸ despite the fact that its policies have required collection of these statistics since 2009.⁹⁹ Nor does it measure the efficacy of these searches: it cannot quantify the number or percentage of searches that identify contraband or evidence of federal crimes.¹⁰⁰ Nevertheless, under a broad relevance standard, HSI may retain the information obtained through these searches, including mirror images containing all the information found on an individual's device, and may share it with other law enforcement agencies.¹⁰¹

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.¹⁰² 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.¹⁰³ In Portland, HSI special agents joined with other DHS officers to arrest protestors based on faulty or nonexistent evidence.¹⁰⁴

During this time, HSI also reportedly requested aerial surveillance of protest activity in Minneapolis.¹⁰⁵ 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”¹⁰⁶ — have yielded few specifics about the protest surveillance.¹⁰⁷

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.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.¹⁰⁹ HSI justified the program by referencing its goals of “combating transnational criminal actors and other security threats.”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.”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.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 2022.¹¹³ 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.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.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.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.”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.”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.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.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.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.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.¹²³ Similar issues led the Portland, Oregon, police department to dismantle its gang databases,¹²⁴ and other cities are facing pressure to discontinue or drastically reform their use of such databases.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.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.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.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.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.¹³⁰ Based on unsubstantiated gang allegations, immigration judges often deny bond or set prohibitively high bond, which

leads to lengthy detentions.¹³¹ This outcome is particularly harsh for teenagers, who can be detained in prison-like facilities far from their families for years.¹³²

HSI's designations also close the door on options for relief from removal, such as Special Immigrant Juvenile Status (SIJS), Deferred Action for Childhood Arrivals (DACA), and U visas. SIJS determinations — which provide a path to lawful permanent residency — are based on state court judges' findings that an immigrant child came to the United States after experiencing abuse or neglect in their home country and that the best interest of the child precludes a return. However, this judgment can be overridden at USCIS's discretion based on ostensibly adverse information, such as gang allegations contained in HSI memos. Likewise, U visas — which protect “victims of certain crimes who have suffered mental or physical abuse” and certain members of their immediate families — can be denied based on supposed

gang affiliation or membership.¹³³ 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.¹³⁴

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.”¹³⁵

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.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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.¹³⁹ ICE spent more than \$200,000 on Clearview contracts in 2020,¹⁴⁰ 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.¹⁴¹

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.¹⁴² The assessment also refers to a nonpublic HSI policy governing use of facial recognition tools.¹⁴³ 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.¹⁴⁴

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.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹ These risks have prompted several companies that develop facial recognition software to exit the market or ban law enforcement from using their products.¹⁵⁰ 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.¹⁵¹

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.”¹⁵² 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.¹⁵³

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.¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷ Despite the intrusive character of these devices, DHS does not limit their use to investigations into serious crimes.¹⁵⁸

Additionally, documents obtained through FOIA requests show that as early as 2010, HSI sought the equipment necessary to mount stingrays on aircraft.¹⁵⁹ Mounting a stingray on an aircraft drastically increases the device’s radius, allowing it to both sweep more broadly and move more quickly.¹⁶⁰ 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.¹⁶¹

DHS’s internal policy on stingrays, implemented in 2015, lacks sufficient safeguards to meaningfully constrain HSI special agents’ actions.¹⁶² 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.¹⁶³ 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.¹⁶⁴ Whereas exigent circumstances are defined by reference to Fourth Amendment case law,¹⁶⁵ exceptional circumstances have no grounding in Fourth Amendment history.¹⁶⁶ 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.”¹⁶⁷ 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.¹⁶⁸

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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ And unlike DOJ, DHS does not require HSI to collect and maintain statistics about circumstances in which the device is used without a warrant.¹⁷²

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).¹⁷³ 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.¹⁷⁴

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.¹⁷⁵ 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.¹⁷⁶

By aggregating vast troves of public and nonpublic data — information collected by the federal government as well as data purchased from commercial data brokers¹⁷⁷ — 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.”¹⁷⁸ Concerningly, despite the variety of sources from which RAVEn draws, HSI agents are not required to verify data for accuracy.¹⁷⁹

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.¹⁸⁰ 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.”¹⁸¹ 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.¹⁸² 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.¹⁸³ 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.¹⁸⁴

AI tools can absorb the gender, racial, and political biases of the data on which they are trained.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹ 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.¹⁹⁰

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,¹⁹¹ creating tensions with other

federal agencies as well as with local partners.¹⁹² 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.¹⁹³

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.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶

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.¹⁹⁷ These should include:

- a requirement that agents document suspicion of wrongdoing before initiating an investigation;¹⁹⁸
- time limits for completing each investigation stage;¹⁹⁹
- 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.”²⁰⁰

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.”²⁰¹

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.²⁰² 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.

Endnotes

- 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 perception of HSI’s investigative independence is unnecessarily impacted by the political nature of civil immigration enforcement” by ERO).
- 2 ICE, “Homeland Security Investigations,” DHS, accessed May 16, 2023, <https://www.ice.gov/about-ice/homeland-security-investigations#tab3>.
- 3 For example, while HSI’s press releases “appear to de-emphasize the immigration enforcement work engaged in by HSI in conjunction with . . . ERO,” its budget justification for fiscal year 2022 described 4,326 new worksite investigations and 3,903 Form I-9 employment eligibility inspections in 2020, resulting in 1,001 arrests. Carrie Cordero and Katie Galgano, *From Mardi Gras to the Philippines: A Review of DHS Homeland Security Investigations*, Center for a New American Security, July 28, 2021, <https://www.cnas.org/publications/reports/from-mardi-gras-to-the-philippines-a-review-of-dhs-homeland-security-investigations>. See also ICE, “Homeland Security Investigations.”
- 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”).
- 5 DHS Office of Inspector General (hereinafter DHS IG), *An Assessment of the Proposal to Merge Customs and Border Protection with Immigration and Customs Enforcement*, November 1, 2005 (hereinafter *Proposal to Merge CBP with ICE*), 2, <https://www.oig.dhs.gov/reports/2006/assessment-proposal-merge-customs-and-border-protection-immigration-and-customs-enforcement/oig06-04nov05>.
- 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.
- 7 DHS IG, *Proposal to Merge CBP with ICE*, 3, 25, 58.
- 8 DHS IG, *Proposal to Merge CBP with ICE*, 18–19; and James Jay Carafano and David Heyman, *DHS 2.0: Rethinking the Department of Homeland Security*, Heritage Foundation and Center for Strategic and International Studies, December 13, 2004, 15, <https://www.heritage.org/homeland-security/report/dhs-20-rethinking-the-department-homeland-security>.
- 9 DHS IG, *Proposal to Merge CBP with ICE*, 8–9. See, e.g., Olivia B. Waxman, “The ‘Abolish ICE’ Movement Is Growing. Here’s Why the U.S. Immigration and Customs Enforcement Agency Was Created,” *Time*, June 29, 2018, <https://time.com/5325492/abolish-ice-history>.
- 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/fleo04.pdf>. See also DHS IG, *Proposal to Merge CBP with ICE*, 124.
- 11 This narrative began during the Reagan administration but grew in force after the creation of DHS. Tanvi Misra, “The Rise of ‘Crimmigration,’” *Bloomberg*, September 16, 2016, <https://www.bloomberg.com/news/articles/2016-09-16/c-sar-garc-a-hern-ndez-on-the-rise-of-crimmigration>; and Ryan Devereaux, “What’s in a Name: How Post-9/11 Visions of an Imperiled Homeland Supercharged U.S. Immigration Enforcement,” *Intercept*, September 10, 2021, <https://theintercept.com/2021/09/10/immigration-enforcement-homeland-security-911>.
- 12 *Immigration Reform and the Reorganization of Homeland Defense, Hearing Before the S. Comm. on the Judiciary Subcomm. on Immigration*, 107th Cong. (2002) (statement of Bill Ong Hing, National Asian Pacific American Legal Consortium), 2, https://www.judiciary.senate.gov/imo/media/doc/hing_testimony_06_26_02.pdf. See also Katie McDonough, “A Short Brutal History of ICE,” *Splinter News*, February 2, 2018, <https://splinternews.com/a-short-brutal-history-of-ice-1822641556>. This criticism of DHS remains pertinent today. See, e.g., Waxman, “‘Abolish ICE’ Movement Is Growing.”
- 13 Juliet Stumpf, “The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power,” *American University Law Review* 56, no. 2 (December 2006): 382–83, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1274&context=aulr>; and Teresa A. Miller, “Citizenship and Severity: Recent Immigration Reforms and the New Penology,” *Georgetown Immigration Law Journal* 17, no. 4 (2003): 611, 622–23, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739088.
- 14 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214 (1996), <https://www.congress.gov/104/plaws/publ132/PLAW-104publ132.pdf>; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009–546 (1996), <https://www.congress.gov/104/crpt/hrpt828/CRPT-104hrpt828.pdf>; and Stumpf, “Crimmigration Crisis,” 383–84.
- 15 Stumpf, “Crimmigration Crisis,” 384.
- 16 Miller, “Citizenship and Severity,” 611, 640.
- 17 Stumpf, “Crimmigration Crisis,” 384; and Miller, “Citizenship and Severity,” 611, 657n195.
- 18 Jennifer M. Chacón, “Criminalizing Immigration,” *Reforming Criminal Justice* 1 (2017): 208–9, https://law.asu.edu/sites/default/files/pdf/academy_for_justice/11_Reforming-Criminal-Justice_Vol_1_Criminalizing-Immigration.pdf.
- 19 United States Sentencing Commission, *Annual Report 2020*, accessed May 16, 2023, <https://www.uscc.gov/about/annual-report/archive/annual-report-2020>.
- 20 For time spent in the United States, see Vivian Yee, Kenan Davis, and Jugal K. Patel, “Here’s the Reality About Illegal Immigrants in the United States,” *New York Times*, March 6, 2017, <https://www.nytimes.com/interactive/2017/03/06/us/politics/undocumented-illegal-immigrants.html>. For crime rates, see Michael T. Light, Jingying He, and Jason P. Robey, “Comparing Crime Rates Between Undocumented Immigrants, Legal Immigrants, and Native-Born US Citizens in Texas,” *Proceedings of the National Academy of Sciences of the United States of America* 117, no. 51 (December 7, 2020), <https://doi.org/10.1073/pnas.2014704117>.
- 21 Chacón, “Criminalizing Immigration,” 216–17.
- 22 Nick Miroff, “‘Kids in Cages’: It’s True That Obama Built the Cages at the Border. But Trump’s ‘Zero Tolerance’ Immigration Policy Had No Precedent,” *Washington Post*, October 23, 2020, <https://www.washingtonpost.com/immigration/kids-in-cages-debate-trump-obama/2020/10/23/8ff96f3c-1532-11eb-82af-864652063d61>.

[story.html](#); and Joel Rose, “The Inquiry into Border Agents on Horseback Continues. Critics See a ‘Broken’ System,” NPR, November 6, 2021, <https://www.npr.org/2021/11/06/1052786254/border-patrol-agents-horseback-investigation-haitian-immigrants>.

23 John Morton (assistant secretary, ICE) to all ICE employees, “Internal Realignment of ICE Offices,” memorandum, June 9, 2010, <https://www.washingtonpost.com/wp-srv/hp/ssi/wpc/MortonMessage.pdf>.

24 Andrew Becker, “Rebranding at ICE Meant to Soften Immigration Enforcement Agency’s Image,” *Washington Post*, June 17, 2010, <https://www.washingtonpost.com/wp-dyn/content/article/2010/06/16/AR2010061605324.html>.

25 Morton, “Internal Realignment of ICE Offices”; and ICE, “Who We Are: Homeland Security Investigations,” DHS, last modified April 14, 2023, <https://www.ice.gov/about-ice/homeland-security-investigations>.

26 Becker, “Rebranding at ICE.”

27 Heather Timmons, “No One Really Knows What ICE Is Supposed to Be. Politicians Love That,” Quartz, July 7, 2018, <https://qz.com/1316098/what-is-ice-supposed-to-do-the-strange-history-of-us-immigration-and-customs-enforcement/ht> (“Today, only the agency’s 6,000 Homeland Security Investigations (HSI) agents are tasked with ICE’s original mission: tracking terrorism and transnational crime syndicates in the US and around the world.”).

28 Jerome P. Bjelopera, *Homeland Security Investigations, a Directorate Within U.S. Immigration and Customs Enforcement: In Brief*, Congressional Research Service, November 10, 2015, 1n2, <https://crsreports.congress.gov/product/pdf/R/R44269/3>; and ICE, “Organizational Structure,” DHS, accessed May 16, 2023, <https://www.ice.gov/leadership/organizational-structure>.

29 Karen L. Neuman, *Privacy Impact Assessment: ICE Investigative Case Management*, DHS/ICE/PIA-045, DHS Privacy Office, June 16, 2016, 1, 3, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-icm-june2016.pdf>.

30 See, e.g., ICE, *Comprehensive Plan for Immigration Data Improvement*, DHS, July 26, 2018, 5, <https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Comprehensive%20Plan%20for%20Immigration%20Data%20Improvement.pdf>.

31 Joan Friedland, *How ICE Blurs the Line Between Enforcement of Civil Immigration Violations and Enforcement of Criminal Laws*, National Immigration Law Center, August 27, 2019, <https://www.nilc.org/2019/08/27/ice-blurs-line-between-civil-and-criminal-enforcement>.

32 ICE, “U.S. Immigration and Customs Enforcement,” DHS, accessed May 16, 2023, <https://www.dhs.gov/topics/immigration-and-customs-enforcement>; and *Oversight of the U.S. Immigration and Customs Enforcement, Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015) (written testimony of Sarah Saldaña, director, ICE), <https://www.dhs.gov/news/2015/04/14/written-testimony-ice-director-sarah-saldana-house-committee-judiciary-hearing>.

33 Todd Feathers, “The Most Powerful Agency You’ve Never Heard Of: Homeland Security Investigations,” *MuckRock*, April 22, 2014, <https://www.muckrock.com/news/archives/2014/apr/22/operation-cornerstone-training-slides>.

34 19 U.S.C. § 1589a (2006); and 8 U.S.C. § 1357(a) (2006).

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 28, 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).

37 Emily Berman, *Domestic Intelligence: New Powers, New Risks*, Brennan Center for Justice, January 18, 2011, 16, 18, 19–20, <https://www.brennancenter.org/media/291/download>. For example, the *Attorney General’s Guidelines* applicable to the FBI divide investigative activity into three categories — assessments, predicated investigations, and full investigations — and outline the supervisory approvals and permissible investigation methods that apply at each level. DOJ, *The Attorney General’s Guidelines for Domestic FBI Operations*, September 29, 2008 (hereinafter *Attorney General’s Guidelines*), 19–22, <https://www.justice.gov/archive/opa/docs/guidelines.pdf>. The *Attorney General’s Guidelines* also impose time limits and reporting requirements on certain types of investigations. DOJ, *Attorney General’s Guidelines*, 21, 26.

38 Berman, *Domestic Intelligence*, 23; and FBI, *Domestic Investigations and Operations Guide* (hereinafter DIOG), accessed May 16, 2023, <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29>.

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 also has 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>.

40 8 U.S.C. § 1357(a)(1) (2006); and 8 C.F.R. § 287.1(a)(2). Courts have upheld the 100-mile border zone but held that the Fourth Amendment requires CBP to have “reasonable suspicion” that the people it stops are undocumented. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). See also *United States v. Soria*, 519 F.2d 1060, 1063 (5th Cir. 1975) (“At the border itself, ‘the agent’s statutory authority to search is virtually unfettered except perhaps as to due process concerning the manner, not the cause, of the search.’ In the general border area, their authority is not as broad.”); American Civil Liberties Union (hereinafter ACLU), “The Constitution in the 100-Mile Border Zone,” accessed May 16, 2023, <https://www.aclu.org/other/constitution-100-mile-border-zone>; and Laura K. Donohue, “Customs, Immigration, and Rights: Constitutional Limits on Electronic Border Searches,” *Yale Law Journal Forum* 128 (April 2019): 962–63nn4–9, https://www.yalelawjournal.org/pdf/Donohue_fd8qua9e.pdf (collecting cases on border search authority). Government officials from both parties have vigorously defended this broad search authority. See, e.g., Ron Nixon, “Cellphone and Computer Searches at U.S. Border Rise Under Trump,” *New York Times*, January 5, 2018, <https://www.nytimes.com/2018/01/05/us/politics/trump-border-search-cellphone-computer.html> (quoting statement by Trump administration deputy executive assistant commissioner at CBP John Wagner); and Odean L. Volker, “Lawyers, Laptops, and the Border,” *Texas Bar Journal* 72 (2009): 642 (quoting statements by Obama administration homeland security officials, including DHS Secretary Michael Chertoff).

41 HSI, “HSI Domestic Footprint,” ICE, accessed May 16, 2023, <https://www.ice.gov/about-ice/homeland-security-investigations/domestic-operations#map>.

42 DHS IG and DOJ IG, *A Joint Review of Law Enforcement Cooperation on the Southwest Border Between the Federal Bureau of Investigation and Homeland Security Investigations*, July 31, 2019, 4, 12, <https://oig.justice.gov/reports/2019/e1903.pdf>.

43 Cordero and Galgano, *Mardi Gras to the Philippines* (“While HSI frames its public messaging to characterize such crimes as intellectual property theft and child exploitation as falling into its mission to protect the homeland, these types of criminal violations — while extremely important — arguably stretch concepts of homeland security beyond a recognized conceptual framework.”); and Michael Coleman, “Mission Creep: Homeland Security a ‘Runaway Train,’” *Albuquerque Journal*, April 27, 2014, <https://www.abqjournal.com/390438/homeland-security-a-runaway-train.html>.

44 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.hsgac.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*, 21n20 (“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.”

45 Dena Kozanas, *Privacy Impact Assessment: Repository for Analytics in a Virtualized Environment (RAVEN)*, DHS/ICE/PIA-055, DHS Privacy Office, May 13, 2020 (hereinafter Kozanas, *PIA for RAVEN*), 5, 8–10, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice055-raven-may2020.pdf>; and Lynn Parker Dupree, *Privacy Impact Assessment: Homeland Security Investigations (HSI) Surveillance Technologies*, DHS/ICE/PIA-061, DHS Privacy Office, January 24, 2022, 10–11, https://www.dhs.gov/sites/default/files/2022-01/privacy-pia-ice061-hsisuveillance-tech-january2022_0.pdf. In addition to the information it collects, HSI may also have access to additional information collected by the Intelligence Community (IC) — although little has been made public about the scope of any such information sharing. See Intelligence Community Inspector General, DHS IG, and DOJ IG, *Review of Domestic Sharing of Counterterrorism Information*, March 2017, 15, <https://oig.justice.gov/sites/default/files/reports/OIG-17-49-Mar17.pdf> (noting information-sharing pilot program between HSI and DHS’s Office of Intelligence and Analysis, an IC member). See also National Geospatial-Intelligence Agency, *Domestic Imagery*, March 2009, 5, 9, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB527-Using-overhead-imagery-to-track-domestic-US-targets/documents/EBB-Doc17.pdf> (noting that domestic satellite imagery can be shared with non-IC “civil organizations,” including DHS, for “non-intelligence” functions).

46 8 U.S.C. § 1103 (2010); 8 U.S.C. § 1225(d)(3) (2004); 8 U.S.C. § 1324(b)(3) (2004); 8 U.S.C. § 1360(b) (2004); and 19 U.S.C. § 1509 (2020).

47 Executive Order 12333 requires that members of the IC adhere to such guidelines. United States Intelligence Activities, Exec. Order No. 12333, 46 Fed. Reg. 59941 (1981), <https://dpcld.defense.gov/Portals/49/Documents/Civil/eo-12333-2008.pdf>. See also Berman, *Domestic Intelligence*, 23–37; and ACLU, “Fact Sheet — New Attorney

General Guidelines,” accessed May 16, 2023, <https://www.aclu.org/other/fact-sheet-new-attorney-general-guidelines>.

48 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.

49 DHS, “Fact Sheet: DHS Efforts to Combat Exploitation and Abuse,” last modified May 5, 2023, <https://www.dhs.gov/news/2023/05/03/fact-sheet-dhs-efforts-combat-child-exploitation-and-abuse>. Other commenters have noted that these crimes are attenuated from DHS’s core national security mission. See, e.g., Mara Rudman et al., *Redefining Homeland Security: A New Framework for DHS to Meet Today’s Challenges*, Center for American Progress, June 16, 2021, <https://www.americanprogress.org/article/redefining-homeland-security-new-framework-dhs-meet-todays-challenges>; and Cordero and Galgano, *Mardi Gras to the Philippines*. This report focuses on a more fundamental concern with HSI’s narrative: incompleteness.

50 Cordero, *Reforming the Department of Homeland Security*, 8, 13; and ICE, “ICE Awards New Contract for Rapid DNA Testing at Southwest Border, Expands Pilot Program,” news release, DHS, June 18, 2019, <https://www.ice.gov/news/releases/ice-awards-new-contract-rapid-dna-testing-southwest-border-expands-pilot-program>.

51 American Immigration Council, “U.S. Citizen Children Impacted by Immigration Enforcement,” June 24, 2021, <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement>.

52 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/>.

53 Paige Austin et al., *Stuck with Suspicion: How Vague Gang Allegations Impact Relief and Bond for Immigrant New Yorkers*, New York Civil Liberties Union, February 13, 2019, 3, https://www.nyclu.org/sites/default/files/field_documents/O20819-nyclu-nyic-report_0.pdf.

54 National Immigration Law Center, “Worksite Immigration Raids,” updated January 2020, <https://www.nilc.org/issues/workersrights/worksite-raids>.

55 DHS, *Department of Homeland Security U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2022 Congressional Justification*, May 26, 2021 (hereinafter DHS, *ICE FY 2022 Congressional Justification*), 24, https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf.

56 See, e.g., *The Exploitation of Migrants Through Smuggling, Trafficking, and Involuntary Servitude, Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 116th Cong. (2019) (statement of Gregory C. Nevano, assistant director for investigative programs, HSI), <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Nevano-2019-06-26.pdf>.

- 57** DHS, *Department of Homeland Security U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2021 Congressional Justification*, February 9, 2020 (hereinafter DHS, *ICE FY 2021 Congressional Justification*), 123, https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement_0.pdf.
- 58** DHS, *ICE FY 2022 Congressional Justification*, 107; DHS, *ICE FY 2021 Congressional Justification*, 118–19; DHS, *Department of Homeland Security U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2020 Congressional Justification*, 2019, 108, https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf; and DHS, *Department of Homeland Security U.S. Immigration and Customs Enforcement Budget Overview: Fiscal Year 2019 Congressional Justification*, 2018, 256, <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>.
- 59** Eileen Sullivan, “Biden Ends Workplace Immigration Raids, Reversing Trump Policy,” *New York Times*, October 12, 2021, <https://www.nytimes.com/2021/10/12/us/politics/biden-workplace-immigration-raids.html>.
- 60** Sullivan, “Biden Ends Workplace Immigration Raids.”
- 61** Alejandro N. Mayorkas (secretary of homeland security) to Tae D. Johnson (acting director, ICE), Ur M. Jaddou (director, USCIS), and Troy A. Miller (acting commissioner, CBP), “Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual,” memorandum, October 12, 2021, 3, https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf.
- 62** César Cuauhtémoc García Hernández, “Deconstructing Crimmigration,” *UC Davis Law Review* 52, no. 1 (November 2018): 211–12, https://lawreview.law.ucdavis.edu/issues/52/1/Symposium/52-1_Garcia_Hernandez.pdf.
- 63** After a 2018 worksite raid at four Fresh Mark meat and packaging plants in Ohio, 13 individuals were charged with making false statements of citizenship and using fake Social Security cards. HSI agents arrested a total of 146 people in the raid. “13 Fresh Mark Workers Indicted in ICE Raid,” *Business Journal*, August 30, 2018, <https://businessjournaldaily.com/13-fresh-mark-workers-indicted-in-ice-raid/>. Four of the 110 people arrested in a 2018 raid at a garden and landscaping company in Sandusky, Ohio, faced federal fraud and misuse of visa and other documents charges. Three of the four also faced a false statements charge. Eric Heisig, “Four Workers Arrested in Sandusky Raid Face Criminal Immigration Charges,” *Cleveland.com*, August 10, 2018, https://www.cleveland.com/court-justice/2018/08/four_workers_arrested_in_sandu.html. These charges suggest that workplace raids are not proxies for arresting those accused of serious crimes.
- 64** National Immigration Law Center, “Funding for ICE Homeland Security Investigations (HSI) Is Funding for Trump’s Anti-Immigrant Agenda,” April 2019, <https://www.nilc.org/issues/immigration-enforcement/hsi-backgrounder-webpage/>.
- 65** David Jackson, “DHS Chief Regrets ‘Unfortunate’ Timing of ICE Raid of Food Processing Plants in Mississippi,” *USA Today*, August 11, 2019, <https://www.usatoday.com/story/news/politics/2019/08/11/trump-aide-kevin-mcaleenan-unfortunate-timing-ice-raids-mississippi/1981130001>.
- 66** ICE (@ICEgov), “Today’s indictments included plant managers, HR personnel, and supervisors,” Twitter, August 6, 2020, <https://twitter.com/ICEgov/status/1291397515187757058>.
- 67** DHS IG, *ICE Guidance Needs Improvement to Deter Illegal Employment*, January 15, 2021, 6, <https://www.oig.dhs.gov/sites/default/files/assets/2021-01/OIG-21-15-Jan21.pdf>. Agents also failed to follow up on warning notices issued to employers in 72 of the 74 cases the inspector general reviewed. DHS IG, *ICE Guidance Needs Improvement*, 8.
- 68** *Department of Homeland Security Appropriations for 2019, Hearings Before the H. Comm. on Appropriations Subcomm. on Homeland Security*, 115th Cong. (2018) (testimony of Matthew T. Albence, executive associate director, ERO), <https://www.govinfo.gov/content/pkg/CHRG-115hrg30212/html/CHRG-115hrg30212.htm> (“We are not going to turn a blind eye to somebody that we end up in contact with that has violated the immigration laws.”); and Kevin Krause and Dianne Solis, “Immigration Raid Targeting Employer Near Paris Nets 160 Suspected Undocumented Workers,” *Dallas Morning News*, August 28, 2018, <https://www.dallasnews.com/news/immigration/2018/08/28/immigration-raid-targeting-employer-near-paris-nets-160-suspected-undocumented-workers>. See also “13 Fresh Mark Workers Indicted in ICE Raid,” *Business Journal*.
- 69** Peter T. Edge (executive associate director, HSI) to all HSI employees, “Implementing the President’s Border Security and Interior Immigration Enforcement Policies,” memorandum, February 21, 2017, 3, <https://www.brennancenter.org/sites/default/files/2022-03/Edge%20Memo%202017.pdf>. A policy memorandum nearly identical in text was revoked by the Biden administration in January 2021. See Tae D. Johnson (acting director, ICE) to all ICE employees, “Interim Guidance: Civil Immigration Enforcement and Removal Priorities,” memorandum, February 18, 2021, 2n2, https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf; and Matthew T. Albence (executive associate director, ERO) to all ERO employees, “Implementing the President’s Border Security and Interior Immigration Enforcement Policies,” memorandum, February 21, 2017, https://immpolicytracking.org/media/documents/ICE_memo_implementing_the_President_s_Border_Security_and_Interior_Immigration_51Svnmf.pdf.
- 70** HSI leads DHS’s Border Enforcement Security Task Force (BEST), which consists of 112 investigative teams in 74 locations across the country. Through the task force, HSI directs the investigative work of more than 3,000 federal, state, local, tribal, and foreign agents. DHS, *ICE FY 2022 Congressional Justification*, 101; ICE, “We’re the BEST: Border Enforcement Security Task Force,” DHS, accessed May 16, 2023, <https://www.ice.gov/features/best>; ICE, “ICE Shifts Resources to Address Crisis at Southwest Border,” news release, DHS, April 29, 2019, <https://www.ice.gov/news/releases/ice-shifts-resources-address-crisis-southwest-border>; and *The Secure and Protect Act: A Legislative Fix to the Crisis at the Southwest Border, Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) (answers to Sen. Sheldon Whitehouse’s questions for the record from Kevin McAleenan, acting secretary of homeland security) (hereinafter McAleenan, answers to Senator Whitehouse’s questions), 6, <https://www.judiciary.senate.gov/imo/media/doc/McAleenan%20Responses%20to%20Grassley%20QFRs1.pdf>. See also Zolan Kanno-Youngs, “Air Marshals Are the Latest Officials Diverted to the Border to Handle the Surge of Migrants,” *New York Times*, May 15, 2019, <https://www.nytimes.com/2019/05/15/us/politics/federal-agents-border-migrant-surge.html>.
- 71** Caitlin Dickerson, Zolan Kanno-Youngs, and Annie Correal, “‘Flood the Streets’: ICE Targets Sanctuary Cities with Increased Surveillance,” *New York Times*, March 5, 2020, <https://www.nytimes.com/2020/03/05/us/ice-BORTAC-sanctuary-cities.html>.
- 72** Mijente, “Blueprint for Terror: How ICE Planned Its Largest Immigration Raid in History,” July 3, 2019, <https://mijente.net/icepapers>; and ICE Philadelphia Field Office, “Philadelphia Field Office — FOD Approved Operation Cross Check Post-Op Brief,” DHS, March 10, 2017, 1, 5, <https://mijente.net/wp-content/uploads/2019/07/PHL-Cross-Check-Post-Op-Brief-March-2017.pdf>.
- 73** HSI, “FW: Messaging on FAMU Separation,” email, April 23, 2018, 344–47, <https://www.documentcloud.org/documents/6785901-3-8-19-ICE-Prod1#document/p344/a553914> (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).

- 74** Rachel Frazin, "ICE Seeking to Implement DNA Testing at Seven Border Locations," *Hill*, May 29, 2019, <https://thehill.com/latino/445951-ice-seeking-to-implement-dna-testing-at-seven-border-locations>; and ICE, "ICE Awards New Contract for Rapid DNA Testing."
- 75** ICE, "ICE Awards New Contract for Rapid DNA Testing"; and McAleenan, answers to Senator Whitehouse's questions, 2.
- 76** DHS, *FY 2021 Budget in Brief*, February 8, 2020, 31, https://www.dhs.gov/sites/default/files/publications/fy_2021_dhs_bib_0.pdf.
- 77** See, e.g., McAleenan, answers to Senator Whitehouse's questions.
- 78** Elaine Kamarck, "Can Biden Pass Immigration Reform? History Says It Will Be Tough," Brookings Institution, June 22, 2021, <https://www.brookings.edu/blog/fixgov/2021/06/22/can-biden-pass-immigration-reform-history-says-it-will-be-tough>.
- 79** White House, "President Bush Addresses the Nation on Immigration Reform," news release, May 15, 2006, <https://georgewbush-whitehouse.archives.gov/news/releases/2006/05/20060515-8.html>.
- 80** White House, "Remarks by the President in Address to the Nation on Immigration," news release, November 20, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.
- 81** The group of senators consisted of Marco Rubio (R-FL), Jeff Flake (R-AZ), John McCain (R-AZ), Lindsey Graham (R-SC), Dick Durbin (D-IL), Robert Menendez (D-NJ), Chuck Schumer (D-NY), and Michael Bennet (D-CO). Rachel Weiner, "Immigration's Gang of 8: Who Are They?," *Washington Post*, January 28, 2013, <https://www.washingtonpost.com/news/the-fix/wp/2013/01/28/immigrations-gang-of-8-who-are-they>.
- 82** Sen. Robert Menendez, "Senator Menendez Gives Final Remarks on Immigration Reform," June 27, 2013, <https://www.menendez.senate.gov/newsroom/press/senator-menendez-gives-final-remarks-on-immigration-reform>.
- 83** Alejandro Mayorkas (secretary of homeland security) to Tae D. Johnson (acting director, ICE), "Guidelines for the Enforcement of Civil Immigration Law," memorandum, September 30, 2021, 2, <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>.
- 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-pia-ice-rapiddna-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. Saira Hussain, "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 refused were taken 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.
- 87** Caitlin Dickerson, "Trump Administration Targets Parents in New Immigration Crackdown," *New York Times*, July 1, 2017, <https://www.nytimes.com/2017/07/01/us/trump-arrest-undocumented-immigrants.html>. See also "90–120 Days Initiative — Target TCO Border Smuggling of Unaccompanied Minors," email, June 12, 2017, <https://www.documentcloud.org/documents/6785901-3-8-19-ICE-Prod1#document/p268/a553895> (internal HSI memorandum directing agents to conduct "knock and talks" within 72 hours of unaccompanied children's placements to identify sponsors for interview and investigations); and ICE, "Unaccompanied Alien Children Smuggling Disruption Initiative: Concept of Operations," DHS, May 5, 2017, 2, <https://www.documentcloud.org/documents/5980596-Smuggling-Initiative-ConOP.html> (internal ICE document showing a planned joint HSI and ERO effort targeting "parents and sponsors" of unaccompanied children).
- 88** Department of Health and Human Services, ICE, and CBP, *Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters*, April 13, 2018, 5, <https://www.aila.org/File/Related/21031235a.pdf>; and *Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters*, March 11, 2021, <https://www.aila.org/infonet/dhs-and-hhs-terminate-2018-agreement-regarding>. See also Brennan Center for Justice, "DHS-HHS Information Sharing and ICE Enforcement Against Potential Sponsors of Detained Children: A Resource Page," December 6, 2018, <https://www.brennancenter.org/our-work/research-reports/dhs-hhs-information-sharing-and-ice-enforcement-against-potential>.
- 89** Dickerson, "Trump Administration Targets Parents."
- 90** See, e.g., Jesús Rodríguez, "Ending the Misuse of Immigrants' Data," Brennan Center for Justice, May 20, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/ending-misuse-immigrants-data>.
- 91** Seth Freed Wessler, "Is Denaturalization the Next Front in the Trump Administration's War on Immigration?," *New York Times Magazine*, December 19, 2018, <https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html> (explaining that Operation Second Look and its predecessor Operation Janus were "looking into 315,000 immigration cases"). See also Eoin Higgins, "How ICE Works to Strip Citizenship from Naturalized Americans," *Intercept*, February 14, 2018, <https://theintercept.com/2018/02/14/ice-denaturalization-naturalized-citizen-immigration>; and Muslim Advocates et al. to Samantha Deshommes (regulatory coordination division chief, Office of Policy and Strategy, USCIS), May 19, 2021, 3, <https://muslimadvocates.org/wp-content/uploads/2021/05/Muslim-Advocates-USCIS-Comment-with-attached-letter-to-transition-team.pdf> (noting that "in 2017 and 2018, the Trump administration filed double the average number of denaturalization cases filed in the prior 12 years").
- 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

Through a Secret Database,” NBC San Diego, January 10, 2020, <https://www.nbcсандiego.com/news/local/source-leaked-documents-show-the-us-government-tracking-journalists-and-advocates-through-a-secret-database/3438>; and Bill Feather, Mari Payton, and Tom Jones, “CBP Inappropriately Surveilled U.S. Citizens During Migrant Caravan: DHS Report,” NBC San Diego, September 24, 2021, <https://www.nbcсандiego.com/news/investigations/report-cbp-inappropriately-flagged-u-s-citizens-during-migrant-caravan/2726925>. CBP compiled photos, birthdates, and information reflecting whether the individuals were being flagged for additional screening at U.S. border checkpoints, and a DHS source disclosed that the agents also compiled dossiers on each of the individuals. Jones et al., “Source: Leaked Documents Show the U.S. Government Tracking.” The extent of HSI’s participation in the tracking and activity of the working group remains unclear.

93 Amended Complaint at 37-155, *Alasaad v. Duke*, No. 1:17-cv-11730-DJC (D. Mass., September 13, 2017), https://www.aclu.org/wp-content/uploads/legal-documents/7_Amended_Complaint.pdf.

94 Thomas Brewster, “Immigration Cops Just Spent a Record \$1 Million on the World’s Most Advanced iPhone Hacking Tech,” *Forbes*, May 8, 2019, <https://www.forbes.com/sites/thomasbrewster/2019/05/08/immigration-just-spent-a-record-1-million-on-the-worlds-most-advanced-iphone-hacking-tech/?sh=6bed93045a0a>; and purchase orders for Grayshift, LLC, from DHS, [USAspending.gov](https://www.usaspending.gov), accessed June 12, 2023, <https://www.usaspending.gov/search/?hash=a159b58f5a44ba26796a24aa02532b5b>.

95 Brewster, “Immigration Cops Just Spent a Record \$1 Million.”

96 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].”).

97 *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))).

98 Ex. 36 to Plaintiffs’ Motion for Summary Judgement at 17, *Merchant v. Mayorkas*, 1:17-cv-11730-DJC, https://www.aclu.org/wp-content/uploads/legal-documents/Exhibits_31-46.pdf.

99 Ex. 21 to Plaintiffs’ Motion for Summary Judgement at 66, *Merchant v. Mayorkas*, 1:17-cv-11730-DJC, <https://www.aclu.org/legal-document/alasaad-v-nielsen-exhibits-15-30>.

100 Memorandum in Support of Plaintiffs’ Motion for Summary Judgement at 13, *Merchant v. Mayorkas*, 1:17-cv-11730-DJC, <https://www.aclu.org/legal-document/alasaad-v-nielsen-memo-support-motion-summary-judgement>.

101 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.

102 Elizabeth Crisp, “Leaked Document Shows SWAT Teams, Sniper-Trained Units Sent to D.C. Amid Protests,” *Newsweek*, June 5, 2020, <https://www.newsweek.com/leaked-document-shows-swat-teams-sniper-trained-units-sent-dc-amid-protests-1509087>; and Colleen Long, Ben Fox, and Jill Colvin, “Trump’s Show of Federal Force Sparking Alarm in Cities,” *Washington Post*, July 21, 2020, https://www.washingtonpost.com/politics/courts_law/trump-to-send-federal-agents-to-chicago-maybe-other-cities/2020/07/21/af5c5a98-cb67-11ea-99b0-8426e26d203b_story.html.

103 Jasmine Aguilera, “ICE Agents Detain a Police Brutality Protester, Reportedly a U.S. Citizen and Military Vet, in New York City,” *Time*, June 6, 2020, <https://time.com/5849517/protester-new-york-city-protests-immigration-ice>.

104 Shawn Boburg, Meg Kelly, and Joyce Sohyun Lee, “Swept Up in the Federal Response to Portland Protests: ‘I Didn’t Know If I Was Going to Be Seen Again,’” *Anchorage Daily News*, September 10, 2020, <https://www.adn.com/nation-world/2020/09/10/swept-up-in-the-federal-response-to-portland-protests-i-didnt-know-if-i-was-going-to-be-seen-again>.

105 Zolan Kanno-Youngs, “U.S. Watched George Floyd Protests in 15 Cities Using Aerial Surveillance,” *New York Times*, June 19, 2020, <https://www.nytimes.com/2020/06/19/us/politics/george-floyd-protests-surveillance.html>. Aerial surveillance was conducted in at least 15 cities, although there is incomplete reporting on how each operation was authorized and run.

106 U.S. Privacy and Civil Liberties Oversight Board, “History and Mission,” accessed May 16, 2023, <https://www.pclob.gov/About/HistoryMission>.

107 April Glaser, “Who Decides When There Are Helicopters? Experts Weigh In on National Guard Monitoring Protests,” NBC News, January 10, 2021, <https://www.nbcnews.com/business/business-news/who-decides-when-there-are-helicopters-experts-weigh-national-guard-n1253599>.

108 Michelle Hackman and Dustin Volz, “Secret Surveillance Program Collects Americans’ Money-Transfer Data, Senator Says,” *Wall Street Journal*, March 8, 2022, <https://www.wsj.com/articles/secret-surveillance-program-collects-americans-money-transfer-data-senator-says-11646737201>.

109 Sen. Ron Wyden to Michael Horowitz (inspector general, DOJ), letter, January 18, 2023, <https://www.wyden.senate.gov/imo/media/doc/Wyden%20letter%20to%20DOJ%20IG%20money%20transfer%20letter%201.18.23.pdf>.

110 Hackman and Volz, “Secret Surveillance Program.”

111 Hackman and Volz, “Secret Surveillance Program.”

112 HSI obtained the information by issuing administrative subpoenas — orders that the agency can issue on its own without showing probable cause of criminal activity or obtaining court approval — further underscoring its failure to demonstrate any connection to reasonable suspicion of criminal activity. Hackman and Volz, “Secret Surveillance Program.” See also National Immigration Law Center, *Warrants and Subpoenas: What to Look Out for and How to Respond*, September 2020, 4, 5–6, <https://www.nilc.org/wp-content/uploads/2020/09/Warrants-Subpoenas-Facts.pdf>.

113 Dhruv Mehrotra, “ICE Is Grabbing Data from Schools and Abortion Clinics,” *Wired*, April 3, 2023, <https://www.wired.com/story/ice-1509-custom-summons>; and Sen. Ron Wyden to Joseph Cuffari (inspector general, DHS), letter, March 8, 2022, https://www.wyden.senate.gov/imo/media/doc/DHS%20IG%20ICE_HSI%20data%20complaint%20final.pdf.

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.

- 119** See, e.g., Mark Puente, Richard Winton, and Matthew Ormseth, “Body Cams Contradict LAPD’s Gang Designations. It’s Another Milestone in Their Use,” *Los Angeles Times*, January 16, 2020, <https://www.latimes.com/california/story/2020-01-16/how-camera-exposed-lapd-falsification-gang-affiliations-after-decades-of-questions>; and City of Chicago Inspector General (hereinafter Chicago IG), *Review of the Chicago Police Department’s “Gang Database,”* April 11, 2019, 48, <https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf> (noting that the Chicago Police Department (CPD) “does not require Department members to provide evidence in support of a gang designation, which increases the likelihood that gang designations are assigned without sufficient justification and leaves CPD members vulnerable to accusations of inaccuracy or bias”).
- 120** Human Rights Watch et al. to Philip Eure (inspector general, New York City Police Department), letter, September 22, 2020, <https://www.hrw.org/node/376457/printable/print>; Forrest Stuart, *Ballad of the Bullet: Gangs, Drill Music, and the Power of Online Infamy* (Princeton, NJ: Princeton University Press, 2020); and Chip Mitchell, “Study: Cops Overstate Effects of Social Media on Chicago Gang Violence,” NPR, May 10, 2019, <https://www.npr.org/local/309/2019/05/10/722080471/study-cops-overstate-effects-of-social-media-on-chicago-gang-violence>.
- 121** Hannah Dreier, “He Drew His School Mascot — and ICE Labeled Him a Gang Member,” *ProPublica* and *New York Times Magazine*, December 27, 2018, <https://features.propublica.org/ms-13-immigrant-students/huntington-school-deportations-ice-honduras> (describing school police designations of students as gang members based on drawings/images of country codes and school mascots); and Laila L. Hlass and Rachel Prandini, *Deportation by Any Means Necessary: How Immigration Officials Are Labeling Immigrant Youth as Gang Members*, Immigrant Legal Resource Center, May 21, 2018, 3, https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf (describing HSI gang determination based on Nike sneakers and a Chicago Bulls hat categorized for unknown reasons as “MS-13 Gang apparel” and a police report absolving the student of any gang involvement).
- 122** Anita Chabria, Kevin Rector, and Cindy Chang, “California Bars Police from Using LAPD Records in Gang Database. Critics Want It Axed,” *Los Angeles Times*, July 14, 2020, <https://www.latimes.com/california/story/2020-07-14/california-bars-police-from-using-lapd-records-in-gang-database-as-scandal-widens>.
- 123** Kevin Rector, Richard Winton, and Ben Poston, “Three More LAPD Officers Charged with Falsifying Information in Gang Labeling Scandal,” *Los Angeles Times*, October 2, 2020, <https://www.latimes.com/california/story/2020-10-02/three-more-lapd-officers-charged-with-falsifying-information-in-gang-labeling-scandal>.
- 124** Maxine Bernstein, “Portland Police Discovered Nearly 100 Reports Still Contain Gang Designations, Despite Pledge to Purge Them in 2017,” *Oregonian*, March 6, 2020, <https://www.oregonlive.com/crime/2020/03/portland-police-discovered-nearly-100-reports-still-contain-gang-designations-despite-pledge-to-purge-them-in-2017.html>.
- 125** See Heather Cherone, “More Than 3 Years After Watchdog Warned Chicago Police Gang Databases Were ‘Deeply Flawed,’ New System Poised to Launch Despite Objections,” WTTW (PBS Chicago), November 25, 2022, <https://news.wttw.com/2022/11/25/more-3-years-after-watchdog-warned-chicago-police-gang-databases-were-deeply-flawed-new> (describing objections to Chicago’s gang database in light of multiple critical reports by the police department’s inspector general); Rector et al., “Three More LAPD Officers Charged” (on LAPD criticism); and Chris Gelardi, “More Kids and Overwhelmingly Black: New Records Show Concerning Trends in D.C. Gang Database,” *Intercept*, January 9, 2022, <https://theintercept.com/2022/01/09/dc-police-gang-database-mpd>.
- 126** Austin et al., *Stuck with Suspicion*, 23.
- 127** Ali Winston, “Vague Rules Let ICE Deport Undocumented Immigrants as Gang Members,” *Intercept*, February 17, 2017, <https://theintercept.com/2017/02/17/loose-classification-rules-give-ice-broad-authority-to-classify-immigrants-as-gang-members>.
- 128** Katherine Conway, “Fundamentally Unfair: Databases, Deportation, and the Crimmigrant Gang Member,” *American University Law Review* 67, no. 1 (2017): 294, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2212&context=aulr> (describing limitations in immigration court regarding challenges to I-213s — documents prepared by ERO that are similar to HSI memos — and citing *Pouhova v. Holder*, 726 F.3d 1007, 1013–14 (7th Cir. 2013)).
- 129** Sean García-Leys, Meigan Thompson, and Christyn Richardson, *Mislabeled: Allegations of Gang Membership and Their Immigration Consequences*, University of California, Irvine School of Law Immigrant Rights Clinic, April 2016, 15, <https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf>.
- 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-Leys 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.
- 134** USCIS, “Victims of Criminal Activity: U Nonimmigrant Status,” DHS, updated March 20, 2023, <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status>; USCIS, “Consideration of Deferred Action for Childhood Arrivals (DACA),” DHS, accessed May 16, 2023, <https://www.uscis.gov/DACA>; and Sam Levin, “US Immigrant Stripped of ‘Dreamer’ Status in Part over Alleged Gang Tattoo,” *Guardian*, February 16, 2017, <https://www.theguardian.com/us-news/2017/feb/16/daca-man-arrested-seattle-loses-status-trump>.
- 135** Julianne Hing, “ICE Admits Gang Operations Are Designed to Lock Up Immigrants,” *Nation*, November 20, 2017, <https://www.thenation.com/article/archive/ice-admits-gang-operations-are-designed-to-lock-up-immigrants>.
- 136** See, e.g., Ban Facial Recognition (Fight for the Future), interactive map, accessed May 16, 2023, <https://www.banfacialrecognition.com/map> (tracking use of facial recognition technology by law enforcement nationwide); and ACLU, “Stingray Tracking Devices: Who’s Got Them?,” updated November 2018, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them> (tracking local and federal law enforcement access to stingrays). Until March 2020, Clearview AI — a facial recognition technology company that has come under fire for scraping social media platforms for photographs unconnected to any government records — marketed trials of its products to law enforcement agencies and individual law enforcement officers, allowing them to conduct searches without identifying any connection to an active criminal investigation. Ryan Mac et al., “Surveillance Nation,” *BuzzFeed News*, April 9, 2021, <https://www.buzzfeednews.com/article/ryanmac/clearview-ai-local-police-facial-recognition>. Although the available reporting does not focus on HSI special agents, HSI ultimately contracted with Clearview AI, suggesting that its agents may have been among those provided with trials that allowed unconstrained testing of the service. Kim Lyons, “ICE Just Signed a Contract with Facial Recognition Company Clearview AI,” *Verge*, August 14, 2020, <https://www.theverge.com/2020/8/14/21368930/clearview-ai-ice-contract-privacy-immigration>.
- 137** Kashmir Hill, “Your Face Is Not Your Own,” *New York Times Magazine*, March 18, 2021, <https://www.nytimes.com/interactive/2021/03/18/magazine/facial-recognition-clearview-ai.html>.

138 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-sa>; 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/18wdclkm8Wy_MNx02pBBwbpHcxNiMf3Xh; 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_hNtQgBZUifTkBe_iluhd2ymim-GzZw; 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/1tYypuf_aiera7V6eObfY7cIm7NlilyC. 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>.

139 Drew Harwell, “Senators Seek Limits on Some Facial-Recognition Use by Police, Energizing Surveillance Technology Debate,” *Washington Post*, April 21, 2021, <https://www.washingtonpost.com/technology/2021/04/21/data-surveillance-bill/>; Natasha Lomas, “Clearview AI Told It Broke Australia’s Privacy Law, Ordered to Delete Data,” *TechCrunch*, November 3, 2021, <https://techcrunch.com/2021/11/03/clearview-ai-australia-privacy-breach> (describing bans in Australia); and Natasha Lomas, “France Latest to Slap Clearview AI with Order to Delete Data,” *TechCrunch*, December 16, 2021, <https://techcrunch.com/2021/12/16/clearview-gdpr-breaches-france> (describing order by courts in France to delete data collected from residents). Even if HSI were to limit its searches to photographs from criminal arrests and convictions, however, it would be an imperfect solution. As discussed above, members of minority communities have greater rates of interaction with law enforcement due to racial profiling and would likely be disproportionately affected by reliance on photos derived from these encounters. See, e.g., Clare Garvie, Alvaro Bedoya, and Jonathan Frankle, *The Perpetual Lineup: Unregulated Police Face Recognition in America*, Georgetown Law Center on Privacy and Technology, October 18, 2016, <https://www.perpetuallineup.org>.

140 “Recipient Profile: Clearview AI, Inc.,” USA Spending.gov, accessed May 18, 2023, <https://www.usaspending.gov/recipient/8cbe9b49-79af-44f4-3eb5-87296ee4a591-C/latest>.

141 Lyons, “ICE Just Signed a Contract.” As explained in section II of this report, HSI’s involvement with ERO’s deportation mandate makes contracting with HSI as opposed to ERO a distinction without a difference. See Nina Wang et al., *American Dragnet: Data-Driven Deportation in the 21st Century*, Georgetown Law Center on Privacy

and Technology, May 10, 2022, 33, https://www.americandragnet.org/sites/default/files/American_Dragnet_report_English_final.pdf.

142 Dena Kozanas, *Privacy Impact Assessment: ICE Use of Facial Recognition Services*, DHS/ICE/PIA-054, DHS Privacy Office, May 13, 2020, 7 (hereinafter Kozanas, *PIA for ICE Use of FR*), 11, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-frs-054-may2020.pdf>.

143 Kozanas, *PIA for ICE Use of FR*, 11.

144 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.

145 William Crumpler, “How Accurate Are Facial Recognition Systems — and Why Does It Matter?,” Center for Strategic and International Studies, April 14, 2020, <https://www.csis.org/blogs/technology-policy-blog/how-accurate-are-facial-recognition-systems-%E2%80%93-and-why-does-it-matter>. See also Natasha Singer and Cade Metz, “Many Facial-Recognition Systems Are Biased, Says U.S. Study,” *New York Times*, December 19, 2019, <https://www.nytimes.com/2019/12/19/technology/facial-recognition-bias.html>; Patrick Grother, Mei Ngan, and Kayee Hanaoka, *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects*, National Institute of Standards and Technology, Department of Commerce, December 2019 (hereinafter Grother et al., *FRVT Part 3: Demographic Effects*), 2, <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf>; and *Facial Recognition Technology (FRT), Hearing Before the H. Comm. on Homeland Security*, 116th Cong. (2020) (statement of Dr. Charles H. Romine, director, Information Technology Laboratory, National Institute of Standards and Technology, Department of Commerce), <https://www.nist.gov/speech-testimony/facial-recognition-technology-frt-0#:~:text=NIST%20Interagency%20Report%208280%2C5.recognition%20algorithms%20that%20NIST%20evaluate>.

146 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).

147 Grother et al., *FRVT Part 3: Demographic Effects*, 16–17; and Kozanas, *PIA for ICE Use of FR*, 3, 6.

148 For example, in Philadelphia, police applied facial recognition technology to images documenting protests on Instagram to arrest and charge protesters with property damage — including one individual alleged only to have owned a skateboard that others used to damage police cars. Jeremy Roebuck and Vinny Vella, “A Philly Man Who Warned Not to Share Protest Photos Online Was Charged with Trashing Cop Cars Based on Pics Posted to His Instagram,” *Philadelphia Inquirer*, July 31, 2020, <https://www.inquirer.com/news/philly-protests-676-arrests-social-media-state-police-instagram-facebook-sammy-rivera-luke-cossmann-20200731.html>. And in South Carolina, police charged a protestor identified through facial recognition tools with aggravated assault for throwing a water bottle at police. David Travis Bland, “More Arrests Made Connected to Protests, Including One Out on Bond on Murder Charge,” *State*,

- August 14, 2020, <https://www.thestate.com/news/local/crime/article244958110.html>. See also George Joseph and Jake Offenhartz, "NYPD Used Facial Recognition Technology in Siege of Black Lives Matter Activist's Apartment," *Gothamist*, August 14, 2020, <https://gothamist.com/news/nypd-used-facial-recognition-unit-in-siege-of-black-lives-matter-activists-apartment>; and Gwynne Hogan, "De Blasio Says His NYPD Commissioner Didn't Know That Helicopters, Dogs, Dozens of Cops Would Stake Out BLM Protester's Home," *Gothamist*, August 11, 2020, <https://gothamist.com/news/de-blasio-says-his-nypd-commissioner-didnt-know-that-helicopters-dogs-dozens-of-cops-would-stake-out-black-live-matter-organizers-home>.
- 149** 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.jtl.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.").
- 150** Sasha Ingber, "Major Police Body Camera Manufacturer Rejects Facial Recognition Software," NPR, June 27, 2019, <https://www.npr.org/2019/06/27/736644485/major-police-body-camera-manufacturer-rejects-facial-recognition-software>. The ethics board tasked by the company with reviewing the potential for an ethical deployment of the technology found that no such option currently exists; it recommended that "face recognition technology should not be deployed until the technology performs with far greater accuracy and performs equally well across races, ethnicities, genders, and other identity groups." Axon AI and Policing Technology Oversight Board, *First Report of the Axon AI and Policing Technology Ethics Board*, Axon Enterprise, Inc., June 2019, 6, 28, https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5d13d7e1990c4f00014c0aeb/1561581540954/Axon_Ethics_Board_First_Report.pdfhttps://www.policingproject.org/axon. See also Arvind Krishna (chief executive officer, IBM) to Rep. Karen Bass et al., June 8, 2020, <https://www.ibm.com/policy/facial-recognition-sunset-racial-justice-reforms>. Prior to exiting the facial recognition technology market, IBM was implicated in using photos obtained from Flickr.com to train its algorithm without obtaining consent from the posters and working with the NYPD to develop a tool that allowed the police to search for individuals by skin color (among other characteristics). See Shannon Liao, "IBM Didn't Inform People When It Used Their Flickr Photos for Facial Recognition Training," *Verge*, March 12, 2019, <https://www.theverge.com/2019/3/12/18262646/ibm-didnt-inform-people-when-it-used-their-flickr-photos-for-facial-recognition-training>; George Joseph and Kenneth Lipp, "IBM Used NYPD Surveillance Footage to Develop Technology That Lets Police Search by Skin Color," *Intercept*, September 6, 2018, <https://theintercept.com/2018/09/06/nypd-surveillance-camera-skin-tone-search>; and Jeffrey Dastin, "Amazon Extends Moratorium on Police Use of Facial Recognition Software," *Reuters*, May 18, 2021, <https://www.reuters.com/technology/exclusive-amazon-extends-moratorium-police-use-facial-recognition-software-2021-05-18>.
- 151** Interactive map, *Ban Facial Recognition (Fight for the Future)*; and Haley Samsel, "California Becomes Third State to Ban Facial Recognition Software in Police Body Cameras," *Security Today*, October 10, 2019, <https://securitytoday.com/articles/2019/10/10/california-to-become-third-state-to-ban-facial-recognition-software-in-police-body-cameras.aspx>.
- 152** Kozanas, *PIA for ICE Use of FR*, 7.
- 153** Mac et al., "Surveillance Nation" (describing Clearview AI marketing materials touting the product as "100% accurate across all demographic groups").
- 154** Kozanas, *PIA for ICE Use of FR*, 7.
- 155** Elisha Anderson, "Controversial Detroit Facial Recognition Got Him Arrested for a Crime He Didn't Commit," *Detroit Free Press*, July 10, 2020, <https://www.freep.com/story/news/local/michigan/detroit/2020/07/10/facial-recognition-detroit-michael-oliver-robert-williams/5392166002>; Kashmir Hill, "Wrongfully Accused by an Algorithm," *New York Times*, August 3, 2020, <https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html>; and Kashmir Hill, "Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match," *New York Times*, January 6, 2021, <https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html>.
- 156** Rachel Levinson-Waldman, *Cellphones, Law Enforcement, and the Right to Privacy*, Brennan Center for Justice, December 20, 2018, 2, https://www.brennancenter.org/sites/default/files/2019-08/Report_Cell_Surveillance_Privacy.pdf; and Michael Price, "ICE Agents Are Using Battlefield Surveillance Technology to Snoop on Cell Phones," Brennan Center for Justice, June 14, 2017, <https://www.brennancenter.org/our-work/analysis-opinion/ice-agents-are-using-battlefield-surveillance-technology-snoop-cell>.
- 157** Kim Zetter, "Turns Out Police Stingray Spy Tools Can Indeed Record Calls," *Wired*, October 28, 2015, <https://www.wired.com/2015/10/stingray-government-spy-tools-can-record-calls-new-documents-confirm>. DOJ and DHS policy both require that stingrays be configured as pen registers (i.e., dialed number recorders) and not used to collect communications. Alejandro Mayorkas to Sarah Saldaña (assistant secretary, ICE) et al., "Policy Directive 047-02: Department Policy Regarding the Use of Cell-Site Simulator Technology," memorandum, October 19, 2015 (hereinafter *Mayorkas to Saldaña et al.*, "Policy Directive 047-02"), 3, <https://www.dhs.gov/sites/default/files/publications/Department%20Policy%20Regarding%20the%20Use%20of%20Cell-Site%20Simulator%20Technology.pdf>. In addition, the devices can interfere with 911 and other emergency calls by interrupting cell phone service, but neither DHS nor other federal agencies that use stingrays — including various components within DOJ — have responded to concerns about potential disruptions, stating only that they have not studied the issue. Sen. Ron Wyden to Ajit Pai (chairman, Federal Communications Commission), letter, June 26, 2018, <https://docs.fcc.gov/public/attachments/DOC-355228A2.pdf>.
- 158** James D. Nealon (assistant secretary for international affairs, Office of Strategy, Policy, and Plans, DHS) to Sen. Al Franken, "The Department of Homeland Security's Response to Senator Al Franken's August 24, 2017 Letter," December 4, 2017, https://www.aclu.org/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.aclu.org%2Fsites%2Fdefault%2Ffiles%2Ffield_document%2F2_-_may_21_production_pdf#page=31 (responding to the question "Does DHS distinguish between the seriousness of criminal offenses in determining whether to deploy CSS technology?" with "Neither [DHS] nor its Components have specifically prioritized criminal offenses for this purpose. [HSI] does not have a protocol designating a specific list of priority violations.").
- 159** Catrina M. Pavlik-Keenan (FOIA officer, ICE) to Christopher Soghoian (PhD student, Center for Applied Cybersecurity Research, Indiana University), letter, September 19, 2012, 39–44 <https://www.documentcloud.org/documents/479397-stingrayfoia.html> (showing that DHS's Office of Investigations, HSI's predecessor office, requested aircraft-mounting equipment for stingrays).
- 160** Kim Zetter, "How Cops Can Secretly Track Your Phone," *Intercept*, July 31, 2020, <https://theintercept.com/2020/07/31/protests-surveillance-stingrays-dirtboxes-phone-tracking>.
- 161** Derek Benner (acting executive associate director, HSI) to ICE assistant directors et al., "Use of Cell-Site Simulator Technology," memorandum, August 2, 2017 (hereinafter *Benner to ICE*, "Use of Cell-Site Simulator Technology"), 3–4, https://www.aclu.org/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2F...files%2Ffield_document%2Fsupplemental_production_4.28.2020.pdf.
- 162** Mayorkas to Saldaña et al., "Policy Directive 047-02," 4, 5.

- 163** Neema Singh Guliani, “The Four Biggest Problems with DHS’s New Stingray Policy,” ACLU, October 22, 2015, <https://www.aclu.org/blog/privacy-technology/surveillance-technologies/four-biggest-problems-dhss-new-stingray-policy>.
- 164** A 2017 internal HSI memorandum obtained through an ACLU FOIA request does not reference “exceptional circumstances,” which casts some doubt on whether DHS still recognizes this exception. Benner to ICE, “Use of Cell-Site Simulator Technology.” However, training materials from the same period continue to reference both exceptions; it is unclear whether the HSI-level memorandum revised the 2015 policy directive from DHS’s secretary. ICE, “Cell Site Simulator Policy: Exceptional Circumstances,” DHS, accessed May 18, 2023, https://www.aclu.org/sites/all/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.aclu.org%2Fsites%2Fdefault%2Ffiles%2Ffield_document%2F5.25_-_supplemental_production_slide_805_5.15.2020_1.pdf#page=1. See also Alexia Ramírez, “ICE Records Confirm That Immigration Enforcement Agencies Are Using Invasive Cell Phone Surveillance Devices,” ACLU, May 27, 2020, <https://www.aclu.org/news/immigrants-rights/ice-records-confirm-that-immigration-enforcement-agencies-are-using-invasive-cell-phone-surveillance-devices>.
- 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.”
- 166** The term exceptional circumstances appears to have originated in the stingray policy issued by DOJ in September 2015. See DOJ, *Department of Justice Policy Guidance: Use of Cell-Site Simulator Technology*, September 3, 2015, 4, <https://www.justice.gov/opa/file/767321/download>. Like DHS, DOJ provides little guidance on what constitutes an exceptional circumstance.
- 167** Mayorkas to Saldaña et al., “Policy Directive 047-02,” 5.
- 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.
- 169** See, e.g., *In re Use of a Cell-Site Simulator to Locate a Cellular Device Associated with One Cellular Tel. Pursuant to Rule 41*, No. 20-SC-3276 (ZMF), 2021 WL 1133838, at *3 (D.D.C. Mar. 25, 2021), <https://www.dcd.uscourts.gov/sites/dcd/files/Order%20re.%20Delayed-Notice%20%2820sc3276%29%20SIGNED.pdf>; *United States v. Ellis*, 270 F. Supp. 3d 1134, 1145 (N.D. Cal. 2017); and *United States v. Lambis*, 197 F. Supp. 3d 606, 611 (S.D.N.Y. 2016).
- 170** Adolfo Flores, “DHS Has Used a Controversial Cell Phone–Tracking Device More than 1,800 Times,” *BuzzFeed News*, November 17, 2017, <https://www.buzzfeednews.com/article/adolfoflores/this-is-how-many-times-the-department-of-homeland-security> (noting that HSI does not use stingrays for civil immigration enforcement but may use them in task force operations with other agencies that use the devices for that purpose); and Guliani, “Four Biggest Problems with DHS’s New Stingray Policy.” See also ACLU, “Stingray Tracking Devices: Who’s Got Them?” (identifying state and local police departments in 27 states and the District of Columbia with stingrays). The fact that many local law enforcement agencies purchase their stingrays through DHS grants creates an additional incentive for officers to assist with warrantless stingray searches if requested by a DHS officer or agent. *Law Enforcement Use of Cell-Site Simulation Technologies: Privacy Concerns and Recommendations*, H. Comm. on Oversight and Government Reform staff report, 114th Cong. (2016), 29–31, <https://www.muckrock.com/foi/file/154306/embed>.
- 171** DHS IG, *Secret Service and ICE*, 11.
- 172** *Law Enforcement Use of Cell-Site Simulation Technologies*, H. Comm. on Oversight and Government Reform staff report, 23.
- 173** Although the project was first announced in 2020, HSI stated at the time that RAVEN’s development had been in progress since 2018. HSI requested \$8.6 million to continue to develop the platform in FY 2021 and sought three contracts of up to \$100 million each to commercial developers to assist with the process. DHS, *ICE FY 2021 Congressional Justification*, 13; General Services Administration, “Industry Day: Repository for Analytics in a Virtualized Environment (RAVEN),” System for Award Management, last visited May 18, 2023, <https://sam.gov/opp/14c4de6e31ea4b119f111f7b8a5ee5f7/view>; and HSI, “HSI: Securing the Homeland from Transnational Threats and Criminal Organizations,” DHS, April 14, 2021, <https://sam.gov/api/prod/opp/v3/opportunities/resources/files/49001dae75f246b6a948e41255e79d13/download?&status=archived&token=->. See also Caroline Haskins, “Amazon, Google, Microsoft, and Other Tech Companies Are in a ‘Frenzy’ to Help ICE Build Its Own Data-Mining Tool for Targeting Unauthorized Workers,” *Business Insider*, September 1, 2021, <https://www.businessinsider.com/amazon-google-microsoft-ice-raven-data-mining-tool-undocumented-workers-2021-8>. HSI has started using RAVEN for some functions — such as workplace enforcement — but the system is not yet fully operational and development is ongoing. Caroline Haskins, “Google, Amazon, and Microsoft Have Taken Advantage of a Commonly Used but Little-Known Tool to Quietly Enter Dozens of Contracts with ICE and CBP,” *Business Insider*, October 4, 2021, <https://www.businessinsider.com/google-amazon-microsoft-ice-cbp-third-party-contracts-cloud-2021-10>.
- 174** The predecessor to RAVEN was called the ICE Big Data Environment, which agents could search by using ICE’s FALCON Search and Analysis System. That system was migrated into RAVEN in 2018. Kozanas, *PIA for RAVEN*, 4. FALCON is an analytical tool that allows ICE to conduct searches for information across both its own databases and certain other government databases to which it has access, such as databases maintained by the Treasury Department’s Office of Foreign Assets Control and Financial Crimes Enforcement Network. Jonathan R. Cantor, *Privacy Impact Assessment Update: FALCON Search and Analysis System*, DHS/ICE/PIA-032(b) FALCON-SA, DHS Privacy Office, October 11, 2016 (hereinafter Cantor, *PIA Update for FALCON*), 32–34, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice032b-falcon-appendixbupdate-march2021.pdf>. Users can also input ad hoc data gathered from open-source research, commercial databases, and other federal databases such as the FBI’s National Crime Information Center into FALCON, but the tool cannot query those sources. Cantor, *PIA Update for FALCON*, 34.
- 175** Kozanas, *PIA for RAVEN*, 8–10.
- 176** Kozanas, *PIA for RAVEN*, 26–27.
- 177** Through agreements with Thomson Reuters and other data aggregators, HSI can currently search — albeit through multiple databases — information such as utility records, vehicle registration information, and healthcare provider data. Alvaro M. Bedoya, “The Cruel New Era of Data-Driven Deportation,” *Slate*, September 22, 2020, <https://slate.com/technology/2020/09/palantir-ice-deportation-immigrant-surveillance-big-data.html>; and Mijente, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild, *Who’s Behind ICE? The Tech and Data Companies Fueling Deportation*, October 2018, 56n174, <https://mijente.net/wp-content/uploads/2018/10/WHO%E2%80%99S-BEHIND-ICE-The-Tech-and-Data-Companies-Fueling-Deportations-v1.pdf>. HSI works with data brokers to obtain detailed location data on vehicle owners, contracting with companies that aggregate information from ALPRs. Philip Kaplan, *Privacy Impact Assessment Update: Acquisition and Use of License Plate Reader (LPR) Data from a Commercial Service*, DHS/ICE/PIA-039(a), DHS Privacy Office, December 27, 2017 (hereinafter Kaplan, *PIA for LPRs*), 2, 4, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-lpr-january2018.pdf>; and Lily Hay Newman, “Internal

Docs Show How ICE Gets Surveillance Help from Local Cops,” *Wired*, March 13, 2019, <https://www.wired.com/story/ice-license-plate-surveillance-vigilant-solutions>. HSI can also request this information on an individual basis from local law enforcement partners. See, e.g., Suhauna Hussain and Johana Bhuiyan, “Police in Pasadena, Long Beach Pledged Not to Send License Plate Data to ICE. They Shared It Anyway,” *Los Angeles Times*, December 21, 2020, <https://www.latimes.com/business/technology/story/2020-12-21/pasadena-long-beach-police-ice-automated-license-plate-reader-data>. The fact that many local agencies purchased their ALPRs using DHS grants provides an additional incentive to cooperate with those requests. Conor Friedersdorf, “An Unprecedented Threat to Privacy,” *Atlantic*, January 27, 2016, <https://www.theatlantic.com/politics/archive/2016/01/vigilant-solutions-surveillance/427047>. HSI can also access detailed location data through subpoenas issued to 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, *PIA for LPRs*.

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

179 Kozanas, *PIA for RAVEn*, 11.

180 Spencer Woodman, “Palantir Enables Immigration Agents to Access Information from the CIA,” *Intercept*, March 17, 2017, <https://theintercept.com/2017/03/17/palantir-enables-immigration-agents-to-access-information-from-the-cia>.

181 Jimmy Tobias, “ICE Has Kept Tabs on ‘Anti-Trump’ Protesters in New York City,” *Nation*, March 6, 2019, <https://www.thenation.com/article/archive/ice-immigration-protest-spreadsheet-tracking>; and “FW: UPDATED Protest Information,” email, July 31, 2018, <http://thenation.s3.amazonaws.com/pdf/ICE-FOIA/protest-spreadsheet-thenation.pdf>.

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.

183 DHS, *ICE FY 2021 Congressional Justification*, 19. HSI’s most recent budget justification likewise touted RAVEn’s developing AI capabilities. DHS, *U.S. Immigrations and Customs Enforcement Budget Overview: Fiscal Year 2023 Congressional Justification*, March 26, 2022, 66, <https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Immigration%20and%20Customs%20Enforcement%20Remediated.pdf> (describing machine learning and machine translation capabilities).

184 DHS et al., *AI: Using Standards to Mitigate Risks*, May 20, 2019, 8, <https://www.nist.gov/system/files/documents/2019/05/20/nist-ai-rfi-dhs-001.pdf>. In addition, there is little evidence to suggest that the government officials tasked with procuring and reviewing AI tools are sufficiently investigating their accuracy. See also Will Douglas Heaven, “Predictive Policing Algorithms Are Racist. They Need to Be Dismantled,” *MIT Technology Review*, July 17, 2020, <https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice>.

185 Rebecca Heilweil, “Why Algorithms Can Be Racist and Sexist,” *Vox*, February 18, 2020, <https://www.vox.com/recode/2020/2/18/>

[21121286/algorithms-bias-discrimination-facial-recognition-transparency](https://www.vox.com/recode/2020/2/18/21121286/algorithms-bias-discrimination-facial-recognition-transparency).

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-8ce3-9454d0b46d42_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.

191 8 U.S.C. § 1357(a)(1) (2006); and 8 C.F.R. § 287.1(a)(2).

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).

194 Rudman et al., *Redefining Homeland Security*; and Louis A. Rodi III (deputy assistant director, National Security Investigations Division, HSI), “Statement for the Record: The Role of HSI in Counter

Terrorism” (lecture, Washington Institute for Near East Policy, Washington, DC, December 3, 2020), <https://www.washingtoninstitute.org/media/4068>.

195 National Immigration Law Center, “Funding for ICE Homeland Security Investigations.” For example, although they are outside the scope of this report, the Department of Health and Human Services and the Department of State — neither of which have law enforcement mandates — currently have some dealings with immigrants. See, e.g., Department of Health and Human Services, “Office of Refugee Resettlement,” accessed May 16, 2023, <https://www.acf.hhs.gov/orr>; and State Department, “Bureau of Population, Refugees, and Migration,” accessed May 16, 2023, <https://www.state.gov/bureaus-offices/under-secretary-for-civilian-security-democracy-and-human-rights/bureau-of-population-refugees-and-migration>.

196 Berman, *Domestic Intelligence*, 16, 18, 19–20; and DOJ, *Attorney General’s Guidelines*. See also Faiza Patel, Rachel Levinson-Waldman, and Harsha Panduranga, *A Course Correction for Homeland Security: Curbing Counterterrorism Abuses*, Brennan Center for Justice, April 20, 2022, 7–9, <https://www.brennancenter.org/media/9444/download> (describing erosion of protections at DHS’s Office of Investigation and Analysis under political pressures); and Harsha Panduranga and Faiza Patel, *Stronger Rules Against Bias: A Proposal for a New DHS Nondiscrimination Policy*, Brennan Center for Justice, September 9, 2022, 2, <https://www.brennancenter.org/our-work/policy-solutions/stronger-rules-against-bias>.

197 German and Mueller-Hsia, *Focusing the FBI*.

198 See Berman, *Domestic Intelligence*, 43. By comparison, the current *Attorney General’s Guidelines* allow FBI agents to initiate assessments without any documented suspicion of wrongdoing,

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*.

199 See DOJ, *Attorney General’s Guidelines*, 21, 26.

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.

ABOUT THE AUTHORS

► **Mary Pat Dwyer** is the academic program director of the Georgetown Law Institute for Technology Law and Policy and a consulting fellow in the Brennan Center’s Liberty and National Security Program. Prior to joining Georgetown Law, she was a fellow at the Brennan Center, where her research and writing focused on the effects of technology on civil liberties, as well as issues pertaining to content moderation and online speech. She previously served as counsel at O’Melveny & Myers LLP, where she specialized in advising technology companies in international trade and national security matters. She also clerked for Hon. Stanley Marcus on the U.S. Court of Appeals for the Eleventh Circuit and Hon. Graham C. Mullen III on the U.S. District Court for the Western District of North Carolina. She holds a BA from the University of Notre Dame, cum laude, and a JD from Duke University School of Law, summa cum laude and Order of the Coif.

► **Rachel Levinson-Waldman** is the managing director of the Brennan Center’s Liberty and National Security Program, where she works on issues related to policing and technology and provides commentary on law enforcement access to social media, predictive policing, body cameras, license plate readers, and other types of surveillance technologies deployed in public, as well as the federal government’s use of surveillance technologies and information collection in the counterterrorism context. She has authored essays on law enforcement surveillance of social media in the *Oklahoma Law Review* (2019) and the *Howard Law Review* (2018) and an article on the Fourth Amendment and government surveillance in public in the *Emory Law Review* (2017). She has also authored or coauthored multiple Brennan Center reports and white papers: *Ending Fusion Center Abuses* (2022); *A Course Correction for Homeland Security* (2022); *Automatic License Plate Readers: Legal Status and Policy Recommendations for Law Enforcement Use* (2020); *Social Media Monitoring: How the Department of Homeland Security Uses Digital Data in the Name of National Security* (2019); *Cell Phones, Law Enforcement, and the Right to Privacy* (2018); *Trump-Russia Investigations: A Guide* (2017); *The Islamophobic Administration* (2017); and *What the Government Does with Americans’ Data* (2013). She is a graduate of Williams College and the University of Chicago Law School.

ABOUT THE BRENNAN CENTER’S LIBERTY AND NATIONAL SECURITY PROGRAM

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.

ACKNOWLEDGMENTS

The Brennan Center gratefully acknowledges CS Fund/Warsh Mott Legacy for their generous support of our work. This report is an independent Brennan Center publication; the opinions expressed are those of the authors and do not necessarily reflect the views of our supporters.

The authors would like to express their gratitude to current and former colleagues at the Brennan Center who provided invaluable support, including Mike German, Faiza Patel, and Spencer Reynolds for their guidance, input, and comments, and José Guillermo Gutiérrez, Alia Shahzad, and Sahil Singhvi, as well as former Brennan Center intern Sarah Guinee, for their research and fact-checking support. They are also grateful for the guidance and support of Michael Waldman and John Kowal, in particular John’s close and thoughtful reading. They also wish to thank outside reviewers, including Carrie Cordero, for their invaluable review of a draft of this report and for their thoughtful feedback and subject matter expertise. The Brennan Center’s communications team, especially Zachary Laub and Marcelo Agudo, provided valuable input and guidance and prepared this report for publication.

**BRENNAN
CENTER**

FOR JUSTICE

**Brennan Center for Justice at New York University School of Law
120 Broadway // 17th Floor // New York, NY 10271
www.brennancenter.org**