

**DHS AT 20: AN AGENDA FOR REFORM**

# Holding Homeland Security Accountable

How to Strengthen Departmental and Congressional Oversight

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**T**he Department of Homeland Security (DHS) was created hastily as part of the sweeping U.S. response to the terrorist attacks of September 11, 2001. With some 260,000 full-time employees and an annual budget of \$103 billion, the sprawling agency is a ubiquitous facet of American life. As the Brennan Center demonstrates in its DHS at 20: An Agenda for Reform series, which builds on years of research on terrorism prevention, social media monitoring, and surveillance, the department's programs are plagued by an overbroad mandate that gives its agents huge latitude and scant guidance. Previous reports in this series have advised focusing DHS's work and strengthening safeguards against overreach.<sup>1</sup> This report details the internal oversight reforms that must accompany these changes.

Congress has codified the protection of civil rights, civil liberties, and privacy as departmental obligations. DHS's mission statement espouses a commitment to American values, which it does not define but which presumably reflect these protections.<sup>2</sup> Several headquarters oversight offices within DHS are meant to uphold these responsibilities, including the Office for Civil Rights and Civil Liberties (CRCL), the Privacy Office, and the Office of Inspector

General (OIG). Certain headquarters operational divisions, such as the Office of Intelligence and Analysis (I&A), and subdivisions within DHS components also perform oversight, liaise with headquarters oversight offices, and conduct internal affairs inquiries. Finally, the Privacy and Civil Liberties Oversight Board (PCLOB), an independent executive agency that reviews government counterterrorism activities and advises the president, has jurisdiction over DHS.

Yet the existing mechanisms for oversight and accountability are too weak to check the department's expansive authorities and operations. They have proved ineffective to protect the values that DHS purports to uphold. By ceding to law enforcement operations and priorities, they have paved the way for the excessive surveillance and aggressive counterterrorism practices that DHS has become notorious for.

The various oversight offices within DHS have two roles to play. First, they must effectively advise operational and policy decision-makers before the department takes any action. They must determine whether a proposed initiative should be modified or even abandoned to avoid potential civil rights, civil liberties, or privacy harms. Oversight

offices must set meaningful guardrails, determine how to implement them, and communicate them clearly both internally and to the public. This work must be robust and uncompromising.

Second, effective oversight offices must investigate errors and reported abuses, issue corrective action, and hold DHS accountable to the people it has harmed. When the department oversteps its bounds, its oversight offices should systematically determine what went wrong, who was harmed, and how it happened. They should then explain publicly what happened, determine and communicate appropriate changes going forward, and offer meaningful redress to affected individuals for the damages they suffered.

Today, oversight at DHS falls far short in both of these essential roles. Oversight offices have limited access to records. They lack independence and standing in the department's political structure. And they struggle with transparency. Headquarters oversight lacks leverage in component oversight offices, which are all woefully understaffed relative to DHS's immense operational workforce. Furthermore, the reporting lines at those component offices sideline CRCL and the Privacy Office.

Remedies designed to make whole the people harmed by DHS activities are also weak. No cause of action against federal officials exists for civil rights violations, and money damages are rarely available for such harms. The judiciary, meanwhile, has chiseled away at First, Fourth, Fifth, and Sixth Amendment protections.

But there is a way forward.

First, the DHS secretary should increase the prominence, independence, and access of CRCL and the Privacy Office. Whereas the Privacy Office is already authorized by statute, CRCL's oversight authorities must be strengthened (including in statute by Congress), and both offices need a stronger presence throughout DHS, not just at headquarters.

Second, the secretary should direct and empower CRCL and the Privacy Office to step up their reporting on how the department affects Americans. CRCL should release public assessments of proposed operations, and the Privacy Office should revise its current assessment program to ensure that its reports present clear, relevant, and up-to-date information. The status quo serves to obfuscate, not illuminate, DHS programs impacting the American public.

Third, while conducting its programmatic and criminal inquiries, OIG should scrutinize the department's claims about program effectiveness and determine whether DHS activities violate civil rights, civil liberties, and privacy. It also should report on its investigations and their outcomes publicly and in greater detail.

Fourth, the PCLOB should perform an in-depth review of DHS's oversight framework — its successes, failures, and missed opportunities — and offer recommendations to bolster its regulatory functions. Several of the board's ongoing inquiries relate to DHS programs, but their results

likely will not be released publicly because they were initiated by the department as requests for advice. As much information as possible from these inquiries should be made available to the public.

Finally, Congress should codify improved oversight structures within the department and conduct regular public hearings and investigations into DHS oversight. It must also strengthen remedies available to members of the public for abuse by federal agents, including by recognizing constitutional tort claims in statute.

## Existing Oversight Weaknesses

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**DHS oversight has three tiers: CRCL and the Privacy Office at headquarters; various civil rights, civil liberties, privacy, and internal affairs offices in the components; and OIG, which has broad statutory oversight responsibilities and reports to the secretary of homeland security.**

Weak authorities impede these offices.<sup>3</sup> In particular, component civil rights and privacy officers report to component operational leadership, creating a fundamental conflict of interest and a lack of authority and control by headquarters oversight. Functions and jurisdictions also overlap among the various offices. Component agencies handle civil rights, civil liberties, and privacy oversight internally and in conjunction with CRCL and the Privacy Office, which causes confusion and allows complaints to fall through bureaucratic gaps.

This section outlines the three levels of DHS oversight, the respective entities' responsibilities, and gaps and opportunities for improvement. Its assessment is based on limited publicly available information, which is especially scarce for component oversight offices. Interviews with former and current DHS officials and civil society engagements with DHS oversight offices involving the Brennan Center supplement the underlying research.

### CRCL

DHS's founding statute established an officer for civil rights and civil liberties, a presidentially appointed position charged with ensuring that DHS respects the civil rights and liberties of people affected by departmental activities and programs.<sup>4</sup> The officer advises the DHS secretary on incorporating civil rights and civil liberties protections into the department's activities and investigates possible abuses, such as profiling by DHS employees. The officer also reports updates to Congress and oversees compliance with constitutional, statutory, and other civil rights and liberties requirements.<sup>5</sup> This officer directs CRCL — which itself is not explicitly authorized by statute — and its 115-person staff (based on a 2022 count).<sup>6</sup> That such a small office could effectively oversee and curtail the civil

rights and liberties harms of the massive, globally dispersed DHS workforce is dubious. Unsurprisingly, CRCL has struggled to do so.

CRCL staff reviews draft policies and intelligence products, carries out trainings, and provides advice to government employees — mostly DHS officers but also state and local partners.<sup>7</sup> CRCL’s formal mechanism of pre-operational review is to conduct impact assessments, which analyze the potential effects of DHS programs, policies, and activities on individuals’ civil rights and civil liberties. Some assessments are directed by Congress, such as reviews of information-sharing coordination and rail screening, and others are directed by the secretary. Department leadership may request reviews as well, and the CRCL officer can initiate them.<sup>8</sup>

These assessments are the office’s most comprehensive reviews, but they sometimes overlook obvious civil rights and civil liberties gaps, in effect sanctioning continued harm by the department.<sup>9</sup> For instance, in a 2013 review of invasive electronic device searches at the U.S. border, CRCL found that Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) operations do not violate the First or Fourth Amendments. According to the assessment, imposing a “reasonable suspicion” standard on DHS’s otherwise total discretion would be “operationally harmful” with no civil rights or civil liberties benefits.<sup>10</sup> Yet in the years since CRCL issued this assessment, CBP has targeted Americans at the border for activities protected by the First Amendment, undermining at a minimum the ongoing accuracy of CRCL’s representations to the public.<sup>11</sup>

CRCL’s assessments are also infrequent and rarely public: DHS’s website lists only eight CRCL impact assessments, few of which are available online. The latest assessment listed is dated 2013.<sup>12</sup> Moreover, the absence of a compliance mechanism limits the power of impact assessments — and of oversight more broadly. Former DHS officials have noted that components can choose to ignore CRCL recommendations without fear of reprisal.<sup>13</sup> Noncompliance is not reported to Congress or the public; no accounting procedures exist to document how often components disregard CRCL input.

CRCL does participate in various deliberative forums on the potential civil rights and civil liberties effects of proposed DHS operations. For example, the department maintains a data access review council that lets CRCL and other oversight offices provide input on data-sharing agreements with national security agencies.<sup>14</sup> The council also oversees I&A’s creation of “data analysis tools” for the department, which I&A is supposed to memorialize in written documents reviewed by the council. Neither the data-sharing agreements nor these operational documents are available to the public, and available privacy documentation provides little insight.<sup>15</sup> Accordingly, it is difficult to assess these programs and whether the council provides meaningful oversight.<sup>16</sup>

DHS officials claim that working closely with oversight offices ensures that the department does not violate constitutional protections,<sup>17</sup> but the influence of these internal advice functions is unclear. Case in point is CRCL’s sidelined involvement in reviewing intelligence reports, including those about sensitive topics that involve American citizens.<sup>18</sup> I&A successfully appealed to DHS senior officials to remove CRCL from its review process, presumably because I&A found CRCL input an impediment to its freewheeling approach to intelligence activities.<sup>19</sup> While CRCL’s exact role today is unknown, the fact that CRCL could be deliberately removed from the review process underscores its weak authority.

## DHS Intelligence Oversight

### >> Chronic abuses plague I&A, the headquarters

office that conducts domestic intelligence activities and oversees many other DHS intelligence functions. I&A’s intelligence oversight branch is tasked with ensuring that the office’s activities comply with guidelines for the collection and dissemination of information about Americans.<sup>20</sup> However, I&A’s oversight personnel lack independent authority; they are subordinate to the officials they oversee and have no recourse when the office’s lead official or another senior employee disregards their advice.<sup>21</sup> These dynamics impede intelligence oversight, limiting oversight officers’ ability to enforce guidance.

A recent I&A reorganization did little to address these shortcomings and nothing to address the inherent structural obstacles.<sup>22</sup> The I&A undersecretary announced in May 2023 that oversight and compliance roles previously dispersed around the organization had been centralized and elevated, but the person responsible for oversight still reports to an officer who reports to the undersecretary — keeping the new unit subordinate to the office it oversees.<sup>23</sup> I&A’s authorities remain “vague,” as the undersecretary noted at a September 2023 public event; the reorganization amounted to scarcely more than renaming I&A’s subdivisions and shuffling functions and personnel, all of which future leadership can easily undo.<sup>24</sup>

DHS components execute intelligence operations as well. CBP and ICE officers have conducted extensive surveillance of activists across the political spectrum, including those who oppose their operations. ICE also purchases location information from data brokers, a practice that evades Fourth Amendment protections.<sup>25</sup> These intelligence-gathering activities threaten the rights of U.S. citizens, immigrants, and travelers, yet they go almost entirely without oversight.

At the component level, smaller oversight offices perform tasks analogous to those executed by CRCL, but they report to their component heads, not to headquarters.<sup>26</sup> Although this arrangement may foster trust in component oversight officers, it undermines CRCL's autonomy, authority, and relative independence and risks that operational officers may too easily override issues flagged by their oversight personnel.<sup>27</sup>

Additionally, CRCL is mandated to review complaints filed by members of the public about alleged civil rights and civil liberties abuses that the DHS inspector general has declined to investigate.<sup>28</sup> The number of such complaints has risen steadily over the last eight years.<sup>29</sup> Yet the office declines to investigate roughly 70 percent of complaints.<sup>30</sup> CRCL may also choose to refer them to the relevant components for investigation and then review their findings. A review of available statistics suggests CRCL generally retains investigations related to immigration and detention, while allegations regarding discrimination, use of force, First and Fourth Amendment abuses, and other rights violations are referred to OIG, which usually investigates about 20 referred complaints of the hundreds received by CRCL annually.<sup>31</sup>

The complaints process aims primarily to inform CRCL's "proactive policy advice" to DHS leadership. The office states that it does not provide injured persons with any "rights or remedies,"<sup>32</sup> nor does it provide any redress or relief to anyone filing complaints.<sup>33</sup> The weight of CRCL's insight into complaints about DHS leadership is unknown. Civil society organizations have cited these factors as reasons to pursue alternate routes such as litigation to remedy abuses.<sup>34</sup> And the complaint process itself is confusing, opaque, and wrought with deficiencies.<sup>35</sup> CRCL lacks authority to subpoena the department for necessary documents, hampering its ability to access information that is essential to investigations. How many complaints slip through the cracks, as has occurred in the past, is anyone's guess.<sup>36</sup>

CRCL issues annual reports to Congress that, while helpful, lack detail, especially as to the findings of its inquiries.<sup>37</sup> The reports are filled with self-serving metrics and superficial and conclusory information but little demonstrated value, reflecting a missed opportunity for meaningful transparency. The 95-page fiscal year 2021 report, for instance, allocated only a single paragraph to CRCL's involvement in Operation Allies Welcome, a government-wide initiative to resettle Afghan refugees in the United States that involved national security and counterterrorism considerations and potentially implicated concerns such as profiling based on national origin.<sup>38</sup> The report described how CRCL held listening sessions, visited military facilities resettling refugees, and developed guidance. It said nothing, however, about the content of any of the guidance or listening sessions, how these activities affected refugees' rights or well-being, or how CRCL influenced department operations.

The public does not know the full extent of CRCL's influence or lack thereof mainly because DHS limits the transparency of the office's work. Reports to Congress must be approved by department leadership, which affects the tenor of criticism and discourages any mention of instances when CRCL advice was "disregarded or excluded from policy development," as recognized by at least one former CRCL official.<sup>39</sup> CRCL provides only vague information in its public reports about complaint investigations, largely describing them only in number and not in terms specific to civil rights and liberties concerns.

The proposed CRCL Authorization Act would strengthen the office's standing in the department and give it stronger investigative powers akin to those of the Privacy Office.<sup>40</sup> Passing this legislation is a necessary first step toward preventing DHS operations from encroaching on Americans' civil rights and civil liberties.

### Privacy Office

The Privacy Office, whose head officer reports to the DHS secretary, is charged with ensuring that the department's systems, technologies, forms, and programs comply with privacy protections for personal information. The office also investigates possible privacy violations and abuses in DHS programs and operations, develops and reviews departmental privacy rules and policies, submits reports to Congress and the public on its findings, and trains DHS operational personnel and partners.<sup>41</sup>

The Privacy Office's authorizing statute gives it access to any DHS records and personnel it requires, along with the authority to subpoena files and testimony and to interview any person under oath — all stronger investigative powers than those wielded by CRCL.<sup>42</sup> Its statutory authorities include broad jurisdiction for privacy oversight and compliance, and the office must document the effects of DHS programs on personal privacy via its privacy threshold analyses (PTAs) and privacy impact assessments (PIAs).<sup>43</sup> Operational offices are required to submit PTAs to the Privacy Office prior to implementing or updating a system or program. In turn, the office determines whether further consideration regarding privacy impact is required; if so, it conducts a more in-depth PIA. The office usually posts PIAs on the DHS website, but not the more numerous PTAs.<sup>44</sup>

Owing to its statutory authority, the Privacy Office enjoys considerably more access throughout the department than CRCL. Privacy officers placed in each component are required to identify and address privacy issues. However, these component-level officers do not report directly to the Privacy Office.<sup>45</sup> Although they ultimately submit PIAs to the chief privacy officer at headquarters for approval,<sup>46</sup> like their CRCL counterparts they report first to their component supervisors. As a result, component leadership can easily sideline the chief privacy officer.

Moreover, notwithstanding its wider access and stronger position within DHS, the Privacy Office has not fully used

its broad investigative authorities to conduct effective departmental oversight. According to a 2020 OIG audit, for example, the office neglected to perform periodic reviews of existing information technology systems for new or evolving privacy risks. The audit also found that the office failed to monitor completion of privacy trainings: over the two-year period covered by the audit, approximately half of all headquarters staff had not completed mandatory trainings.<sup>47</sup>

A recent OIG report on DHS noncompliance with privacy requirements — and the Privacy Office’s failure to enforce them — illustrates these problems. DHS’s law enforcement components use “commercial telemetry data,” material purchased from private companies that includes cell phone location data and device information.<sup>48</sup> The privacy implications of these purchases are numerous, as the data can be analyzed to track individual people, ascertain personal relationships, and paint a full picture of a person’s activities based on phone locations over time.<sup>49</sup> Indeed, as the Supreme Court recognized in *Carpenter v. United States*, comprehensive location data can reveal “the privacies of life”

(i.e., the details of our associations and activities).<sup>50</sup> Even more troubling, simply by paying large sums of money, agencies can make these location data purchases — voluntary contractual arrangements with data brokers — that evade the warrant requirement of compelled disclosures.<sup>51</sup>

Location data is an incredibly powerful tool for investigators and intelligence analysts, yet OIG found in September 2023 that three DHS operational agencies — CBP, ICE, and the Secret Service — failed to fulfill the department’s basic privacy obligations. Although CBP and ICE submitted initial PTAs, the agencies used location data before more fulsome PIAs had been completed. The Secret Service completed no privacy documentation at all. OIG also found that components failed to fill the policy gap themselves: the Secret Service developed no rules for using this data, and CBP and ICE failed to establish oversight and compliance practices to enforce the rules they did develop. Similarly, OIG found that the Privacy Office failed to fulfill its own obligations, allowing components to operationalize this sensitive information without required documentation in place.<sup>52</sup>

## The Lawyers’ Role

**>> Attorneys at DHS, as at other agencies, both advise** decision-makers about the scope of their legal authority and defend agency action against challenges. Attorneys do not conduct oversight, but they are crucial in interpreting the legal contours of programs and thus setting the limits of agency work.<sup>53</sup> DHS attorneys take an aggressive approach to the department’s already broad authorities. In one particularly egregious example, the department issued legal guidance concluding that surveillance of demonstrators who threatened (or appeared to threaten) to vandalize public monuments was a legitimate homeland security mission.<sup>54</sup> The guidance relied on a politicized executive order by then-President Donald Trump decrying “anarchists and left-wing extremists,” issued in response to racial justice demonstrations at which some participants defaced Confederate monuments.<sup>55</sup> Although DHS withdrew the specific memorandum authorizing these efforts, the department never disavowed the underlying legal interpretation (and indeed defended it), which may facilitate future surveillance of First Amendment-protected activity well beyond the plausible scope of DHS’s purpose.<sup>56</sup>

At the same time, DHS attorneys have often adopted a narrow interpretation of safeguards that could otherwise constrain the department. For instance, the guidelines that apply to I&A’s domestic intelligence work — approved by the attorney general and subject to interpretation by DHS

attorneys — contain a permissive provision that allows I&A to surveil Americans for their constitutionally protected speech and activities when officers assert that doing so furthers one or more of the office’s extremely broad mandates.<sup>57</sup> Those guidelines have also provided support for expansive legal interpretations of terrorism and homeland security threats generally, as demonstrated by I&A’s intrusion into local controversies over public monuments.<sup>58</sup> Likewise, at U.S. borders and ports of entry, customs officers and Border Patrol agents invoke the department’s excessively broad definition of the U.S. border zone (which construes it to extend 100 miles into the country) to search and seize property such as cellular phones and laptops — and thus the data on those devices — without probable cause.<sup>59</sup> These policies too have been sanctioned and defended by DHS attorneys.<sup>60</sup>

These powerful legal interpretations are expounded in undisclosed documents. The American public has little understanding of how the government discerns the application of law and the Constitution with respect to DHS operations. At the very least, DHS should make its interpretations of legal authorities and institutional guardrails public so that Americans can understand the department’s claims to execute the law on their behalf. And Congress should clarify and better delineate DHS’s overly permissive authorities that can and have fostered abuse.



These shortcomings are not merely technical; they can have serious consequences. For instance, U.S. Citizenship and Immigration Services (USCIS) broadly monitors social media to vet people like refugees — and scoop up information about Americans they know — in programs that have proved minimally effective. On at least one occasion, one of USCIS’s divisions ignored the Privacy Office’s recommendation to update its PIA to address how it collects social media data to inform the Deferred Action for Childhood Arrival program, keeping Americans in the dark about these operations and how they infringe on privacy.<sup>61</sup> Outdated and inaccurate assessments contravene DHS’s obligation to inform the public.

While the Privacy Office does issue PIAs, it does not appear to have a process to advise the department on whether a given program should be undertaken or technology purchased.<sup>62</sup> It has approved a wide range of programs and technologies and addressed procedural and training issues in its assessments, but it has stopped short of asking whether projects violate personal privacy, far less rejecting them when they do.<sup>63</sup> Furthermore, PIAs provide a fragmented view of data systems, investigating them on an individual basis and failing to account for the interconnected nature of the 2,000-plus data sets that DHS maintains.<sup>64</sup>

Like CRCL, the size of the Privacy Office relative to the department’s operational workforce is trivial: in 2022, 49 of DHS’s some 260,000 full-time personnel worked at the headquarters Privacy Office. Statistics on component privacy officers are not available.<sup>65</sup> Regardless, it seems unlikely that such a small office could effectively coordinate with and oversee reviews by privacy staff embedded across the department.

### Component-Specific Oversight

Oversight frameworks differ across DHS components. Each component has a dedicated privacy office to facilitate the assessment of operational effects on privacy, yet only some have offices dedicated to civil rights and civil liberties.<sup>66</sup> The disability and multicultural affairs branches at the Transportation Security Administration (TSA) conduct investigations into civil rights and civil liberties complaints.<sup>67</sup> The Federal Emergency Management Agency (FEMA) has a multifaceted civil rights program that addresses civil rights issues specific to disaster response, facilitates access to benefits, and investigates civil rights complaints about denial of benefits.<sup>68</sup> CBP has an Office of Professional Responsibility (OPR) that handles both violations of internal policy and operational effects on the public.

However, systemic problems limit these programs’ effectiveness.<sup>69</sup> For one, component oversight offices struggle with conflicts of interest due to their reporting structures, which also breed a lack of visibility on the part of headquarters oversight offices and can serve to sideline CRCL and the Privacy Office. Additionally, component oversight offices fail to provide effective complaint processes and

remedies, in part because their limited resources are directed toward internal matters rather than assessing how their programs affect the public.<sup>70</sup> The complaint processes that do exist tend to be disorganized and confusing as a result.

Offices within the DHS components that work on issues related to civil rights and liberties, privacy, and accountability do not report to headquarters oversight offices. Instead, they report to their respective agency heads, working at best in liaison or coordination roles with CRCL and the Privacy Office. This dynamic can create conflicts of interest and leave headquarters oversight in the dark. Indeed, without embedded staff or at least a reporting line, and with no coercive subpoena authority (as noted above), CRCL in particular is quite limited in its ability to oversee DHS components.

Component-based rights and privacy offices are meant to safeguard constitutional rights, but like their headquarters counterparts, they are subject to the will of operational leadership. For example, CBP’s Privacy and Diversity Office (PDO) consults with CBP offices to determine whether recommendations from CRCL investigations can be fully or partially implemented, then notifies CRCL of concurrence or nonconcurrence for each item. The CBP directive governing these activities offers no standard for agency personnel to determine that a recommendation can or cannot be implemented, which essentially gives its leadership unreviewable discretion to disregard CRCL guidance. PDO’s responsibility for signaling the component’s disagreement with CRCL points to its conflicting roles as both enforcer of compliance and shield from oversight.<sup>71</sup>

Components are responsible for implementing the oversight and policy rules developed by DHS headquarters offices. Yet implementation is often inconsistent or perfunctory, leaving many DHS operations uncovered. For instance, in 2019, the DHS secretary issued a short memorandum that prohibited collecting or using information about First Amendment–protected activities, but the memo contained a broad exemption for information “relevant to a criminal, civil, or administrative activity relating to” the multitude of laws that DHS enforces. Although the memo directed CRCL and the Privacy Office to assist with implementation across components,<sup>72</sup> no public information suggests that such implementation has ever occurred. In the case of CBP, there appear to be no publicly available PDO-issued directives guaranteeing compliance with headquarters CRCL policy, despite the office’s mandate to follow CRCL’s guidance.<sup>73</sup>

Moreover, much like CRCL, component oversight offices offer few remedies for people whose rights have been violated. Instead, the component offices typically focus their limited resources on internal matters — employee discipline, diversity, hiring, and labor protection — rather than on how their activities affect the public. Naturally, when offices intended to protect civil rights focus only or primarily on internal affairs, their capacity to adequately

address public complaints diminishes, thereby demonstrating where the component's priorities lie.

The Civil Rights Division of the U.S. Coast Guard, for example, has no public-facing role.<sup>74</sup> Its five-year civil rights strategic plan aims to improve equal employment opportunity in the agency but makes no mention of operational effects on the public,<sup>75</sup> though it interacts with Americans daily and has even perpetrated human rights abuses: since at least 2016, the Coast Guard has detained thousands of low-level drug smugglers at sea for weeks or months, in deplorable conditions and without access to assistance, sometimes with no evidence that their drugs were headed for U.S. shores.<sup>76</sup> This practice presents a clear opportunity for rights-focused offices — or the inspector general, who has a mandate to root out abusive practices — to intervene.

Other agencies have faced scrutiny as well. The Cybersecurity and Infrastructure Security Agency (CISA) has an Office of Equity, Diversity, Inclusion and Accessibility but no civil rights office.<sup>77</sup> Yet CISA's activities — including tracking political activities as part of its mandate to address threats to critical infrastructure — can easily infringe on people's civil rights.<sup>78</sup>

Furthermore, complaint and recourse procedures among the component agencies are fraught. FEMA allows members of the public to file complaints and claims to facilitate dispute resolution, but it provides no information publicly on the efficacy of this process.<sup>79</sup> TSA's disability unit reviews and investigates civil rights complaints; it does offer the agency corrective advice, but surveys of its work suggest that the unit does not provide a remedy to people who have been harmed.<sup>80</sup>

Because there is no centralized oversight process, complainants frequently experience uncertainty over who in the department can investigate cases or answer questions. Inquiries may be shuttled between CRCL, OIG, and various component investigative bodies.<sup>81</sup> For instance, while CBP's Office of Professional Responsibility may decide to investigate certain civil rights and civil liberties complaints, it can also assign investigations or inquiries back to the program office that carried out the activity.<sup>82</sup> This procedural maze has led to years of mishandling the reunifications of thousands of migrant children and their families separated under the Trump administration's "zero tolerance" policy, including cases that remain unresolved.<sup>83</sup>

DHS created the Joint Intake Center (JIC) around 2011 (possibly earlier) to deal with misconduct allegations involving CBP employees, but this effort too seems to have fallen short.<sup>84</sup> Advocates who frequently represent complainants along the southern border have found that "these mechanisms routinely fail to provide accountability or redress for well-documented examples of abuse of migrants."<sup>85</sup> An analysis by a nonprofit that helps migrants file CBP complaints found that many of the organization's submitted complaints were sent to field offices, including several that CRCL, the DHS inspector general, or CBP's OPR were better suited to

investigate.<sup>86</sup> The JIC has struggled to manage this process. After the nonprofit requested that CRCL conduct investigations into family separation incidents, CBP could not find documents previously submitted to the intake center, requiring resubmission. And a 2016 Government Accountability Office report found that the JIC's tracking system for complaints related to immigrant holding facilities did not include crucial categories for facility and issue types, a shortcoming that remains unresolved.<sup>87</sup> The inability to search across locations and problems makes it impossible for component-level oversight agencies to observe patterns of abuse, limiting them to addressing individual cases.

## CBP's Office of Professional Responsibility

**>> Some components combine internal affairs and public impact oversight in one office.** For example, CBP's Office of Professional Responsibility is charged with the agency's internal oversight: ensuring compliance with misconduct and corruption policies, screening employees for suitability, and investigating allegations of employee malfeasance, including use of force incidents, about which it publishes annual reports that shed some light on the issue.<sup>88</sup>

In the past, OPR has struggled to exercise its authority and exert influence over major CBP missteps. In 2016, current and former Border Patrol agents posted images of deceased migrants to a Facebook group alongside xenophobic and sexist comments, including vulgar illustrations of members of congress.<sup>89</sup> It took two years for the office to respond, even though a senior CBP official was notified as early as 2016 about the issue. In the end, OPR issued social media guidance and conducted trainings for field agents in one sector, but its staff members were "discouraged" to see agents "treat [the trainings] as a joke."<sup>90</sup> CBP has also handed disciplinary decision-making authority to a human resources component that can merely suggest appropriate disciplinary measures to field office directors, leaving punishment in the hands of the managers who permitted the infractions in the first place.<sup>91</sup> And while OPR has recently become better resourced, many agents come from Border Patrol incident teams plagued by evidence tampering and obstruction of investigations.<sup>92</sup>

While a component office like OPR has the potential to combine access with subject matter expertise to address harms, OPR's struggles to be effective highlight the need for a stronger DHS headquarters presence in the components to foster relatively independent oversight and accountability.

In sum, the absence of a coherent, DHS-wide oversight structure and procedure gives headquarters offices weak insight into sprawling component operations. The end results are poorly aligned component oversight, a failure to facilitate meaningful review processes and remedies, and a persistent focus on overseeing internal matters rather than activities that directly affect the public. These limitations cause confusion, undermine credibility and accountability, and hinder efforts to protect civil rights, civil liberties, and privacy.

## Office of Inspector General

DHS's inspector general, who is appointed by the president and is subject to Senate confirmation, enjoys far more autonomy than the heads of CRCL or the Privacy Office. Although OIG is subordinate to the DHS secretary, the long-standing tradition of independent inspector general oversight — including the office's ability to issue reports directly to Congress — affords it considerable influence.<sup>93</sup>

The office performs four types of inquiries: audits, inspections, evaluations, and investigations of specific incidents of alleged malfeasance. OIG has the right of first refusal over many inquiries; it can assume responsibility for investigating misconduct allegations or hand matters over to another departmental oversight body.<sup>94</sup> DHS employees must refer allegations fitting a wide array of categories to OIG, including criminal misconduct by a DHS employee, wrongdoing by senior personnel, and serious but noncriminal misconduct by a law enforcement officer. OIG also investigates allegations that “reflect systemic violations,” such as abuses of civil rights and civil liberties or racial or ethnic profiling.<sup>95</sup> And while the office could theoretically refer criminal inquiries to the Department of Justice, publicly available material suggests that it has never done so.

Notwithstanding this broad investigative authority, OIG has chosen to maintain a limited scope of inquiry. Most of the complaints it fields relate to detentions at the southern border, whereas major concerns related to watch lists and biased profiling by CBP and ICE receive less scrutiny.<sup>96</sup> Similarly, OIG leaders rejected proposals to investigate the use of force by Secret Service agents during the 2020 racial justice protests in Washington, DC.<sup>97</sup> And many OIG reports dwell on technical matters — such as employee use of agency credit cards, potential fraud in Covid-19 funeral assistance programs, or component cybersecurity measures — rather than how DHS operations harm the public.<sup>98</sup> Certainly, assessing internal security matters has value, but inquiries like these consume resources at the cost of fostering transparency and accountability in matters that directly affect Americans.

When OIG does investigate DHS operations and misdeeds, the office often defers to the department's representation of the nature or efficacy of its operations. For

instance, in one recent report assessing I&A's open-source collection program, OIG did not scrutinize the assumptions underlying the intelligence office's social media monitoring work. I&A officers reach broad conclusions about Americans' exercise of their First Amendment rights based on ambiguous social media posts that they struggle to interpret.<sup>99</sup> Yet in its review of I&A's work, OIG instead dwelled on technical benchmarks like recordkeeping and the steps to produce intelligence reports, failing to consider the accuracy or reliability of those reports or their potential to cause harm.<sup>100</sup> In another inquiry, OIG appeared to take at face value and even applaud I&A's claim that it had developed a domestic terrorism incident tracker, avoiding any attempt to scrutinize the accuracy or reliability of such an undertaking, despite the troubled history of how the department construes terrorism.<sup>101</sup> And in its recent report on DHS components' failures to comply with privacy requirements when purchasing and using Americans' electronic location data, OIG focused only on questions of policy documentation, ignoring more fundamental concerns about the constitutionality and efficacy of the programs.<sup>102</sup> This is despite the fact that these programs raise clear constitutional questions about the government's ability to uncover intimate details of people's lives that in other circumstances would require a warrant.

Political infighting and management issues in OIG have also seriously undermined employee trust, and with it the office's ability to fulfill its oversight mandate. In February 2021, an OIG investigation revealed that a senior OIG official had used the whistleblowing process to pressure the inspector general to resign, then attempted to take his job.<sup>103</sup> The incident “exacerbated an atmosphere of mistrust . . . to the detriment of the agency and its mission.”<sup>104</sup> A 2022 survey of OIG personnel affirmed this conclusion: respondents in several offices working with OIG senior leaders or on sensitive matters reported that they did not think that leadership maintained high standards of honesty and integrity.<sup>105</sup>

Members of Congress and civil society groups have expressed deep concerns about the behavior of the current inspector general, Joseph Cuffari. Most notoriously, Cuffari chose not to notify Congress about the Secret Service's deletion of texts relating to the storming of the Capitol on January 6, 2021, ignoring advice from his staff that the office was legally obligated to do so.<sup>106</sup> He had previously violated federal ethics regulations while overseeing a DOJ inspector general field office in Arizona, including using his public office for private gain.<sup>107</sup>

OIG remains a missed opportunity for meaningful, independent executive branch oversight of the department. Rather than embracing a broad mandate and confronting DHS's fundamental issues, OIG has chosen a narrow scope of inquiry and often defers to DHS accounts and assertions. Personnel and leadership crises have further marred the office's standing within the department.



# Recommendations

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**Other reports in our DHS at 20 series recommend that** the department and Congress constrain overbroad mandates and unfettered discretion. Even with such restrictions, DHS requires stronger and more independent oversight. The secretary of homeland security has the statutory reorganization authority to centralize and standardize oversight across the department, including by giving headquarters offices a mandate to manage staff in each component.<sup>108</sup> And Congress can pass legislation codifying stronger oversight practices within DHS while giving entities like CRCL authority over components and enhanced ability to access records. Congress should also create a statutory right to sue federal officials for civil rights violations and reinvestigate its own supervision of the department's oversight functions through regular hearings and demands for public reporting.

## Secretary of Homeland Security and Other DHS Officials

The secretary is responsible for ensuring that DHS operations comply with law and do not encroach on Americans' civil rights, civil liberties, and privacy. The following steps to strengthen protections across the department are critical; the secretary has the power and statutory authority to make these changes immediately.

### >> Support the CRCL Authorization Act.

CRCL's lack of statutory authorization has limited its influence within DHS headquarters. The office also lacks clear jurisdiction across the department, along with the subpoena power it needs to conduct effective investigations. Legislation expressly authorizing CRCL has been introduced but has never passed. The CRCL Authorization Act would require integration of civil rights and civil liberties protections into all DHS programs, mandate regular CRCL impact assessments, give subpoena powers to the office's investigators, and ultimately better serve people and communities whose rights the department has potentially violated.<sup>109</sup>

While the bill does not contain everything needed for stronger oversight at DHS, codification of CRCL's authorities — especially its investigative powers — would greatly improve the office's ability to access the information it needs and hold sway over the department. By putting DHS's full weight behind this legislative effort, the secretary can uphold the Biden administration's commitment to protect civil rights in matters of law enforcement and national security.<sup>110</sup>

### >> Solidify oversight independence and reach.

Headquarters oversight offices such as CRCL and the Privacy Office lack a meaningful presence in the components. Although components do have privacy offices and

some have other entities that perform civil rights investigations, these activities are inconsistent and uncoordinated across the department.<sup>111</sup> Similarly, component privacy personnel do not consistently report to senior officers in the Privacy Office.<sup>112</sup>

CRCL and Privacy Office personnel often have limited access to departmental information — which is frequently filtered through operational offices rather than directly obtained — or no access at all. CRCL's lack of subpoena power to demand the documents it requires from components exacerbates its disadvantage. DHS must do more to strengthen the independence and reach of CRCL and the Privacy Office.

Both offices should have teams embedded in each component that report back to their respective headquarters office. These personnel should be charged not only with conducting audits and inquiries but also with supporting components by ensuring that they adequately consider civil rights, civil liberties, and privacy interests, and by helping them navigate the headquarters bureaucracy and processes. In addition, because many of the department's activities occur far from Washington, CRCL and the Privacy Office should each have field officers embedded in components operating in those areas — for example, at Border Patrol sector offices and Homeland Security Investigations field offices.

The secretary should significantly increase hiring to support this expanded footprint based on the size and complexity of DHS operations that an office oversees. The new hires should be selected primarily for their expertise in civil rights, civil liberties, and privacy considerations rather than their familiarity with the departmental operations — and for their commitment to protecting those values. Prior work experience, publications, and writing exercises may help illustrate that expertise and commitment.

The secretary should also direct component and headquarters offices to open their books to CRCL and the Privacy Office and to make their personnel available, even when a request may not be enforceable by subpoena. The secretary must ensure that headquarters oversight officers can obtain the information they need to do their jobs.

CRCL's public and congressional reporting is superficial and full of busywork metrics. The secretary should direct both CRCL and the Privacy Office to conduct more frequent public reporting — ideally on a quarterly basis, along with ad hoc reporting as issues arise — that prioritizes the substance of rights and privacy harms, recommendations, and remediations above training benchmarks and inquiry findings. The secretary should staff new divisions within CRCL and the Privacy Office committed to public transparency so that these reporting responsibilities do not burden already busy offices doing important programmatic advising.

Finally, the secretary must address the department's nebulous and convoluted complaint procedures. DHS should create centralized complaint intake and tracking procedures for headquarters and component activities to replace the subpar process currently provided by the Joint Intake Center and other ad hoc methods.

### **>> Improve Privacy Office engagement.**

Impact assessments and related materials issued by the Privacy Office inform the public about new programs and organizational structures and how particular initiatives implicate privacy concerns. Yet they do not provide an adequate understanding of how different systems within the DHS machinery interact. They also fail to relay the sources of supposedly sensitive information or to communicate potential biases in data sets or the tools used to analyze them.

The Privacy Office should fix these flaws in its previous assessments and issue sufficiently transparent reports going forward. Further, the office conducts many more privacy threshold analyses than it does in-depth impact assessments. These PTAs typically remain nonpublic, but they could provide greater insight — both into DHS operations and into what the department views as potentially affecting privacy interests. DHS should release completed and future PTAs.

In addition, based on a review of public privacy documentation, the office apparently declines to weigh in on whether the department should undertake certain initiatives or adopt new technologies, opting instead simply to present risks and offer suggestions for mitigating them. Meaningful privacy analysis would influence decisions to proceed with novel undertakings — an especially important angle as DHS expands its vast data repositories, including its stock of biometric information, and increasingly seeks to rely on automation and artificial intelligence (AI) in its analysis.<sup>113</sup> The Privacy Office must assess both how to implement programs and whether their benefits outweigh the risks to Americans' privacy. It should issue formal privacy opinions and hold veto power over proposed operations or data systems on the basis of harm to privacy interests, appealable to the deputy secretary.

### **>> Require civil rights and civil liberties assessments.**

CRCL too should substantially improve and expand on its programmatic assessments to determine how proposed DHS programs and operations, along with the department's technology systems, analytical tools, and data sharing, could affect civil rights and liberties.

The effects of DHS programs often extend beyond a narrow set of unlawful harms. Counterterrorism programs can stigmatize entire communities without concretely harming a would-be plaintiff in a legally recognized way. They can massively shift societal values around

electronic privacy and profiling, as various government programs in the wake of September 11 bear witness to. And they can chill people's willingness to speak critically of the government or on social issues, associate with others for political purposes, or participate in religious activities.

CRCL's assessments must consider the full gamut of potential harms engendered by the department's activities. The office should start by evaluating new DHS programs, but it should also retrospectively assess existing programs. The secretary should mandate DHS-wide compliance with its assessments, which Congress should codify.

### **>> Foster technological competence.**

DHS has numerous data systems that interact in complex and evolving ways to serve the department's risk assessment, screening, vetting, watch-listing, information-sharing, and intelligence-gathering functions.<sup>114</sup> Offices throughout DHS are exploring how to use AI to boost these activities — in manners that are opaque and may evade scrutiny. Additionally, entities such as the Office of the Chief Information Officer and I&A constantly develop new technical architecture to share information across department systems and support their hundreds of thousands of users. These systems connect with other federal, state, local, and private-sector data networks to amass large (and at times unvalidated) data sets and store huge amounts of sensitive information about Americans.

DHS oversight staff must be equipped to handle the complexities of this technical framework. Other DHS offices offer bonus pay and specialized growth opportunities to tech-savvy personnel through the DHS Cybersecurity Service program.<sup>115</sup> The secretary should extend this program to oversight personnel who work on cyber and technology initiatives. Such an expansion would not only help find and retain staff but also send a message about the importance of overseeing an increasingly complex, technology-driven environment.

### **>> Reform component oversight.**

DHS component oversight offices should function as a microcosm of headquarters oversight. The secretary should direct several changes to this effect.

The head of each component oversight office should report to the head of the component for administrative purposes and to the head of CRCL or the Privacy Office (as appropriate depending on jurisdiction) for operational purposes.<sup>116</sup> Alternative arrangements that give headquarters visibility into and control over component oversight functions may also be appropriate.

The component oversight structure should be clearly delineated on the DHS website and the secretary should standardize accountability offices across the department. To the extent possible, this standardization should include office structure, internal affairs functions, complaint

intake methods, guidelines for inquiries, reporting, and communication with the public.

Component oversight offices should publicly report their oversight activities — including detailed information about inquiries, recommendations, and resolutions. Offices should provide periodic updates to complainants and notify them of their findings. Overlapping, fragmented authority, such as which office handles inquiries into potential civil rights violations caused by component personnel, should be clarified and managed consistently.

### >> Empower the Office of Inspector General.

Like the Privacy Office, OIG produces reports that offer insight into the department's activities and potential abuses. But it could do more. First, OIG reports rarely assess how operations affect civil rights, civil liberties, and privacy. Understanding these effects is vital to preventing mistakes and abuses. OIG should hire experts in these topics or detail personnel from CRCL and the Privacy Office to investigative teams, which would also cultivate a more interconnected DHS oversight regime. And it should directly and consistently assess civil rights, civil liberties, and privacy implications in every report it produces.

Second, OIG frequently defers to departmental claims about the merits, values, and goals of the programs that it audits or investigates. As an oversight entity charged with preventing wasteful and abusive practices, OIG should assess and, where appropriate, question the underlying assumptions of DHS programs, particularly when performing broader programmatic audits.

Third, although OIG does not release reports of investigations into allegations of misconduct — and likely would not, due to typical investigative and prosecutorial considerations — these investigations demonstrate not just the department's missteps but also its successes in correcting and preventing wrongdoing. To the fullest extent possible, OIG should release reports addressing how its investigative findings and recommendations to remediate policy and operational concerns affect DHS programs. These reports would offer insight into instances wherein the department has overstepped its legal bounds, with a twofold benefit: educating the public about the department's work on its behalf and pushing the government and Congress to hold DHS accountable.

### >> Promote legal transparency.

DHS's broad mandates and weak safeguards foster unaccountable discretion, leading to abuse and harm. The Office of the General Counsel is tasked with performing legal assessments for various DHS operational, immigration, and intelligence functions, evaluating how those functions affect constitutional rights, and determining their litigation risk. Its legal memoranda are rarely made public.

The department must promote transparency and public access to legal interpretations, not secrecy. Accordingly,

the secretary should direct the public release of all DHS legal memoranda authored or reviewed at the associate general counsel level, the component equivalent, or higher (with any sensitive operational information redacted).<sup>117</sup> For any classified legal memos, the secretary should immediately release the unclassified portions (with classified information redacted) and vigorously pursue a declassification review of the remaining material. This practice should apply to any future legal analysis issued by the department.

### >> Strengthen oversight of practices susceptible to abuse.

Earlier reports in the DHS at 20 series outline how certain DHS activities — including domestic intelligence, profiling, and some collaborations with state and local agencies — are susceptible to abuse. These reports call for widespread changes to enhance oversight of these riskier practices.

As this report details, the existing DHS intelligence oversight structure is inadequate. The Brennan Center previously recommended developing an independent, politically empowered office with jurisdiction across the entire department and provided a roadmap that the secretary should implement immediately.<sup>118</sup> Such an office would be able to oversee component intelligence activities that are currently subject to a patchwork of oversight at best.

DHS and its partners have a history of stereotyping groups of Americans and using bias and presumption in lieu of facts to drive decisions. The department should adopt a better anti-profiling framework, which CRCL and OIG should enforce, as proposed in another report in this series.<sup>119</sup>

In addition, DHS oversight of fusion centers — homeland security intelligence-sharing hubs run by state and local governments with federal support — is remarkably lax. The department should support the creation of a special inspector general and a standing independent oversight entity for fusion centers.<sup>120</sup>

## Privacy and Civil Liberties Oversight Board

### >> Reexamine DHS oversight framework.

The PCLOB has broad jurisdiction to advise on how the government's counterterrorism efforts affect Americans' civil rights, civil liberties, and privacy. The board conducts inquiries into government activities, collaborates with academics and civil society experts, and issues findings and advice on these sensitive matters. It currently examines operations related to domestic terrorism, watch listing, facial recognition and biometric technology in aviation security, and airline passenger data, among other topics. Several of these areas concern DHS oversight, but some important department oversight matters are not covered by the board.

The PCLOB should initiate a new, overarching inquiry into the oversight framework at DHS to assess its effec-

tiveness, challenges, independence (or lack thereof), and potential improvements. The board should make any resulting report and recommendations available to the president, the secretary, Congress, and the public.

## Congress

### >> Fix departmental structures.

Congress should cement better oversight at DHS by codifying a stronger CRCL, Privacy Office, and intelligence oversight structure as reflected in this report's recommendations to DHS officials. Congress should also pass the CRCL Authorization Act, require CRCL to report annually and publicly on its plans for and execution of its impact assessments, and expand (and fund) programs to help CRCL and the Privacy Office hire and retain capable cyber professionals. Congress should tie appropriations to compliance with oversight transparency obligations, meaning that if DHS or its components disregard their oversight duties or undermine oversight offices, they risk compromising their budgets.

### >> Routinely monitor oversight offices.

Congress typically only involves itself with DHS oversight issues on an ad hoc basis as problems arise. At the same time, it calls regularly on DHS operational leaders to tout accomplishments or brief the public.<sup>121</sup> Congress's homeland security committees should call routine public oversight hearings in which they question the heads of CRCL, the Privacy Office, component offices, and the proposed intelligence oversight office about recent inquiries and reporting. These hearings should be public and should aim to shed light not just on the department's scandals but also on its routine oversight functions.

### >> Expand remedies.

Even if DHS's internal oversight functioned properly, people harmed by the department's operations would still have little access to actual remedies. CRCL, for instance, can do nothing for those whose rights the department has violated. The office reports its findings and recommendations to DHS leadership and sends letters to

complainants, but those letters do not result in restitution. Similarly, research suggests that OIG has never made a criminal referral to the Department of Justice — which is not to say that even a criminal conviction would offer those harmed much by way of comfort or remedy.

The government must provide adequate remedies for the many people whose rights and liberties the department's activities have violated. Congress should expand the existing cause of action that authorizes lawsuits against state government officials for civil rights violations, referred to as Section 1983 claims, to federal officials. The Bivens Act of 2021, introduced in the House last term, would have created a statutory right to sue and recover damages from federal officials for deprivation of rights.<sup>122</sup> Congress should reintroduce the bill and pass it promptly. Congress should then assess the challenges faced by victims of clear government overreach and shore up constitutional rights by providing clear statutory remedies tailored to specific contexts, such as for individuals affected by intrusive surveillance, invasive border searches, and physical harm caused by officials.

## Conclusion

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**Given DHS's vast legal authorities and discretion and two decades of missteps, stronger oversight is long overdue.** Structural flaws and weak standing in the department have crippled the offices charged with protecting civil rights, civil liberties, and privacy. As a result, programs evade assessment and abuses slip through the cracks.

The secretary must modernize and expand the reach of CRCL and the Privacy Office while synchronizing component oversight. OIG should embrace a more critical approach to its work. The PCLOB should conduct a thorough inquiry of existing oversight programs, highlighting shortcomings and recommending solutions. And Congress should codify structural changes, buttress remedies, and bolster its oversight of the department. Without these overhauls, DHS officials will continue to overstep, evade meaningful accountability, and leave the American public in the dark.



# Endnotes

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- 1 For instance, *A New Vision for Domestic Intelligence* recommends ending the sharing of social media intelligence about Americans and the practice of interviewing incarcerated persons, as well as the creation of better protections for Americans' information. *Stronger Rules Against Bias* offers solutions to long-standing issues of profiling. And *Ending Fusion Center Abuses* proposes a novel, robust federal oversight mechanism for the national network of fusion centers. 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, <https://www.brennancenter.org/our-work/policy-solutions/new-vision-domestic-intelligence>; Harsha Panduranga and Faiza Patel, *Stronger Rules Against Bias: A Proposal for a New DHS Nondiscrimination Policy*, Brennan Center for Justice, updated September 15, 2022, <https://www.brennancenter.org/our-work/policy-solutions/stronger-rules-against-bias>; and Michael German, Rachel Levinson-Waldman, and Kaylana Mueller-Hsia, *Ending Fusion Center Abuses: A Roadmap for Robust Federal Oversight*, Brennan Center for Justice, December 15, 2022, <https://www.brennancenter.org/our-work/policy-solutions/ending-fusion-center-abuses>.
- 2 DHS's mission statement reads, "With honor and integrity, we will safeguard the American people, our homeland, and our values." Department of Homeland Security (hereinafter DHS), "Mission," last updated February 26, 2023, <https://www.dhs.gov/mission>. The department does not specify which "values" it protects and puts them last in its series of duties. But the promise — and opportunity — to defend American ideals as well as people is one of its stated commitments.
- 3 Faiza Patel, Rachel Levinson-Waldman, and Harsha Panduranga, *A Course Correction for Homeland Security: Curbing Counterterrorism Abuses*, Brennan Center for Justice, April 20, 2022, <https://www.brennancenter.org/our-work/research-reports/course-correction-homeland-security>.
- 4 6 U.S.C. § 113(d) (2002).
- 5 6 U.S.C. § 345 (2004); and Patel, Levinson-Waldman, and Panduranga, *Course Correction*, 17.
- 6 DHS, *Department of Homeland Security, Office of the Secretary and Executive Management: Budget Overview, Fiscal Year 2023 Congressional Justification*, OSEM–O&S–78 (hereinafter DHS, *FY 2023 Congressional Justification*), [https://www.dhs.gov/sites/default/files/2022-03/Office%20of%20the%20Secretary%20and%20Executive%20Managementv2\\_Remediated.pdf](https://www.dhs.gov/sites/default/files/2022-03/Office%20of%20the%20Secretary%20and%20Executive%20Managementv2_Remediated.pdf).
- 7 DHS, "Office for Civil Rights and Civil Liberties," last updated October 11, 2023, <https://www.dhs.gov/office-civil-rights-and-civil-liberties>; and Office for Civil Rights and Civil Liberties (hereinafter CRCL), "Programs Branch," DHS, accessed September 19, 2023, <https://www.dhs.gov/sites/default/files/publications/programs-one-pager-2020.pdf>.
- 8 DHS, "Civil Rights and Civil Liberties Impact Assessments," last updated January 10, 2023, <https://www.dhs.gov/civil-rights-civil-liberties-impact-assessments>. None of CRCL's publicly available impact assessments were instigated by the office. For analysis of other publicly available impact assessments, see Patel, Levinson-Waldman, and Panduranga, *Course Correction*, 18–19.
- 9 Patel, Levinson-Waldman, and Panduranga, *Course Correction*, 18–19.
- 10 Tamara Kessler, *Civil Rights/Civil Liberties Impact Assessment: Border Searches of Electronic Devices*, DHS, January 29, 2013, [https://www.dhs.gov/sites/default/files/publications/Border%20Searches%20of%20Electronic%20Devices\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/Border%20Searches%20of%20Electronic%20Devices_0.pdf).
- 11 See Ryan Devereaux, "The U.S. Targeted Journalists on the Border. Two Senators Want to Know Why," *Intercept*, March 11, 2019, <https://theintercept.com/2019/03/11/southern-us-border-mexico-journalists>; Tom Jones, "Secure Line Secrets: Documents Released Behind Border Surveillance of Journalists, Attorneys and Humanitarian Aid Workers," NBC 7 San Diego, March 24, 2023, <https://www.nbcsandiego.com/news/investigations/secure-line-secrets-documents-released-behind-border-surveillance-of-journalists-attorneys-and-humanitarian-aid-workers/3194760>; and Ryan Devereaux, "Pastor Wins Civil Rights Suit Against Trump Administration Border Surveillance," *Intercept*, March 28, 2023, <https://theintercept.com/2023/03/28/dhs-cbp-border-surveillance-kaji-dousa>. The experiences of American Muslims at the border suggest that many cases remain unheard. See Murtaza Hussain, "Complaints Describe Border Agents Interrogating Muslim Americans, Asking for Social Media Accounts," *Intercept*, January 14, 2017, <https://theintercept.com/2017/01/14/complaints-describes-border-agents-interrogating-muslim-americans-asking-for-social-media-accounts>.
- 12 DHS, "Civil Rights and Civil Liberties Impact Assessments."
- 13 Patel, Levinson-Waldman, and Panduranga, *Course Correction*, 18.
- 14 Jonathan Cantor, *Privacy Impact Assessment for the Data Management Hub*, DHS Privacy Office, October 29, 2019, <https://www.dhs.gov/sites/default/files/publications/privacy-pia-dhsall076-datamanagementhub-october2019.pdf>.
- 15 DHS Privacy Office, *Privacy Impact Assessment for the DHS Data Analysis Tools*, June 13, 2023, <https://www.dhs.gov/sites/default/files/2023-06/privacy-pia-dhsall055a-dat-june2023.pdf>.
- 16 Cantor, *PIA for Data Management Hub*.
- 17 Cybersecurity and Infrastructure Security Agency (hereinafter CISA), "Foreign Influence Operations and Disinformation," accessed September 19, 2023, <https://www.cisa.gov/topics/election-security/foreign-influence-operations-and-disinformation> ("CISA works with its Privacy Office and Office for Civil Rights and Civil Liberties to ensure these principles are reflected in all of its activities [related to foreign influence and misinformation operations]."); *Examining the January 6 Attack on the U.S. Capitol, Hearing Before the S. Comm. on Homeland Security and Governmental Affairs and S. Comm. on Rules and Administration*, 117th Cong. (2021), (testimony of Melissa Smislova, acting undersecretary for intelligence and analysis, DHS), 3, [https://www.rules.senate.gov/imo/media/doc/Testimony\\_Smislova1.pdf](https://www.rules.senate.gov/imo/media/doc/Testimony_Smislova1.pdf) ("We are also working with our privacy, civil liberties, and civil rights colleagues in the Department to ensure that this new scope of intelligence collection and analysis respects constitutional rights, consistent with the law. Producing intelligence in a purely domestic context is rightly limited by law and creates complexities for intelligence collection. We are mindful of our duty to respect privacy, civil rights, and civil liberties and to act within the authorities granted to DHS."); and DHS, "Submitted Written Testimony of Acting Secretary Chad F. Wolf Before the U.S. Senate Committee on Homeland Security And Governmental Affairs," August 6, 2020, <https://www.dhs.gov/news/2020/08/06/submitted-written-testimony-acting-secretary-chad-f-wolf-us-senate-committee> ("We have the necessary oversight mechanisms from the Office of the Inspector General, the Office for Civil Rights and Civil Liberties, and the respective Offices of Professional Responsibility at DHS Components to review any allegations of misconduct, including alleged violations of civil rights or civil liberties."). At other times, the department pays lip service to respecting civil rights, civil liberties, and privacy without providing detailed plans or demonstrating efficacy. DHS, "Oral Testimony of Secretary of Homeland Security Alejandro N. Mayorkas Before the Senate Appropriations Committee on 'Domestic Violent Extremism in America,'" May 12, 2021, <https://www.dhs.gov/news/2021/05/12/oral-testimony-secretary-homeland-security-alejandro-n-mayorkas-senate> ("[T]he Department is redoubling its efforts to detect and disrupt all forms of foreign and domestic terrorism and targeted violence, while safeguarding privacy protections, civil rights, and civil liberties.").

- 18** Benjamin Wittes, “How the DHS Intelligence Unit Sidelined the Watchdogs,” *Lawfare* (blog), August 6, 2020, <https://www.lawfareblog.com/how-dhs-intelligence-unit-sidelined-watchdogs>.
- 19** Reynolds and Patel, *New Vision for Domestic Intelligence*.
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- 23** Ellen M. Gilmer, “Homeland Intelligence Unit Marred by Missteps Gets Overhaul,” May 4, 2023, Bloomberg Government, <https://about.bgov.com/news/homeland-intelligence-unit-marred-by-missteps-gets-overhaul>; and Ken Wainstein (undersecretary for intelligence and analysis, DHS) to Rep. Mark E. Green (chair, Committee on Homeland Security, U.S. House of Representatives), May 31, 2023, 1–2, <https://aboutbgov.com/8nb>.
- 24** See Atlantic Council, “A Conversation with Kenneth Wainstein, DHS Under Secretary for Intelligence and Analysis,” September 6, 2023, <https://www.atlanticcouncil.org/event/a-conversation-with-kenneth-wainstein>.
- 25** Reynolds and Patel, *New Vision for Domestic Intelligence*, 8–9; and Brennan Center for Justice et al., “Coalition Letter Calls for Congressional Hearings on Fourth Amendment Is Not for Sale Act,” January 26, 2022, <https://www.brennancenter.org/our-work/research-reports/coalition-letter-calls-congressional-hearings-fourth-amendment-not-sale>.
- 26** Scott Shuchart, *Building Meaningful Civil Rights and Liberties Oversight at the U.S. Department of Homeland Security*, Center for American Progress, April 2019, 17n62, <https://www.americanprogress.org/wp-content/uploads/sites/2/2019/03/DHS-Civil-Rights-Oversight-report1.pdf>.
- 27** Instead, the component-level civil rights offices shuttle paperwork and, occasionally, facilitate CRCL investigations. They are often responsible for issuing civil rights policies and directives. Shuchart, *Building Meaningful Civil Rights and Liberties Oversight*, 16n66.
- 28** DHS, “CRCL Compliance Branch,” last updated March 16, 2023, <https://www.dhs.gov/compliance-branch>.
- 29** The number of CRCL complaint investigations nearly doubled between the 2014 and 2022 fiscal years, from 417 to 829. CRCL, *Office for Civil Rights and Civil Liberties: Fiscal Year 2014 Annual Report to Congress*, DHS, July 28, 2015, 24, [https://www.dhs.gov/sites/default/files/publications/crcl-fy-2014-annual-report\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/crcl-fy-2014-annual-report_0.pdf); CRCL, *Office for Civil Rights and Civil Liberties Semiannual Report to Congress: First and Second Quarters, FY 2022 (October 1, 2022 [sic]–March 31, 2022)*, DHS, August 31, 2022, 14, <https://www.dhs.gov/sites/default/files/2022-08/crcl-fy-22-q1-q2-semiannual-report.pdf>; and CRCL, *Office for Civil Rights and Civil Liberties Semiannual Report to Congress: Third and Fourth Quarters, FY 2022 (April 1, 2022–September 30, 2022)*, DHS, February 2, 2023, 114, <https://www.dhs.gov/sites/default/files/2023-02/crcl-fy-22-q3-q4-semiannual-report.pdf>.
- 30** Adam Isacson and Zoe Martens, “The DHS Accountability Process — Abuses at the U.S.-Mexico Border: How To Address Failures and Protect Rights,” Washington Office on Latin America, August 2, 2023, <https://www.wola.org/analysis/section-ii-accountability-for-abuses-at-the-u-s-mexico-border-how-to-address-failures-and-protect-rights>.
- 31** More opened complaints about detention conditions were retained by CRCL for investigation than any other category of complaint: 31 in 2021 (see CRCL, *U.S. Department of Homeland Security Office for Civil Rights and Civil Liberties: Fiscal Year 2021 Annual Report to Congress*, DHS, December 12, 2022 (hereinafter FY 2021 Annual Report to Congress), 30, [https://www.dhs.gov/sites/default/files/2022-12/FINAL%20CRCL%20FY%202021%20Annual%20Report\\_508.pdf](https://www.dhs.gov/sites/default/files/2022-12/FINAL%20CRCL%20FY%202021%20Annual%20Report_508.pdf)); 22 in 2020 (see CRCL, *U.S. Department of Homeland Security Office for Civil Rights and Civil Liberties: Fiscal Year 2020 Annual Report to Congress*, DHS, June 22, 2022 (hereinafter FY 2020 Annual Report to Congress), 31, [https://www.dhs.gov/sites/default/files/2022-07/crcl-fy-2020-annual-report-508\\_0.pdf](https://www.dhs.gov/sites/default/files/2022-07/crcl-fy-2020-annual-report-508_0.pdf)); and 38 in 2019 (see CRCL, *U.S. Department of Homeland Security Office for Civil Rights and Civil Liberties: Fiscal Year 2019 Annual Report to Congress*, DHS, August 5, 2021 (hereinafter FY 2019 Annual Report to Congress), 33, [https://www.dhs.gov/sites/default/files/publications/crcl-fy-2019-annual-report\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/crcl-fy-2019-annual-report_0.pdf)). The total number of complaints retained by OIG were as follows: 16 in 2021 (see CRCL, *FY 2021 Annual Report to Congress*, 23); 8 in 2020 (see CRCL, *FY 2020 Annual Report to Congress*, 25); and 16 in 2019 (see CRCL, *FY 2019 Annual Report to Congress*, 26).
- 32** CRCL, *Fiscal Year 2019 Annual Report to Congress*, 5; CRCL, “Make a Civil Rights Complaint,” DHS, last updated April 25, 2023, <https://www.dhs.gov/file-civil-rights-complaint>.
- 33** This is not to say that DHS has no redress programs. Notably, as we discuss in *Overdue Scrutiny for Watch Listing and Risk Prediction*, it operates the DHS Traveler Redress Inquiry Program (TRIP) through TSA, which allows travelers to seek answers about their potential placement on watch lists and the ramifications for interactions with TSA and CBP. Rachel Levinson-Waldman and José Guillermo Gutiérrez, *Overdue Scrutiny for Watch Listing and Risk Prediction: Civil Liberties Abuses and Unknown Scrutiny*, Brennan Center for Justice, October 19, 2023, <https://www.brennancenter.org/our-work/policy-solutions/overdue-scrutiny-watch-listing-and-risk-prediction>; and Transportation Security Administration (hereinafter TSA), “DHS Traveler Redress Inquiry Program,” DHS, accessed September 20, 2023, <https://www.tsa.gov/travel/passenger-support/travel-redress-program>. CRCL’s involvement is likely limited to the sort of “proactive policy advice” it describes elsewhere.
- 34** Asian Law Caucus et al. to Janet Napolitano (secretary of homeland security), July 21, 2009, <https://perma.cc/77HW-EQ9D>; and DHS, Management Directive 3500: Operational Roles and Responsibilities of the Officer for Civil Rights and Civil Liberties and the Office of the Chief Counsel, May 19, 2004, <https://www.dhs.gov/sites/default/files/publications/crcl-directive-3500.pdf>.
- 35** CRCL provides a guide to its winding inquiry process. See CRCL, “Civil Rights Complaint Flowchart,” DHS, accessed September 20, 2023, [https://www.dhs.gov/sites/default/files/2023-02/crcl-complaints-flowchart\\_508.pdf](https://www.dhs.gov/sites/default/files/2023-02/crcl-complaints-flowchart_508.pdf). Note that CRCL’s inquiries themselves provide no remedy to anyone affected by the department. In one letter to such a recipient, CRCL wrote that its “complaint process does not provide individuals with legal rights or remedies.” The office instead advised the recipient to find an attorney. Susan Ferriss, Alison Fitzgerald Kodjak, and Joshua E. S. Phillips, “Homeland Security’s Civil Rights Unit Lacks Power to Stop Abuse of Migrant Kids,” Center for Public Integrity, August 2, 2019, <https://publicintegrity.org/inequality-poverty-opportunity/immigration/homeland-securitys-civil-rights-unit-we-lack-power-to-block-abuse-of-migrant-kids>.
- 36** See, e.g., *ACLU of Arizona v. U.S. Department of Homeland Security Office for Civil Rights and Civil Liberties*, No. 15CV00247 (D. Ariz. November 15, 2017), Declaration of Aarti G. Reddy in Support of Plaintiffs’ Response to Defendants’ Motion for Partial Reconsideration or, in the Alternative, for Pretrial Stay Pending Potential Appeal at 2–3, <https://www.brennancenter.org/sites/default/files/2023-09/ACLU%20AZ%20v.%20CRCL%20Reddy%20Decl%20w%20exs..pdf> (detailing two incidents wherein CRCL neglected to complete its investigations into complaints regarding abuse of unaccompanied migrant children by Border Patrol agents and subsequently closed the complaints due to the length of time elapsed). CRCL is not alone in the department in this failure. See

Joseph Cox, "DHS Did Not Investigate Hundreds of Civil Rights Abuse Complaints, Documents Reveal," *Vice*, June 19, 2018, <https://www.vice.com/en/article/43589q/dhs-civil-rights-complaints-uninvestigated>.

**37** DHS, "CRCL Annual Reports to Congress," last updated December 22, 2022, <https://www.dhs.gov/publication/crcl-annual-reports>.

**38** CRCL, *FY 2021 Annual Report to Congress*. See also "Operation Allies Welcome Announces Departure of All Afghan Nationals from the National Conference Center Safe Haven in Leesburg, Va.," *Homeland Security Today*, September 28, 2022, <https://www.hstoday.us/subject-matter-areas/customs-immigration/operation-allies-welcome-announces-departure-of-all-afghan-nationals-from-the-national-conference-center-safe-haven-in-leesburg-va>.

**39** Shuchart, *Building Meaningful Civil Rights and Liberties Oversight*, 11.

**40** Department of Homeland Security Office for Civil Rights and Civil Liberties Authorization Act, H.R. 4349, 117th Cong. (2021) (hereinafter DHS CRCL Authorization Act), <https://www.govtrack.us/congress/bills/117/hr4349/text>.

**41** 6 U.S.C. § 142 (2002). This report does not address the disclosure activities of the Privacy Office — notably its role in executing DHS's Freedom of Information Act obligations — except to note that it had a FOIA backlog of nearly 50,000 requests as of 2020, undercutting any serious commitment to transparency that the department may claim.

**42** 6 USC § 142 (b)(1)(C) (2007); and DHS, "Authorities and Responsibilities of the Chief Privacy Officer," last updated August 22, 2022, <https://www.dhs.gov/chief-privacy-officers-authorities-and-responsibilities>.

**43** DHS, "Privacy Impact Assessments," last updated August 18, 2022, <https://www.dhs.gov/privacy-impact-assessments>.

**44** DHS, "Privacy Compliance Process," last updated January 13, 2022, <https://www.dhs.gov/compliance>.

**45** Shuchart, *Building Meaningful Civil Rights and Liberties Oversight*; Privacy Office, *Guide to Implementing Privacy: Version 1.0*, DHS, June 2010, 4, <https://www.dhs.gov/xlibrary/assets/privacy/dhsprivacyoffice-guidetoimplementingprivacy.pdf>; and DHS, Directive 047-01-005: Component Privacy Officer, February 6, 2017, <https://www.dhs.gov/sites/default/files/publications/dhs%20policy%20instruction%20047-01-005%20Component%20Privacy%20Officer%20Privacy.pdf>.

**46** DHS, Directive 047-01-005: Component Privacy Officer, 2–3; and Privacy Office, *Privacy Impact Assessments: The Privacy Office Official Guidance*, DHS, June 2010, 7, [https://www.dhs.gov/sites/default/files/publications/privacy\\_pia\\_guidance\\_june2010\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy_pia_guidance_june2010_0.pdf).

**47** DHS Office of Inspector General (hereinafter OIG), *DHS Privacy Office Needs to Improve Oversight of Department-Wide Activities, Programs, and Initiatives*, November 4, 2020, <https://www.oig.dhs.gov/sites/default/files/assets/2020-12/OIG-21-06-Nov20.pdf>.

**48** OIG, *CBP, ICE, and Secret Service Did Not Adhere to Privacy Policies or Develop Sufficient Policies Before Procuring and Using Commercial Telemetry Data (Redacted)*, September 28, 2023, <https://www.oig.dhs.gov/sites/default/files/assets/2023-09/OIG-23-61-Sep23-Redacted.pdf>.

**49** Bennett Cyphers, "How the Federal Government Buys Our Cell Phone Location Data," *Electronic Frontier Foundation*, June 13, 2022, <https://www.eff.org/deeplinks/2022/06/how-federal-government-buys-our-cell-phone-location-data>; and Byron Tau, "Homeland Security Watchdog to Probe Department's Use of Phone Location Data," *Wall Street Journal*, December 2, 2020, <https://www.wsj.com/articles/homeland-security-watchdog-to-probe-departments-use-of-phone-location-data-11606910402>.

**50** *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (quoting *Riley v. California*, 573 U.S. 373, 403 (2014) (internal quotation marks omitted)); *Fixing FISA, Part II, Hearing Before the H. Comm. on the*

*Judiciary, Subcomm. on Crime and Federal Government Surveillance*, 117th Cong. (2023), (testimony of Elizabeth Goitein, senior director of the Liberty and National Security Program, Brennan Center for Justice), 41, <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/goitein-testimony.pdf>.

**51** *Fixing FISA* (testimony of Elizabeth Goitein), 39.

**52** OIG, *CBP, ICE, and Secret Service Did Not Adhere to Privacy Policies*.

**53** Of course, technical exceptions apply, such as in the case of the DHS Office of the General Counsel, which is responsible for assisting intelligence oversight personnel with inquiries and facilitating the reporting of violations outside of the department. I&A, *Instruction IA-1000: Intelligence Oversight Program and Guidelines*, app. A.

**54** Steve Vladeck and Benjamin Wittes, "DHS Authorizes Domestic Surveillance to Protect Statues and Monuments," *Lawfare* (blog), July 20, 2020, <https://www.lawfaremedia.org/article/dhs-authorizes-domestic-surveillance-protect-statues-and-monuments>; and Shane Harris, "DHS Authorizes Personnel to Collect Information on Protestors It Says Threaten Monuments," *Washington Post*, July 20, 2020, [https://www.washingtonpost.com/national-security/dhs-authorizes-personnel-to-collect-information-on-protesters-it-says-threaten-monuments/2020/07/20/6f58867c-cace-11ea-b0e3-d55bda07d66a\\_story.html](https://www.washingtonpost.com/national-security/dhs-authorizes-personnel-to-collect-information-on-protesters-it-says-threaten-monuments/2020/07/20/6f58867c-cace-11ea-b0e3-d55bda07d66a_story.html).

**55** *Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence*, Exec. Order No. 13933, 85 Fed. Reg. 40081 (June 26, 2020), <https://www.federalregister.gov/documents/2020/07/02/2020-14509/protecting-american-monuments-memorials-and-statues-and-combating-recent-criminal-violence>; Michael D. Shear, "Trump Issues Executive Order Targeting Vandalism Against Monuments," *New York Times*, updated August 9, 2020, <https://www.nytimes.com/2020/06/26/us/politics/trump-monuments-executive-order.html>; and Nikki Carvajal, Sarah Westwood, and Caroline Kelly, "Trump Says He Signed Executive Order to Protect Monuments," *CNN*, June 26, 2020, <https://www.cnn.com/2020/06/26/politics/trump-signs-monuments-executive-order/index.html>.

**56** Betsy Woodruff Swan, "DHS Has a Program Gathering Domestic Intelligence — and Virtually No One Knows About It," *Politico*, March 6, 2020, <https://www.politico.com/news/2023/03/06/dhs-domestic-intelligence-program-00085544> (referencing August 14 rescission); and H. Permanent Select Comm. on Intelligence, "House Intelligence Committee Takes Next Steps in Investigation into Actions by Department of Homeland Security's Office of Intelligence and Analysis in Portland and in Response to Protests Nationwide," press release, August 19, 2020, <https://democrats-intelligence.house.gov/news/documentsingle.aspx?DocumentID=1040> ("The fact that I&A adopted such a flawed legal analysis in the first place and its inability to fully repudiate such overreach is disappointing").

**57** I&A, *Instruction IA-1000: Intelligence Oversight Program and Guidelines*.

**58** I&A, *Instruction IA-1000: Intelligence Oversight Program and Guidelines*, app. B, glossary 1. See also Reynolds and Patel, *New Vision for Domestic Intelligence*, 7.

**59** ACLU, "Customs and Border Protection's (CBP's) 100-Mile Rule," September 14, 2015, [https://www.aclu.org/wp-content/uploads/legal-documents/14\\_9\\_15\\_cbp\\_100-mile\\_rule\\_final.pdf](https://www.aclu.org/wp-content/uploads/legal-documents/14_9_15_cbp_100-mile_rule_final.pdf); Customs and Border Protection (hereinafter CBP), *CBP Directive 3340-049A: Border Search of Electronic Devices*, DHS, January 4, 2018, <https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf>; and Congressional Research Service, *U.S. Customs and Border Protection's Powers and Limitations: A Primer*, updated November 30, 2021, <https://crsreports.congress.gov/product/pdf/LSB/LSB10559>.

**60** For example, in its brief before the U.S. Court of Appeals for the



Eleventh Circuit in the 2018 case *United States v. Vergara*, the government defended this highly permissive legal construction: "Indeed, the ability to conduct suspicionless border searches of cellphones and other digital devices is central to the United States' sovereign right to determine who and what may cross its borders. To require any level of suspicion — let alone a warrant based on probable cause, as Vergara argues in his brief — would impose a new and more burdensome constitutional requirement for an entire category of border searches, i.e., border searches of cellphones and other digital devices. Such a requirement would also severely undermine the ability of officers to police the border by letting terrorists, spies, smugglers, and other criminals know that information transported on cellphones and other digital devices will be immune from random, unpredictable, and suspicionless searches at the border." *United States v. Vergara*, No. 16-15059 (11th Cir. January 23, 2017), Brief of the United States at 26, [https://www.brennancenter.org/sites/default/files/2023-09/Microsoft%20Word%20-%20b\\_Vergara%2C%20Hernando\\_US%20response%20brief%20FINAL%20pxs.docx.pdf](https://www.brennancenter.org/sites/default/files/2023-09/Microsoft%20Word%20-%20b_Vergara%2C%20Hernando_US%20response%20brief%20FINAL%20pxs.docx.pdf).

**61** Faiza Patel et al., *Social Media Monitoring: How the Department of Homeland Security Uses Digital Data in the Name of National Security*, Brennan Center for Justice, updated March 11, 2020, 32n460, <https://www.brennancenter.org/our-work/research-reports/social-media-monitoring>.

**62** Patel, Levinson-Waldman, and Panduranga, *Course Correction*, 21n269.

**63** Patel, Levinson-Waldman, and Panduranga, *Course Correction*, 21. See also Privacy Office, "Guide to Implementing Privacy" (noting that PIAs have two goals: to determine the risks and effects of data collection, and to evaluate protections and alternative processes; notably missing is the authority to reject proposed programs). The Privacy Office conducts PIAs for four policy reasons (none of which provides an opportunity to reject proposed programs outright): providing information to senior leadership and offices necessary for making decisions about programs, assessing privacy concerns during policy development, providing transparency, and serving as a foundation for accountability to oversight bodies. See Hugo Teufel III, "Privacy Police Guidance Memorandum," DHS, December 30, 2008, [https://www.dhs.gov/sites/default/files/publications/privacy\\_policyguide\\_2008-02\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/privacy_policyguide_2008-02_0.pdf).

**64** OIG, Summary Report: Persistent Data Issues Hinder DHS Mission, Programs, and Operations, DHS, May 24, 2021, 2, <https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-37-May21.pdf>.

**65** DHS, *FY 2023 Congressional Justification*, OSEM–O&S–8.

**66** DHS, "Privacy Office Contacts," last updated August 1, 2022, <https://www.dhs.gov/privacy-office-contacts>.

**67** TSA, "Civil Rights," DHS, accessed September 20, 2023, <https://www.tsa.gov/travel/passenger-support/civil-rights>.

**68** U.S. Commission on Civil Rights, *Are Rights a Reality? Evaluating Federal Civil Rights Enforcement*, November 2019, 362, <https://www.usccr.gov/files/pubs/2019/11-21-Are-Rights-a-Reality.pdf>; and Federal Emergency Management Agency (hereinafter FEMA), "Civil Rights," DHS, accessed September 20, 2023, [https://www.fema.gov/sites/default/files/documents/fema\\_ocr-civil-rights-flyer-english.pdf](https://www.fema.gov/sites/default/files/documents/fema_ocr-civil-rights-flyer-english.pdf).

**69** See for example Sarah Turberville and Katherine Hawkins, "Flawed Oversight: The Inspector General's Office and the Need for Reform in DHS," Project on Government Oversight (hereinafter POGO), June 6, 2023, <https://www.pogo.org/testimony/2023/06/flawed-oversight-the-inspector-generals-office-and-the-need-for-reform-in-dhs>.

**70** This section does not cover FEMA's Office of Professional Responsibility (OPR) or the Secret Service's Office of Professional Responsibility. FEMA, "Office of Professional Responsibility," DHS, last updated May 24, 2023, <https://www.fema.gov/about/offices/professional-responsibility>; U.S. Secret Service, "Assistant Director Gloria R. Armstrong, Office of Professional Responsibility," accessed

September 20, 2023, <https://www.secretservice.gov/about/leadership/opr>. It also does not cover ICE's Office of Diversity and Civil Rights, which appears to focus on employment matters, nor its Office of Professional Responsibility, about which little is publicly available.

**71** CBP, Directive 2130-021: Roles and Responsibilities of U.S. Customs and Border Protection Component Offices and Employees Regarding Civil Rights and Civil Liberties Matters, DHS, June 3, 2011, 4, <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-directive-2130-021.pdf>.

**72** DHS, "Memo from Acting Secretary [Kevin McAleenan] on Information Regarding First Amendment Protected Activities," May 17, 2019, [https://www.dhs.gov/sites/default/files/2022-06/info\\_regarding\\_first\\_amendment\\_protected\\_activities\\_as1\\_signed\\_05.17.2019-508.pdf](https://www.dhs.gov/sites/default/files/2022-06/info_regarding_first_amendment_protected_activities_as1_signed_05.17.2019-508.pdf).

**73** CBP Office of Diversity and Civil Rights, *Fiscal Year 2012 Annual Report*, 4; and CBP, Directive 2130-021: Roles and Responsibilities, 4.

**74** U.S. Coast Guard (hereinafter USCG), "Civil Rights Directorate," accessed September 20, 2023, <https://www.uscg.mil/Resources/Civil-Rights>.

**75** USCG, *Civil Rights Strategic Plan, 2020–2025*, September 2020, [https://www.uscg.mil/Portals/0/Headquarters/civilrights/PDFs/CG%20Civil%20Rights%20Strategic%20Plan\\_PRINT.pdf?ver=OTaRWh1ehEQkhpBwEYBC-A%3d%3d&timestamp=1621512356640](https://www.uscg.mil/Portals/0/Headquarters/civilrights/PDFs/CG%20Civil%20Rights%20Strategic%20Plan_PRINT.pdf?ver=OTaRWh1ehEQkhpBwEYBC-A%3d%3d&timestamp=1621512356640).

**76** Seth Freed Wessler, "The Coast Guard's 'Floating Guantánamos,'" *New York Times*, November 20, 2017, <https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html>.

**77** CISA, "Office of Equity, Diversity, Inclusion and Accessibility (OEDIA)," accessed September 20, 2023, <https://www.cisa.gov/office-equity-diversity-inclusion-and-accessibility-oedia>.

**78** Ken Klippenstein, "DHS Intel Report on Cop City Protesters Cribbed Far-Right Activist Andy Ngo," *Intercept*, June 5, 2023, <https://theintercept.com/2023/06/05/dhs-cop-city-andy-ngo>; and CISA, "Foreign Influence Operations and Disinformation," accessed September 20, 2023, <https://www.cisa.gov/topics/election-security/foreign-influence-operations-and-disinformation>.

**79** FEMA's External Civil Rights Division in its Office of Equal Rights allows the public to file complaints "in connection with FEMA employees, programs or activities, or those conducted by recipients of FEMA financial assistance." The office will then investigate, issue findings, and facilitate dispute resolution. See FEMA, "External Civil Rights Division," DHS, last updated August 15, 2023, <https://www.fema.gov/about/offices/equal-rights/civil-rights>.

**80** TSA, "Civil Rights"; and Government Accountability Office (hereinafter GAO), *TSA Should Assess Potential for Discrimination and Better Inform Passengers of the Complaint Process*, November 2022, 27–28, <https://www.gao.gov/assets/gao-23-1052/01.pdf>. TSA also facilitates claims under the Federal Tort Claims Act for harms such as lost or stolen property and physical injury at a security checkpoint.

**81** CRCL, "Civil Rights Complaint Flowchart."

**82** CBP Office of Professional Responsibility (hereinafter CBP OPR), *Fiscal Year 2018 Annual Report*, 2018, 10, <https://www.cbp.gov/sites/default/files/assets/documents/2020-Jul/Office-of-Professional-Responsibility-FY-2018-ANNUAL-REPORT.pdf>.

**83** For a discussion of the crisis, see Caitlin Dickerson, "The Family-Separation Files," *Atlantic*, December 31, 2022, <https://www.theatlantic.com/politics/archive/2022/12/the-secret-history-of-family-separation-document-collection/672146>.

**84** CBP OPR, *FY 2018 Annual Report*, 10; National Immigration Forum, "Department of Homeland Security Complaint Process," July 5, 2011, <https://immigrationforum.org/article/department-homeland-security-complaint-process>.



- 85** Isacson and Martens, “The DHS Accountability Process.”
- 86** Kino Border Initiative and Jesuit Conference of Canada and the United States, *Intake Without Oversight: Firsthand Experiences with the Customs and Border Patrol Complaints Process*, July 2017, 2, [https://www.kinoborderinitiative.org/wp-content/uploads/2017/11/IntakeWithoutOversight\\_v06.pdf](https://www.kinoborderinitiative.org/wp-content/uploads/2017/11/IntakeWithoutOversight_v06.pdf).
- 87** GAO, “Immigration Detention: Additional Actions Needed to Strengthen DHS Management of Short-Term Holding Facilities,” May 26, 2016, <https://www.gao.gov/products/gao-16-514>.
- 88** CBP, “What We Do,” accessed September 20, 2023, <https://www.cbp.gov/careers/opr/what-we-do>; and CBP OPR, Fiscal Year 2019 Annual Report, 2019, 7, <https://www.cbp.gov/sites/default/files/assets/documents/2021-Mar/OPR-FY2019-Annual-Report.pdf>.
- 89** A. C. Thompson, “Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes,” ProPublica, July 1, 2019, <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes>.
- 90** OIG, *CBP Senior Leaders’ Handling of Social Media Misconduct*, DHS, May 12, 2021, 14, <https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-34-May21.pdf>.
- 91** POGO, *An Oversight Agenda for Customs and Border Protection: America’s Largest, Least Accountable Law Enforcement Agency*, October 12, 2021, 13, <https://docs.pogo.org/report/2021/CBP-Oversight-Report-2021-10-12.pdf>. See also CBP, *Report on Internal Investigations and Employee Accountability: Fiscal Year 2021*, DHS, 2021, 18, [https://www.cbp.gov/sites/default/files/assets/documents/2022-May/fy21-cbp-opr-internal-investigation-accountability\\_1.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2022-May/fy21-cbp-opr-internal-investigation-accountability_1.pdf) (noting that the Office of Field Operations saw the majority of proposed discipline intakes).
- 92** Isacson and Martens, “The DHS Accountability Process.”
- 93** Inspector General Act of 1978, Pub. L. 95-452 § 3 (codified at 5a U.S.C. § 3). This arrangement is typical among executive department inspectors general.
- 94** DHS, Management Directive 0810.1: The Office of Inspector General, June 10, 2004, 5, <https://www.oig.dhs.gov/sites/default/files/0810.1%20The%20Office%20of%20Inspector%20General.pdf>; and CRCL, “File a Civil Rights Complaint,” DHS, last updated March 17, 2023, <https://www.dhs.gov/publication/file-civil-rights-complaint>.
- 95** DHS, Management Directive 0810.1: Office of Inspector General, 5. CRCL is also responsible for reviewing alleged civil rights and civil liberties violations as well as alleged instances of racial or ethnic profiling, which creates jurisdictional overlap between the departments’ investigative duties. Despite the note in CRCL’s officer-authorizing directive that this authority is “complementary,” the jurisdictional overlap creates tensions between the two offices and confusion about who bears primary responsibility. DHS, Management Directive 3500: Operational Roles and Responsibilities.
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**116** The authors of this report acknowledge, as government employees have noted in prior conversations with the Brennan Center, that component oversight personnel enjoy a certain amount of trust by reporting up through component leadership. However, this model prevents DHS headquarters oversight offices from understanding and effectively overseeing component activities. There is precedent for a workable “dual reporting” structure. The DHS inspector general, for example, reports to both the homeland security secretary and Congress. GAO, *DHS Office of Inspector General: Actions Needed to Address Long-Standing Management Weaknesses*, June 2021, 7, <https://www.gao.gov/assets/720/714718.pdf>. And the DHS chief financial officer reports to both the secretary and the undersecretary for management. See DHS, Directive 252-01: Organization of the Department of Homeland Security, March 31, 2009, 3n1, [https://www.dhs.gov/sites/default/files/publications/mgmt/human-resources/mgmt-dir\\_252-01-organization-of-the-dhs\\_rev-00.pdf](https://www.dhs.gov/sites/default/files/publications/mgmt/human-resources/mgmt-dir_252-01-organization-of-the-dhs_rev-00.pdf).

**117** The intent of this recommendation is not to require the release of all communications between attorneys and clients, but to inform the public about legal interpretations concerning the development of new or updated policy, programs, or systems across the department’s various operations, as well as DHS involvement with other government agencies.

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The Brennan Center's Liberty and National Security Program works to advance effective national security policies that respect constitutional values and the rule of law, using research, innovative policy recommendations, litigation, and public advocacy. The program focuses on reining in excessive government secrecy, ensuring that counterterrorism authorities are narrowly targeted to the terrorist threat, and securing adequate oversight and accountability mechanisms.

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