



May 6, 2022

The Honorable Jeanne Shaheen
Chair
Subcommittee on Commerce, Justice,
Science, and Related Agencies
Senate Committee on Appropriations
506 Hart Senate Office Building
Washington, DC 20510

The Honorable Matt Cartwright
Chair
Subcommittee on Commerce, Justice,
Science, and Related Agencies
House Committee on Appropriations
2102 Rayburn House Office Building
Washington, DC 20515

The Honorable Jerry Moran
Ranking Member
Subcommittee on Commerce, Justice,
Science, and Related Agencies
Senate Committee on Appropriations
521 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Robert B. Aderholt
Ranking Member
Subcommittee on Commerce, Justice,
Science, and Related Agencies
House Committee on Appropriations
1036 Longworth House Office Building
Washington, DC 20515

Dear Chairs Shaheen and Cartwright, and Ranking Members Moran and Aderholt:

The Project On Government Oversight (POGO) submits the following requests for language to be included in the fiscal year 2023 Commerce, Justice, Science, and Related Agencies appropriations bill and report.

POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. POGO champions reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

To further strengthen Congress's efforts to promote government accountability and civil rights, we suggest several modest reforms, all of which could be addressed in either bill text or report language accompanying the Commerce, Justice, Science, and Related Agencies appropriations bill:

1. Improve Death in Custody Reporting Act implementation
2. Prohibit using federal funds to purchase face recognition for police-worn body cameras
3. Limit use of face recognition to serious violent felonies
4. Prohibit the unrestricted purchase of location data protected by the Fourth Amendment
5. Prohibit use of face recognition as the sole basis for arrest

All of these suggestions are further described in the attachment to this letter.

Thank you for your consideration of these proposals to strengthen government accountability and civil rights. For more information, please have your staff contact us at david.janovsky@pogo.org and joanna.derman@pogo.org.

Sincerely,



David Janovsky
Analyst
The Constitution Project at POGO



Joanna Derman
Policy Analyst

Enclosure: 1

cc: Senate Committee on Appropriations Chairman Patrick Leahy
House Committee on Appropriations Chair Rosa DeLauro
Senate Committee on Appropriations Ranking Member Richard Shelby
House Committee on Appropriations Ranking Member Kay Granger

POGO Recommendations to Strengthen Government Accountability and Oversight

In order to strengthen government accountability and oversight, the Project On Government oversight (POGO) recommends the following reforms be incorporated into report language accompanying both the Senate and the House Commerce, Justice, Science, and Related Agencies appropriations bill for fiscal year 2023.

Improve Death in Custody Reporting Act Implementation

Appropriations Committee: Commerce, Justice, Science, and Related Agencies

Agency: Department of Justice

Account: General Administration – Salaries and Expenses

Type of Request: Report Language

Background: Congress reauthorized the Death in Custody Reporting Act (DCRA) (Pub. L. 113-242) in 2014, directing the Department of Justice to collect data on deaths that occur in the custody of local, state, and federal law enforcement and corrections agencies. The act also instructed the attorney general to submit a report to Congress within two years of the enactment of the law analyzing that data and proposing ways to reduce deaths in custody, and allows the attorney general to reduce the Edward Byrne Memorial Justice Assistance Grant allocations to noncompliant states.

Nearly eight years later, the department has yet to release that report or impose the penalty. In addition, the collection program the department has implemented through the Bureau of Justice Assistance lacks measures to ensure accurate and transparent data.

Proposed Report Language: The Committee is disappointed in the Department of Justice's continued failure to fully implement DCRA. Within 90 days of the passage of this legislation, the Attorney General shall submit a report to appropriators outlining the Department's plans to implement DCRA. The report shall address the quality of the data the Department has collected to date and consider ways to improve the quality and transparency of future data collected, including implementing DOJ's 2016 proposed collection plan. It shall also include a timeline for the public release of the report required by DCRA.

Prohibit Using Federal Funds to Incorporate Face Recognition into Police-Worn Body Cameras

Appropriations Committee: Commerce, Justice, Science, and Related Agencies

Agency: Department of Justice
Account: Salaries and Expenses
Type of Request: Bill Text

Background: In recent years, dozens of cities across the U.S. have used federal funding to build their police-worn body camera programs but largely failed to place restrictions on incorporating face recognition into these devices. Installing face recognition into body cameras would be of minimal public safety value, while needlessly creating situations that undermine community trust in law enforcement.

Studies have repeatedly shown face recognition is more likely to misidentify women and people of color. There are already three documented cases where face recognition errors led to misidentification and wrongful arrests of Black men. And pilot programs of real-time face recognition (the form that would be built into body cameras) have produced error rates over 90%. Despite this, some vendors are recklessly moving ahead to build face recognition into body cameras.

Given how significant a role federal funds play in the development and maintenance of body camera programs, Congress has an obligation to make sure the equipment does not endanger civil rights or civil liberties.

Proposed Bill Text: None of the funds made available by this Act may be used for the purchase of a police-worn body camera that is equipped with or subjected to any facial recognition technology or other biometric surveillance.

Limit Use of Face Recognition to Investigating Serious Violent Felonies

Appropriations Committee: Commerce, Justice, Science, and Related Agencies
Agency: Department of Justice
Account: Salaries and Expenses
Type of Request: Bill Text

Background: The value of limiting the use of powerful surveillance tools to top-tier investigations is well established: It has been demonstrated for over 50 years in contexts such as wiretapping. We need to apply reasonable standards to face recognition as well.

Face recognition can be used to help identify suspects in serious violent crimes, such as homicides and assaults. But it should not be used to stockpile information about suspects for investigation of minor offenses, fines, or bench warrants. Doing so creates risks of pervasive surveillance and overpolicing that is disproportionately borne by people of color.

Failure to limit when face recognition can be used also creates danger of it being exploited for social control and targeted persecution, something that already occurs in autocratic regimes.

There are already numerous documented cases where the ability to use face recognition absent limits has resulted in the tech being misused to target protesters, including in Baltimore and Broward County, Florida. This should not be the norm in the United States.

Limiting the use of face recognition will prevent this type of selective targeting and misuse, while still allowing law enforcement to use the tech for public safety priorities.

Proposed Bill Text: (1) **SERIOUS CRIME LIMIT**—None of the funds made available by this Act may be used by an officer, employee, or contractor of the United States to use facial recognition, or request search results or other data from facial recognition, except for the purpose of preventing, investigating, disrupting, or prosecuting a serious violent felony as defined in 18 USC 3559(c)(2)(F).

(2) **EXCEPTIONS**—The prohibition described in Section 1 shall not apply if face recognition is used solely for the purpose of

- (A) assisting in identifying any person who is deceased, incapacitated or otherwise physically unable of identifying himself, or the victim of a crime;
- (B) conducting testing to evaluate the accuracy of facial recognition systems; or
- (C) logging into government systems or otherwise verifying identity as a component of government work or employment.

Prohibit Unrestricted Purchase of Location Data Protected by Fourth Amendment

Appropriations Committee: Commerce, Justice, Science, and Related Agencies

Agency: Department of Justice

Account: N/A

Type of Request: Bill Text

Background: Location data can be highly sensitive, revealing our most intimate activities and interactions, such as personal relationships, political and religious views, and medical histories. Protecting this information from undue interference can be especially important for people of color, government dissidents, and other marginalized communities.

Normally, if law enforcement officers want to access cell phone location data, they need a warrant. But a glaring loophole in current law allows law enforcement to circumvent this process by paying third party data brokers to access private, sensitive cell phone location data.

Government agencies, including the FBI, DHS, ICE, IRS, and DEA, purchase the personal cell phone location data of American citizens from brokers without any court oversight or probable cause requirements. When Congress funds federal law enforcement agencies, it shouldn't allow that money to be used to skirt Fourth Amendment requirements. It's critical that funding include a rule preventing purchase of data that would otherwise require a warrant and suspicion of wrongdoing to obtain.

Notably, such a rule would in no way prohibit law enforcement from accessing and using location data to track down a suspect in a criminal investigation or otherwise protect public safety. It would simply hold law enforcement to the same legal standard, regardless of the means they are using to access our information.

Proposed Bill Text: None of the funds made available by this Act may be used to purchase records or information if the compelled production of such information or records would require a warrant for law enforcement purposes.

Prohibit Face Recognition from Being Sole Basis for Arrests

Appropriations Committee: Commerce, Justice, Science, and Related Agencies

Agency: Department of Justice

Account: Salaries and Expenses

Type of Request: Bill Text

Background: Face recognition is an invasive surveillance tool that law enforcement agencies, including the FBI, use frequently. It is critical to prevent excess reliance on face recognition technology, which can be prone to error. Numerous studies have demonstrated that many face recognition algorithms are more likely to misidentify women and people of color. And there are already numerous documented instances when a face recognition misidentification led to a wrongful arrest.

A range of factors can impact even the most effective algorithms: Features that reduce image quality, such as bad lighting, indirect angles, distance, poor cameras, and low image resolution, all make misidentifications more likely. Lax system settings, such as employing lower requirements to trigger matches, increase the potential for misidentifications as well. Even as face recognition software improves in quality — and even if algorithmic bias dissipates — there will always be situation-based limits to how effective the technology is. And there will always be a danger in giving too much credence to matches that could misidentify innocent individuals.

Law enforcement officials who are well-versed in the use of face recognition acknowledge that limits on how much law enforcement officers rely on matches are necessary. For example,

current FBI policy already establishes that a face recognition match cannot be the sole basis for an arrest. This amendment would codify that policy to ensure it is continued at the FBI and applied to other law enforcement agencies that use face recognition.

Proposed Bill Text: None of the departments or agencies funded in this Act may use any of their funds to carry out a policy that allows for law enforcement agencies to use a face recognition match as the sole basis upon which probable cause is established for a search, arrest, or other law enforcement action.