May 6, 2022

The Honorable Chris Murphy
Chair
Subcommittee on Homeland Security
Senate Committee on Appropriations
136 Hart Senate Office Building
Washington, DC 20510

The Honorable Shelley Moore Capito
Ranking Member
Subcommittee on Homeland Security
Senate Committee on Appropriations
172 Russell Senate Office Building
Washington, DC 20510

The Honorable Lucille Roybal-Allard
Chair
Subcommittee on Homeland Security
House Committee on Appropriations
1016 Longworth House Office Building
Washington, DC 20515

The Honorable Chuck Fleischmann
Ranking Member
Subcommittee on Homeland Security
House Committee on Appropriations
2410 Rayburn House Office Building
Washington, DC 20515

Dear Chair Murphy, Ranking Member Capito, Chair Roybal-Allard, and Ranking Member Fleischmann:

The Project On Government Oversight (POGO) submits the following requests for language to be included in the fiscal year 2023 Homeland Security 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 either in bill text or report language that accompanies the Homeland Security appropriations bill:

1. Prohibit using federal funds to purchase face recognition for police-worn body cameras
2. Limit the use of face recognition to serious violent felonies
3. Prohibit the unrestricted purchase of location data protected by the Fourth Amendment
4. Prohibit the use of face recognition as the sole basis for arrest
5. Require Department of Homeland Security use-of-force reporting
6. Strengthen Civil Rights and Civil Liberties authority
7. Require the Department of Homeland Security’s Ethics & Compliance Law Division to report on how the department could require ethics opinions regarding post-employment restrictions for DHS officials and former officials
8. Require the Office of the Commissioner to submit a report on U.S. Customs and Border Protection’s implementation of Integrity Advisory Panel recommendations

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

Thank you for your consideration of these modest reforms to strengthen congressional oversight. 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: Chairman of the Senate Committee on Appropriations Patrick Leahy
Ranking Member of the Senate Committee on Appropriations Richard Shelby
Chair of the House Committee on Appropriations Rosa DeLauro
Ranking Member of the House Committee on Appropriations 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 Homeland Security appropriations bills for fiscal year 2023.

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

** Appropriations Committee:** Homeland Security  
**Agency:** Department of Homeland Security  
**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: Homeland Security
Agency: Department of Homeland Security
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: Homeland Security
Agency: Department of Homeland Security
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 the Use of Face Recognition from Being Sole Basis for Arrests

**Appropriations Committee:** Homeland Security  
**Agency:** Department of Homeland Security  
**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.

Require Department of Homeland Security Use-of-Force Reporting

**Appropriations Committee:** Homeland Security  
**Agency:** Department of Homeland Security  
**Account:** Customs and Border Protection  
**Type of request:** Report Language
**Background:** Department of Homeland Security components, including the U.S. Border Patrol, have frequently engaged in acts of excessive force that are not fully investigated or disclosed to the public, harming migrants, border communities, and the agency’s mission. The House Appropriations Committee adopted report language requiring increased transparency regarding DHS use of force in fiscal year 2022, which should be carried forward and adopted by the Senate as well.

**Proposed Report Language:** “Use of Force.—DHS shall prioritize use-of-force policies and practices that direct officers and agents to place paramount value on the preservation of human life, deploy de-escalation and non-lethal responses, and train agents to use lethal force as a last resort in responding to an imminent, life-threatening situation after all reasonable alternatives have been exhausted.

Not later than 24 hours after any use-of-force incident resulting in serious injury or death, DHS shall make public a summary of the known facts of the incident, with appropriate due process protections for the involved parties. Beginning not later than 90 days after the date of enactment of this Act and quarterly thereafter, the Department shall collect and publish data on all use-of-force incidents, including vehicle pursuits. The summaries shall include the location; type(s) of force used; justification for each use of force; number of law enforcement personnel involved; number of individuals injured, delineated by age, gender, nationality, race, and ethnicity; and type, source, and location of any medical care provided. The reports should be updated, as necessary, to include the results of agency incident reviews and any disciplinary or other agency actions or outcomes.

Not later than 120 days after the date of enactment of this Act, the Department shall brief the Committee on a plan for establishing an independent commission of experts to serve as a permanent civilian oversight body for DHS law enforcement components. The Commission shall review component use-of-force and misconduct reviews and make public recommendations for changes in policy, practice, or oversight. Commission members should have authority to observe Discipline Review Board and Use of Force Review Board proceedings. Membership of the Commission should include a balanced variety of stakeholder perspectives, including members representing law enforcement organizations, border communities, legal experts, and immigrant advocacy organizations.

The Committee directs GAO to issue a report on the Department’s use-of-force policies, incident tracking mechanisms, and training for DHS law enforcement components, including an assessment of whether use-of-force policies, standards, and practices—including vehicle pursuit policies, apprehension tactics, and training on de-escalation and non-lethal responses—reflect law enforcement best practices and adhere to standards developed by expert organization such as
the Police Executive Research Forum and the International Association of Chiefs of Police. The report should also assess whether policies and oversight mechanisms reflect recommendations from the Homeland Security Advisory Council’s Integrity Advisory Panel, including recommendations to reward professionalism, prevent abuse and corruption, and create a culture of accountability.”

Strengthen the Department of Homeland Security’s Office for Civil Rights and Civil Liberties Authority

Appropriations Committee: Homeland Security
Agency: Department of Homeland Security
Account: Office for Civil Rights and Civil Liberties
Type of request: Bill Text

Background: The Department of Homeland Security’s Office for Civil Rights and Civil Liberties (CRCL) is charged with integrating civil rights and civil liberties into all DHS programs and activities by conducting civil rights and civil liberties impact assessments, conducting periodic reviews of DHS policies, and providing recommendations and other technical assistance to the Secretary and component heads. CRCL should be given stronger authority to carry out its investigations in an independent manner, and it should consult with its own legal counsel. It should also be informed by civil rights and civil liberties expertise, and independent from legal advice provided to DHS or its components.

Proposed Bill Text: Funding shall be made available for the creation of an Office of Legal Counsel within CRCL. The Office of Legal Counsel shall have the authority to (1) access all Departmental records and documents necessary to carry out CRCL reviews, assessments, and investigations; and (2) issue subpoenas as necessary to require the production of information, documents, reports, and other data or documentary evidence necessary to carry out its responsibilities.

Funding shall be made available for DHS component agencies to designate a career appointee as the Officer for CRCL of that component. The Officer of each DHS component shall have full access to the component’s oversight investigations and must make publicly available investigation findings and recommendations, with redactions only as required by the Freedom of Information Act, and in the case of a complaint made concerning allegations of abuses of civil rights and civil liberties, inform the complainant of action taken.
Department of Homeland Security Ethics Database

**Appropriations Committee:** Homeland Security  
**Agency:** Department of Homeland Security  
**Account:** Departmental Management and Operations – Office of the Secretary and Executive Management – Operations and Support – Management and Oversight  
**Type of Request:** Report Language

**Background:** Legislators have recently expressed concern about the “revolving door” of Department of Homeland Security employees moving into the private contracting sector. These types of moves raise at least the appearance of conflicts of interest, if not actual conflicts. DHS needs to upgrade its ethics transparency and protocols. The Department of Defense (DOD) provides a useful model. At DOD, post-employment activities require a written ethics opinion on the applicability or inapplicability of post-employment restrictions to activities that an official or former official may undertake, a requirement introduced in the 2008 National Defense Authorization Act. DOD must keep all such opinions and reports accessible in a central database for at least five years. DHS should establish a similar system.

**Proposed Report Language:** Ethics Opinion Database. The Committee is concerned about the harm caused by agency officials passing through a revolving door from government service to the very industries they regulate and oversee, and back, as well as officials going from industry into government service. Therefore, the Committee requests DHS’s Ethics Law Division to produce a report within 180 days of this bill’s enactment about how the Department could require written ethics opinions on the applicability or inapplicability of post-employment restrictions to activities that a senior DHS official or former official may undertake. The report should include a plan to retain such ethics opinions for at least five years and to promptly make them public in a manner consistent with the Freedom of Information Act.

Customs and Border Protection Integrity Advisory Panel Recommendations

**Appropriations Committee:** Homeland Security  
**Agency:** Department of Homeland Security  
**Account:** Customs and Border Protection – Executive Leadership and Oversight – Office of the Commissioner  
**Type of Request:** Report Language

**Background:** In March 2016 the Customs and Border Protection’s Integrity Advisory Panel (IAP), composed of law enforcement experts and headed by former U.S. Drug Enforcement Administrator Karen Tandy and then-New York Police Department Commissioner William
Bratton, presented the “Final Report of the CBP Integrity Advisory Panel” with 39 recommendations for “assuring integrity” at the agency. Along with interim recommendations from 2015, it was adopted unanimously. In these detailed reports, the IAP identified that the rapid growth of CBP without a focus on accountability and discipline mechanisms has led to serious criminal and integrity problems within the agency. The panel stressed that CBP is “vulnerable to a corruption scandal that could potentially threaten the security of our nation” and that “the “CBP discipline system is broken.” CBP has never provided a public accounting of which recommendations were adopted or how.

Congress and the public deserve a full accounting of which IAP recommendations have and have not been adopted and why.

**Proposed Report Language:** The Committee is concerned that CBP has yet to release information on which IAP recommendations have not been adopted and why. Therefore, within 180 days of this bill’s enactment, the Office of the Commissioner shall submit to the House and Senate Appropriations and Homeland Security/Homeland Security and Governmental Affairs Committees a detailed analysis of CBP’s implementation of the 2015 and 2016 reports of the Homeland Security Advisory Council’s CBP Integrity Advisory Panel. Each IAP recommendation shall be assessed based on (a) whether it was implemented, (b) if so, how implementation may have deviated from the IAP’s language or intent, and (c) for recommendations that have not been implemented, a timetable for doing so or an explanation of why implementation is not foreseen.