



5 Immediate Steps To Rein in DHS in the Wake of Portland

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Introduction and summary

In recent months, Americans have looked on in disbelief as unidentified and camouflaged U.S. Department of Homeland Security (DHS) personnel roamed the streets of Portland, Oregon, using unmarked vans to arrest U.S. citizens who exercised their First Amendment right to protest.¹ Calls to restructure, dismantle, or defund DHS have come from across the political spectrum in the aftermath of these harmful and alarming actions. Tom Ridge, who served as the first secretary of homeland security during the George W. Bush administration, warned that DHS was not created to serve as “the president’s personal militia.” From the perspective of a former governor, Ridge also said that “it would be a cold day in hell before I would consent to a unilateral, uninvited intervention into one of my cities.”² Former Sen. Barbara Boxer (D-CA) wrote in an op-ed that her vote to create the department was a mistake. As Boxer explained, the authorizing legislation contained no protections to ensure that the expansive powers entrusted to DHS could not be used to create a federal police force that terrorizes American citizens in American cities or to carry out gratuitously cruel policies such as taking children from their parents at the border.³ Ridge’s successor at DHS, Michael Chertoff, similarly cautioned that using DHS personnel to conduct general “police operations” over the objection of state and local officials—particularly as a “political maneuver” against cities run by an opposing political party—raises serious legal and moral concerns.⁴

There is no particular reason to believe that Congress got it exactly right 18 years ago when it voted to create DHS. In fact, there is significant evidence that they rushed to cobble together the behemoth department from 22 distinct federal agencies serving disparate functions in the wake of 9/11.⁵ The department was indeed forged at a time of significant national fear—the same fear that contributed to the U.S. invasion of Iraq, a decision that had devastating consequences for U.S. national security and human rights.⁶ While the Bush administration’s proposal to create DHS promised that the agency would “Improve Efficiency Without Growing Government,”⁷ the opposite has occurred. Still, it was not until the events in Portland in July that the idea of seriously reexamining DHS’ future picked up steam from across the political spectrum.⁸

A top-to-bottom review of DHS is badly needed and long overdue but is beyond the scope of this report. Over the years, a small number of nongovernmental organizations have taken up the challenge, some adopting a more reform-oriented position and others calling for outright abolition of the department.⁹ As the U.S. House of Representatives was preparing to take up the department's fiscal year 2021 funding bill, before it was pulled from consideration, Rep. Norma Torres (D-CA) filed with the House Rules Committee an amendment that would allocate \$2,000,000 to commission a study by the National Academy of Public Administration of options for dissolving the department and transferring its functions to other federal departments or to one or more new independent agencies.¹⁰ Conducting such an analysis is, of course, only the first step; building the political will to move a massive reorganization bill through Congress would be its own substantial challenge. But even as the work to achieve meaningful transformation continues, the recent events in Portland that captured national attention highlight the urgent need for immediate reforms. Here, the Center for American Progress identifies five immediate steps that the next administration and Congress should take to begin to rein in the department and prevent its personnel from being inappropriately used in the future to serve as a general federal police force.

Warning signs and a rampant culture of impunity

Over the years, there have been many warning signs about dysfunction and a culture of abuse at DHS. There is a history of malicious behavior, including a lack of accountability for repeated abuses by U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) personnel;¹¹ killings along and across the U.S.-Mexico border, resulting from the unjustified use of force, that have been allowed to go unpunished;¹² families separated at the border and children dying in custody;¹³ talk about “tak[ing] the shackles off” ICE and Border Patrol personnel through new Trump administration policies;¹⁴ and fear across the nation of both real and threatened raids that have torn families and communities apart.¹⁵

But over the agency’s nearly 18-year lifespan, even as its abuses have grown, federal funding for DHS has increased year after year. Since at least 2006, the United States has spent more on immigration enforcement than on all other federal criminal law enforcement agencies combined, and the gap has widened significantly during the Trump administration.¹⁶ The budgets of ICE and CBP have nearly tripled since DHS’ founding, with the number of ICE Enforcement and Removal Operations officers tripling and the Border Patrol nearly doubling in size.

Even where Congress has attempted to enforce its policy preferences on the department as part of the appropriations process, DHS has found ways to transfer or reprogram funds to get around these restrictions or has knowingly manipulated the appropriations process to pressure Congress to supplement the agency’s budget and effectively increase the agency’s baseline for the following year.¹⁷ Between fiscal years 2016 and 2018, ICE managed to increase its funding for detention and removal by nearly 28 percent—from \$3.2 billion to \$4.1 billion—largely by increasing detention capacity beyond appropriated limits, and then using the threat of releasing tens of thousands of detained people onto the streets to secure additional funding in final spending packages.¹⁸ Although the fiscal year 2018 law established detention funding levels designed to “require ICE to reduce the number of detention beds,” ICE instead increased the average daily population by nearly 20 percent; the agency even increased its detention population by several

thousand beds in the middle of a partial government shutdown, stretching from December 2018 into January 2019, that covered DHS.¹⁹ Throughout the Trump administration, funds have been diverted from other important functions to support the administration's anti-immigrant agenda. Funds appropriated to the U.S. Department of Defense and to military construction projects have been reprogrammed pursuant to various authorities, including an emergency declaration, to erect additional sections of border wall that Congress has expressly refused to fund.²⁰ Additionally, in 2019, hundreds of millions of dollars appropriated by Congress to the Federal Emergency Management Agency (FEMA) and the U.S. Coast Guard were transferred—right at the beginning of hurricane season—to expand ICE's detention capacity and build temporary shelters to expedite the deportation of asylum-seekers.²¹

While DHS' immigration enforcement agencies have grown and received constant attention and scrutiny, other important functions of the agency that are truly critical to a homeland security mission have been woefully neglected.²² Although the department was created with a focus on countering foreign terrorist threats to the country, it has been slow to pivot as domestic terrorism—increasingly by white supremacists—has become a more significant and lethal threat to Americans' lives.²³ DHS is charged with helping to combat cybersecurity threats aimed at undermining U.S. democracy and compromising the country's critical infrastructure, yet the department's failures to guard even its own systems against cyberattacks have persisted for at least a decade.²⁴ It is no surprise that DHS was unable to protect critical election infrastructure from foreign tampering during the most recent presidential election and will likely fail to prevent it in 2020 as well.²⁵ While FEMA's budget has increased significantly over the years, the agency's poor response to natural disasters ranging from Hurricane Katrina²⁶ to Hurricane Maria²⁷—combined with its inability to effectively prepare the country for a pandemic that it largely foresaw²⁸—is cause for significant concern, as climate change promises costlier and more extreme weather events and greater threat from pandemics.²⁹

All of this should come as little surprise. Multiple mission-critical objectives were thrown into a single department with little thought to how they would coexist, yet much of the national conversation around DHS focuses exclusively on just one part of the department's mission: the immigration enforcement work of ICE and CBP. The outsize attention that immigration issues receive undermines core homeland security concerns, including by interfering with the ability of senior leadership to give proper attention to these other priorities. Further complicating necessary oversight regarding the department's multitude of responsibilities is the

fact that because more than 100 committees and subcommittees have jurisdiction over matters entrusted to DHS,³⁰ the department can get inconsistent, mixed messages about congressional priorities. In 2013, former DHS Secretary Chertoff explained that when this happens, “[E]ither the department has no guidance or, more likely, the department ignores both because they’re in conflict. And so the department does what it wants to do.”³¹ Moreover, congressional oversight tends to focus on the issues getting the most public attention, which again results in disproportionate interest in immigration issues and disregard for higher-order matters. Immigration policy, too, has been distorted by the fact that since 9/11 and the creation of DHS, the issue has been framed first and foremost as a homeland security issue rather than as a multifaceted issue of central concern to American families and the American economy.

DHS abuses on the streets of Portland

As the nation reeled in outrage following the murders of Black people at the hands of the police—which have only continued in recent weeks—protests and uprisings over police brutality erupted in cities across the country. On the morning of July 4, federal officers and police clashed with protesters who had begun demonstrating in Portland, Oregon, in the aftermath of the unjustified police killing of George Floyd in late May. Quickly, videos surfaced of unidentified federal officers using excessive force and unmarked vehicles to arrest protesters, seemingly without cause.³² The mayor of Portland called the deployment of federal troops an abuse of power,³³ and the Oregon attorney general filed a lawsuit against the federal government for violating the civil rights of protesters, accusing its agencies of unlawful law enforcement practices.³⁴ Following massive public outcry, Ken Cuccinelli, the senior official performing the duties of the DHS deputy secretary,³⁵ admitted that DHS was using unmarked vehicles to detain protesters in Portland far away from federal buildings, adding that the department would send more law enforcement personnel to Portland.³⁶ Recently, the American Civil Liberties Union of Oregon filed a lawsuit charging federal officials, including DHS, with using excessive force and making unlawful arrests against lawful protestors, including several U.S. citizens who are veterans and others who identify as supporters of Black Lives Matter.³⁷

When the administration decided to send a massive public show of force into Portland, it drew upon features embedded in the structure of DHS as well as the broad authorities given to department personnel. For instance, to justify the deployment of ICE and CBP officers and agents to perform a domestic law enforcement function that is outside their areas of responsibility, expertise, and training, DHS cross-designated large numbers of DHS personnel as Federal Protective Service (FPS) officers.³⁸ The department's Office of Intelligence and Analysis—which, months earlier, successfully lobbied DHS leadership to cut the department's Office for Civil Rights and Civil Liberties (CRCL) out of the approving and reviewing chain for intelligence work³⁹—also provided questionable intelligence support to Portland law enforcement officials and collected intelligence reports on journalists engaged in First Amendment-protected activity covering the federal government's response to the protests.⁴⁰

5 initial steps to reduce DHS abuses

Since the Homeland Security Act of 2002 was enacted 18 years ago, DHS has not once been reauthorized. By contrast, Congress has passed an annual National Defense Authorization Act for nearly 60 consecutive years.⁴¹ What that means is that DHS has not—even in the most basic sense—undergone comprehensive congressional oversight and evaluation, with committees of jurisdiction regularly reviewing the department’s actions in service of its many missions and making necessary legislative changes to the department’s mandate and authorities. The next administration and Congress will both need to take a hard look at the structure of DHS from top to bottom and give serious thought to whether some of the department’s functions would be better accomplished within different government agencies or in new Cabinet-level departments. But in the meantime, there are five steps that policymakers should take to reduce abuses and prevent department personnel from once again being deployed to serve as a general federal police force as they were in Portland.

Significantly restrict DHS’ ability to designate CBP and ICE personnel as FPS

Congress should constrain the DHS secretary’s authority to cross-designate CBP and ICE personnel to act as FPS officers, and a future administration should use such designations judiciously. CBP and ICE personnel already have significant authority to make warrantless arrests for violations of federal law when they are performing duties related to the enforcement of the country’s immigration laws.⁴² But DHS’ decision to cross-designate large numbers of CBP and ICE agents and officers as FPS officers, with the thin veneer of justification in the guise of protecting federal property in Portland, allowed the department to send forces into the city with similarly expansive authority to make warrantless arrests.⁴³ DHS personnel used that authority not only around federal buildings but also on the streets of Portland.⁴⁴ This cross-delegation also gave largely untrained CBP and ICE personnel the responsibility of maintaining order during a protest involving First Amendment-protected activity.⁴⁵

Restrict the Border Patrol to the actual border

CBP's ability to operate far beyond the country's land and maritime borders should be limited by statute and regulation. Under current law, CBP generally can take actions to prevent illegal border crossings only "within a reasonable distance from any external boundary of the United States."⁴⁶ Federal regulations generally define this "reasonable distance" to be a maximum of 100 air miles away from any border, land or sea, but allow agency personnel to determine where a shorter distance might be reasonable.⁴⁷ Rather than delegate this decision, the regulatory process could be used to develop a sound basis for limiting the geographic range of CBP actions to a more "reasonable distance" from the border. As it stands, nearly 2 out of every 3 people in the country reside within 100 air miles of any land or maritime border, including large areas that no reasonable person would consider a border.⁴⁸ Importantly, even this geographic limitation evaporates when a CBP officer or agent is designated to work for the FPS. CBP's broad reach and expansive powers pose a substantial threat to civil liberties that has been exacerbated by a pervasive lack of accountability throughout the agency.⁴⁹

Require state and local cooperation for domestic law enforcement operations involving ICE and CBP unrelated to their primary responsibilities

CBP and ICE personnel should not be sent on any domestic operation unrelated to their primary duties unless a request for assistance has been made by relevant state and local officials, and the contours of DHS' role have been memorialized in a written memorandum of agreement. The importance of cooperation was highlighted by the fact that when federal personnel descended upon Portland over the objection of local officials, it only made the situation—which was coming under control—more volatile.⁵⁰ Had the federal response been limited to uniformed and identifiable FPS personnel focused on protecting federal properties, the situation likely would not have gotten out of control. But the large numbers of unidentified federal officers in camouflage who engaged forcefully with protestors and journalists and arrested people in the streets in unmarked vans added a layer of complexity that undermined the authority of local officials and jeopardized their general police powers.

Enhance the authority, transparency, and independence of oversight bodies

Oversight entities working to improve the department and its components should be given greater independence and authority. CRCL, for instance, should be empowered to conduct robust investigations and be increasingly transparent with complainants and other stakeholders, including Congress.⁵¹ DHS should also restore CRCL's rightful place in approving and reviewing activities by the department's Office of Intelligence and Analysis. Legislation to authorize CRCL has strong bipartisan support in both the House and Senate and would strengthen the civil rights and civil liberties watchdog within the department, but the legislation should be reviewed and updated in the next Congress.⁵² The Homeland Security Advisory Council (HSAC), which provides advice and recommendations to the department on a range of topics, also should be revamped to include greater public engagement. HSAC's 2016 final report and recommendations to enhance integrity at CBP and improve disciplinary processes would be a useful starting point for the next administration,⁵³ and a similar study with a newly constituted HSAC should promptly be initiated with respect to ICE. A major challenge that the next administration will face when implementing reforms to the immigration enforcement practices of ICE and CBP is that the cultures of both agencies have been transformed during the current administration; top-to-bottom reviews by HSAC could play an important role in identifying changes to enhance integrity and accountability in the years ahead.

Reduce ICE's and CBP's budgets

As Congress reviews whether DHS as it is currently constituted can effectively meet the responsibilities it has been given, it should at the first opportunity reverse years of out-of-control spending on the department's immigration enforcement components. The current decrease in the number of people detained in immigration facilities—even as more people must still be released without further delay to avoid additional preventable deaths⁵⁴—provides a particular opportunity for Congress and a future administration to significantly scale back a detention system that has grown exponentially over the years. By reducing ICE's and CBP's funding to more reasonable levels, the country could direct those resources to important domestic priorities such as education, infrastructure, and the nation's response to the COVID-19 pandemic.

Conclusion

These five policy changes won't immediately fix the issues that have plagued DHS for nearly 18 years, and far more work must be done to understand what the structure, oversight, authorities, and mission of a reformed DHS, or the various components of a dismantled DHS, would look like. But seeing anonymous federal troops kidnapping American citizens on the streets of an American city and using immigration enforcement personnel to attack American citizens exercising their right to protest—on top of years of abuses by ICE and CBP—illustrates just how immediate the need is to take interim actions to rein in DHS. These policy recommendations are just that—a start and a way to prevent future abuses of authority such as those that took place in Portland. The next administration and Congress would be wise to work to implement these changes as soon as possible even as it begins a thorough review of the department itself.

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- 34 *Ellen Rosenblum v. John Does 1-10 et al, the United States Department of Homeland Security; United States Customs and Border Protection; the United States Marshals Service and the Federal Protective Service*, 3:20-cv-01161-HZ, U.S. District Court for the District of Oregon (July 17, 2020), available at http://opb-imgserve-production.s3-website-us-west-2.amazonaws.com/original/ag_rosenblum_xxxx_updated_complaint_1595086491349.pdf.

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