

DHS has a program gathering domestic intelligence in partnership with Silicon Valley oligarchs — and virtually no one knows about it

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exclusive DHS has a program gathering domestic intelligence in partnership with Silicon Valley oligarchs — and virtually no one knows about it

Collecting information from Americans raises ongoing civil liberties concerns. The Homeland Security Department headquarters are seen.

A virtually unknown DHS program allowed officials to go directly to incarcerated people — circumventing their lawyers — for interviews, raising important civil liberties concerns, according to legal experts. | Susan Walsh/AP Photo

By Betsy Woodruff Swan



For years, the Department of Homeland Security has run a virtually unknown program gathering domestic intelligence, one of many revelations in a wide-ranging tranche of internal documents reviewed by POLITICO.

Those documents also reveal that a significant number of employees in DHS's intelligence office have raised concerns that the work they are doing could be illegal.

Under the domestic-intelligence program, officials are allowed to seek interviews with just about anyone in the United States. That includes people held in immigrant detention centers, local jails, and federal prison. DHS's intelligence professionals have to say they're conducting intelligence interviews, and they have to tell the people they seek to interview that their participation is voluntary. But the fact that they're allowed to go directly to incarcerated people — circumventing their lawyers — raises important civil liberties concerns, according to legal experts.

That specific element of the program, which has been in place for years, was paused last year because of internal concerns. DHS's Office of Intelligence and Analysis, which runs the program, uses it to gather information about threats to the U.S., including transnational drug trafficking and organized crime. But the fact that this low-profile office is collecting intelligence by questioning people in the U.S. is virtually unknown.

The inner workings of the program — called the "Overt Human Intelligence Collection Program" — are described in the large tranche of internal documents POLITICO reviewed from the Office of Intelligence and Analysis. Those documents and additional interviews revealed widespread internal concerns about legally questionable tactics and political pressure. The documents also show that people working there fear punishment if they speak out about mismanagement and abuses.

One unnamed employee — quoted in an April 2021 document — said leadership of I&A's Office of Regional Intelligence "is 'shady' and 'runs like a corrupt government.'" Another document said some employees worried so much about the legality of their activities that they wanted their employer to cover legal liability insurance.

Carrie Bachner, formerly the career senior legislative adviser to the DHS under secretary for intelligence, said the fact that the agency is directly questioning Americans as part of a domestic-intelligence program is deeply concerning, given the history of scandals related to past domestic-intelligence programs by the FBI.

Bachner, who served as a DHS liaison with Capitol Hill from 2006 to 2010, said she told members of Congress "adamantly" — over and over and over again — that I&A didn't collect intelligence in the U.S.

"I don't know any counsel in their right mind that would sign off on that, and any member of Congress that would say, 'That's OK,'" said Bachner, who currently runs a consulting firm. "If these people are out there interviewing folks that still have constitutional privileges, without their lawyer present, that's immoral."

DHS Under Secretary for Intelligence and Analysis Kenneth Wainstein, a former federal prosecutor who took the helm of I&A last June, said in a statement that his office is addressing its employees' concerns. An I&A spokesperson provided POLITICO with a list of steps the office has taken since September 2020 to address internal complaints, including conducting a number of new trainings and hiring two full-time ombudsmen.

In its statement, I&A did not address the domestic-intelligence program. But POLITICO reviewed an email, sent last August, saying that the portion of the program involving interviews with prisoners who had received their Miranda rights was "temporarily halted" because of internal concerns.

"The true measure of a government organization is its ability to persevere through challenging times, openly acknowledge and learn from those challenges, and move forward in service of the American people," Wainstein said in his statement. "The Office of Intelligence and Analysis has done just that over the past few years ... Together, we will ensure that our work is completely free from politicization, that our workforce feels free to raise all views and concerns, and that we continue to deliver the quality, objective intelligence that is so vital to our homeland security partners."
'A loophole that we exploit'

A key theme that emerges from internal documents is that in recent years, many people working at I&A have said they fear they are breaking the law.

POLITICO reviewed a slide deck titled "I&A Management Analysis & Assistance Program Survey Findings for FOD." FOD refers to I&A's Field Operations Division — now called the Office of Regional Intelligence — which is the largest part of the office, with personnel working around the country. Those officials work with state, local and private sector partners; collect intelligence; and analyze intelligence. When the U.S. faces a domestic crisis related to national security or public safety, people in this section are expected to be the first in I&A to know about it and then to relay what they learn to the office's leadership. Their focuses include domestic terror attacks, cyber attacks, border security issues, and natural disasters, along with a host of other threats and challenges.

The survey described in the slide deck was conducted in April 2021. A person familiar with the survey said it asked respondents about events of 2020. Its findings were based on 126 responses. Half of the respondents said they'd alerted managers of their concerns that their work involved activity that was inappropriate or illegal. The slide deck seems to try to put a positive spin on this.

"There is an opportunity to work with employees to address concerns they have about the appropriateness or lawfulness of a work activity," it reads.

"Half of the respondents have voiced to management a concern about this, many of whom feel their concern was not appropriately addressed."

Other documents laid out concerns related to a specific internal dispute about how the law applies to I&A's interactions with American citizens.

Three legal texts govern I&A's activities: Title 50 of the U.S. Code, which lays out laws about national security; Executive Order 12333, which details how the Intelligence Community works; and the Homeland Security Act of 2002, which set up the Department of Homeland Security. The U.S. intelligence agencies governed by Title 50 face strict rules related to intelligence activity in the U.S. or targeting U.S. citizens. Internally, many I&A personnel have raised concerns that they get asked to take steps that are inappropriate for a Title 50 agency.

On Nov. 12, 2020, barely a week after Election Day, Robin Taylor, then the director of I&A's Field Operations Division, emailed to multiple officials a summary of 12 listening sessions that an internal employee watchdog had held with division employees.

Taylor's email included a few lines referencing employees' concerns about the scope and appropriateness of their work.

"Many taskings seem to be law enforcement matters and not for an intelligence organization," read one portion, referring to assignments. "How is any of this related to our Title 50 authorities? Even if we are technically allowed to do this, should we? What was the intent of Congress when they created us?" Departmental Support "seems like a loophole that we exploit to conduct questionable activities."

Later in that document came a line that was even more bleak: "Showing where we provide value is very challenging."

Taylor, who is no longer at I&A, could not be reached for comment.

Another document, with notes from listening sessions that the Ombudsman — an internal sounding board for employee concerns — held with Field Operations Division employees in late October of 2021, shows that concerns about Title 50 persisted into the Biden administration.

"I&A and FOD leadership don't seem to understand how Title 50 applies to FOD, which causes conflicts," the document says.

The document also suggests that some in the division feel that when it comes to determining their legal boundaries, they're on their own.

"The liability for negative consequences of field employees' activities in the field falls on them, even if they received supervisor and G4 approval for their activities," the document states. "Employees recommended I&A provide field employees with professional liability insurance." In response, an I&A spokesperson pointed to I&A's Intelligence Oversight Guidelines.

"Whether supporting a National or Departmental mission under Title 50 or Title 6, I&A's activities are conducted according to its Intelligence Oversight Guidelines which appropriately restrict the collection, maintenance, and dissemination of U.S. persons information and place additional emphasis on preserving the privacy and civil rights and other liberties of U.S. persons," the spokesperson said in a statement.

The spokesperson also said I&A has implemented new training on intelligence legal authorities. And Steve Bunnell, DHS's former general counsel, returned to the department to advise Wainstein and Homeland Security Secretary Alejandro Mayorkas on "the strategic direction of the organization and identify any areas of significant risk." Border Patrol agents and others stand next to a new stretch of border wall.

Border Patrol agents and others stand next to a new stretch of border wall in Calexico, Calif., Friday, Oct. 26, 2018. | Gregory Bull/AP Photo
Fears of Retaliation

The Management Analysis and Assistance Program survey slide deck from April 2021 details another prevalent concern: retaliation against people who speak out. Many employees didn't even want to fill out a survey on working conditions because they feared being punished for sharing negative views, according to the document.

"Numerous narrative comments, as well as inquiries prior to taking the survey, indicate the members of the workforce did not want to provide feedback due to fear of retaliation," it reads.

Taylor's Nov. 12, 2020, email about listening sessions also painted a grim picture.

"Are these sessions pointless?" opened a section listing participants' main concerns. "Some believed that the feedback would be used against them in their performance evaluations," that section added.

And it reflected a low view of the division's leaders.

"One individual said that FOD [Field Operations Division] leadership is 'shady' and 'runs like a corrupt government,'" the document said, later suggesting that people who raise concerns could be punished with contentious assignments. "If you speak out, you'll find yourself on the SW border or in Portland, recalled by FOD HQ, or moved," it said. "If HQ finds out that you've spoken to others outside the Division (e.g. OCG, Ombuds), you'll get in trouble."

"OCG" appears to be a typo of the acronym for DHS's Office of General Counsel. "Ombuds" refers to I&A's ombudsman.

And employees didn't see evidence that managers faced any punishment for engaging in retaliation. The document summarizing the Ombudsman's October 2021 listening sessions reflects this.

"FOD and I&A leadership are not held professionally accountable — including for retaliation against employees, inexperience leading to poor decision-making, and a lack of transparency — and are not addressing issues revealed in crisis events they presided over."

An I&A spokesperson said in a statement that the office has set up mandatory whistleblower protection training for all supervisors and managers, and also requires annual refresher training on the issue. This was one of many changes at I&A since September 2020, according to the statement. The office has also added "additional employee feedback mechanisms" so people working there can share concerns candidly and anonymously, according to the statement. And the office has "refreshed Intelligence Oversight training" for new hires, and has added monthly trainings on the topic that all employees can join. Live training is also available on request, according to the statement.

"I&A leadership clearly and repeatedly underscores the expectation that all I&A employees are empowered to express concern and professionally challenge their leadership, the Office of General Counsel, I&A's Ombudsmen, and the Intelligence Oversight Officer without fear of retaliation," the statement added.
Politicization

Another major concern: political pressure. An Intelligence Community Climate Survey Analysis for FY2020, during the Trump administration, found that a "significant number of respondents cited concerns with politicization of analytic products and/or the perceptions of undue influence that may compromise the integrity of the work performed by employees. This concern touches on analytic topics, the review process, and the appropriate safeguards in place to protect against undue influence."

The same document said that "a number of respondents expressed concerns/challenges with the quality and effectiveness of I&A senior leadership" including "inability to resist political pressure."

The mistrust is pervasive, the document says.

"The workforce has a general mistrust of leadership resulting from orders to conduct activities they perceive to be inappropriate, bureaucratic, or political," it reads. "They don't believe they received convincing justification for these actions and the assuring words of leadership that we are operating within our authorized mission ring hollow when we are abruptly told to stop what we're doing, leadership is removed, and outside investigators are brought in to audit our actions."

Chad Wolf, who headed the Department of Homeland Security during the last year of the Trump administration, told POLITICO via email that I&A's challenges have "largely stemmed from lack of proper leadership and a clearly defined mission."

"I&A is part of the Intelligence Community but operates in a domestic environment and within a Department with specific operational, law enforcement based responsibilities," he continued. "That is a unique role for a relatively young Department. The concept of I&A is sound but how it is put into practice and operationalized has proven difficult." President Joe Biden attends the Department of Homeland Security's 20th anniversary ceremony.

President Joe Biden attends the Department of Homeland Security's 20th anniversary ceremony in Washington, Wednesday, March 1, 2023. | Susan Walsh/AP Photo
From Trump to Biden

Some of the office's problems appear to have continued under the Biden administration.

In an email on March 14, 2022, Deputy Under Secretary for Intelligence Enterprise Operations Stephanie Dobitsch passed along results from a survey of U.S. Intelligence Community employees focused on analytic objectivity and process. The survey was taken from Spring 2020 through May 2021, spanning much of the last year of the Trump administration and the first four months of Biden's term. It shows that in numerous areas, people working at I&A were more concerned about their workplace than people working at other U.S. intelligence agencies. Those areas included "Experiences with Distortion/Suppression of Analysis."

Dobitsch added in her email to multiple officials about the survey that "[p]rotecting bureaucratic interests surfaced as an important factor in the most significant distortion or suppression experience." She added that I&A has "come a long way" in improving its analytic processes since the survey was conducted.

Dobitsch was connected to one of I&A's biggest recent controversies: the decision in the summer of 2020, during the last year of the Trump administration, to direct I&A's intelligence collectors to treat the protection of all public monuments, memorials, and statues as part of their mission.

On July 1, 2020, Dobitsch emailed out a "job aid" — meaning, an instruction document — from the office's Intelligence Law Division about "I&A's activities in furtherance of protecting American monuments, memorials, and statues and combating recent criminal violence." At the time, Dobitsch was acting deputy under secretary for intelligence enterprise operations. Her email came at a tumultuous moment when people around the country had been tearing down statues of some American historical figures. In her email, Dobitsch told recipients to reach out to herself "or the attorneys" with any questions or concerns.

A few weeks later, on July 23, Dobitsch sent another email lamenting leaks about I&A's activities related to Portland, Oregon, where large groups of people protesting the George Floyd murder surrounded the federal courthouse and clashed with police. She also praised the work I&A was doing there, and strongly defended it as fully within the office's authority.

But problems were brewing. The following week, on July 30, The Washington Post reported that I&A had published intelligence reports on journalists covering the events in Portland. The next day, the Post reported that I&A had viewed protesters' messages on the Telegram app, including communications about protest routes and protest sites. DHS then used that information in intelligence reports that it shared with partners, according to the Post.

And on August 1, news broke that the then-head of I&A, Brian Murphy, was being ousted from that role. A top lawyer from the office, Joseph Maher — who would later go on to work on the Jan. 6 select committee — replaced him. And two weeks later, on August 14, Maher sent a message to the I&A workforce rescinding the job aid that Dobitsch had sent out.

"We have determined that in applying I&A's collection and reporting authorities to 'threats to damage or destroy any public monument, memorial, or statue' [emphasis added] rather than to the narrower category of 'threats to damage, destroy, or impede Federal Government Facilities, including National Monuments and Icons,' the subject Job Aid created confusion where it was supposed to provide clarity," read the message. "Although there is more than one view regarding I&A's authorities in this area, we consider the narrower interpretation to better align with the threats of concern to I&A."

It read as a major walk-back of the job aid that had been sent just a few weeks earlier — and an example of the kind of reversals that fuel employees' fears about the quality of legal guidance they're receiving. Dobitsch has since been hired permanently into the role that she held in an acting capacity during the Portland scandal.

Spencer Reynolds, counsel at the Brennan Center for Justice at New York University Law School and a former DHS intelligence and counterterrorism attorney, told POLITICO that I&A's mission makes it uniquely susceptible to political pressure.

"In recent years, the office's political leadership—Democrat and Republican—has pushed I&A to take a more and more expansive view of its mandate, putting officers in the position of surveilling Americans' views and associations protected by the U.S. Constitution," he emailed. "There's a tendency to use the office's power to paint political opponents—be they left-wing demonstrators or QAnon truthers—as extremists and dangerous. This has had a disastrous impact on morale—most people don't join the Intelligence Community to monitor their fellow Americans' political, religious, and social beliefs. At the same time, leadership has sidelined I&A's oversight officers, leaving employees with little recourse."

The I&A statement said the office has brought on a research director tasked with ensuring I&A's products are free from political interference.

The office has also hosted sessions with an ombudsman for the Office of the Director of National Intelligence focused on identifying, resisting, and reporting political pressure, according to the statement. The office has also "embedded Intelligence Oversight Personnel with I&A's Open Source Intelligence team and widely communicated 24/7 points of contact for the Intelligence Law Division and Intelligence Oversight Officer."

"If you're a prisoner and somebody says that, you're scared."

Carrie Bachner, former senior legislative adviser to the DHS under secretary for intelligence

Domestic intelligence collection

The documents also cast light on the virtually unknown program run by the office that, in the views of some experts, raises civil liberties concerns: the Overt Human Intelligence Collection Program, abbreviated internally as OHIC.

POLITICO reviewed a document from 2016 detailing how the program should work, as well as emails from last year about pausing part of the program. These emails show that even though the program has been running for years, officials overseeing it still feel more guardrails may be needed to protect Americans' rights.

Under the rules outlined in the document, the program's intelligence-gathering can't be done secretly. I&A employees are supposed to receive special training on collecting human intelligence, or HUMINT — meaning, intelligence that comes directly from people rather than from satellite images, intercepted emails, or other sources. Those collectors, after notifying their supervisors, arrange interviews with people they'd like to talk to. They can reach out to anyone, including government employees, people in the private sector, and — importantly — "[p]ersonnel in DHS administrative detention, FSLTT [Federal, State, Local, Tribal, and Territorial] law enforcement confidential informants, and personnel serving any type of criminal sentence who are incarcerated or on parole."

DHS administrative detention includes immigrant detention centers around the country, as well as Customs and Border Protection facilities on the border.

I&A intelligence collectors can interview "willing sources who voluntarily share information," the document says. Before asking questions, collectors must "explicitly state" that they work for DHS, that participation is voluntary, that the interviewer or interviewee can end the interview at any time, and that the interviewee has no special rights to review or control how I&A uses the information shared. Interviewers must also tell interviewees that they "will not exercise any preferential or prejudicial treatment in exchange for the source's cooperation," the document says.

There's also a lot the interviewers can't say, according to the document. They can't make "any promises" in exchange for information, including promises of help with criminal justice or immigration proceedings. They also can't imply that they hold "any sway over the deliberations of a judge, either criminal or immigration, or any government official with responsibilities related to the subject of the interview." And they can't "[c]oerce, threaten, or otherwise intimidate the source or any person or object of value to the source." They also can't "[t]ask the source to conduct any activities."

The document doesn't refer specifically to how interviewers should handle conversations with people who are jailed and awaiting trial. It doesn't prohibit interviews with them. And the document doesn't require that interviewers contact their lawyers before reaching out to prospective interviewees who are jailed and awaiting trial. A person familiar with how the program operates said I&A does not require its intelligence collectors to reach out to the lawyers of interview subjects who are incarcerated and awaiting trial.

Potential interview subjects in these situations face unique legal risks and opportunities when dealing with government officials. And there's a standard practice for law enforcement officials when they want to talk to someone awaiting trial about topics related to their legal situations: These officials first ask for permission from their lawyers. In fact, legal ethics rules require that lawyers seeking to communicate with people who have lawyers talk to those people's counsel, rather than the people themselves.

Adding another wrinkle to the I&A interviews with jailed people: The instruction document indicates that a law enforcement officer must be present when these interviews take place. It's unclear what, if anything, keeps those officers from sharing what they overhear with prosecutors or investigators, or using it themselves — especially if interviewees' lawyers aren't aware that the conversations are happening and, therefore, can't warn their clients of potential risks.

Bachner, the former DHS official, said incarcerated people likely feel alarmed when approached by U.S. intelligence officials who want to question them and may feel compelled to cooperate even if told otherwise.

"If you're a prisoner and somebody says that, you're scared," she said.

She added that the practice raises a host of other questions.

"What do they do with that information they collect, and is it legal?" she said. "Where do they store that information?"

In I&A, there are also concerns about the program. In August 2022, an I&A official emailed personnel there telling them to temporarily stop interviewing jailed people who were awaiting trial and had been read their Miranda rights.

"Office of Regional Intelligence] leadership is asking collectors to temporarily halt all engagements/debriefings/interviews of mirandized individuals who are in pre-trial/pre-conviction detention [bold and italics in original text]," wrote Peter Kreitner, the acting deputy chief of a team in I&A's Office of Regional Intelligence.

Kreitner noted that the pause came in the wake of a meeting with DHS's Intelligence Law Division and I&A's Intelligence Oversight Office, an internal watchdog.

"This decision is out of an abundance of caution with the intent to clearly identify and define the procedures for collection activities of this nature," Kreitner's email continued, adding that "a final decision and follow-on guidance will be issued."

Professor Laurie Levenson of Loyola Law School, who specializes in criminal procedure, said that having government officials interview jailed, pre-trial people without their lawyers present is "precarious."

"When they go in to talk to somebody, the ordinary course is to get the permission of that person's lawyer once they've been formally charged, period," she said.

"There's also the appearance of not adhering to our ordinary practices of protecting people's constitutional rights," Levenson continued. "And that's a broader concern. That's why I applaud those who say, 'Let's put a pause on this and see what we're doing, see what the normal rules are, and see what the limitations would be on doing these interviews without going through counsel.'"

Patrick Toomey, deputy director of the American Civil Liberties Union's National Security Project, said DHS's human-intelligence program raises serious concerns.

"DHS should not be questioning people in immigration or criminal detention for 'human intelligence' purposes without far stronger safeguards for their rights," Toomey said. "While this questioning is purportedly voluntary, DHS's policy ignores the coercive environment these individuals are held in. It fails to ensure that individuals have a lawyer present, and it does nothing to prevent the government from using a person's words against them in court."

Another element: People facing criminal charges often share information with the government in hopes of receiving leniency at sentencing. By participating in intelligence interviews without their lawyers' guidance, those opportunities could evaporate. And the policy specifically says I&A collectors can't provide any help to the people they interview in exchange for information.

Much remains unknown about the program and its impact — both on the people its collectors question and on any benefits it provides for U.S. national security.

"Collecting' and 'HUMINT' are two words that should never be associated with I&A, never," said Bachner. "It should be 'analytics' and 'state and local support.' That's what should be associated with I&A."

I&A did not provide comment specifically on the overt HUMINT collection program. It is not known how many people conduct interviews under the program, how many people they interview per year, and how many of those interviewees are incarcerated.

The partial halt of the human-intelligence collection program as described in Kreitner's email, coming amid the further concerns about the legality of I&A's activities expressed in internal surveys, underscores the challenges facing Wainstein and other I&A leaders. And, according to Reynolds, the former I&A lawyer now at the Brennan Center, the office needs to take meaningful steps to reassure the public and congressional watchdogs.

"I&A needs to refocus its approach, stop basing its intelligence activities on the constitutionally protected views of Americans, and stop treating vandalism and fistfights as terrorism," he said. "It needs meaningful engagement with its oversight offices and to listen to its personnel when they voice their concerns."